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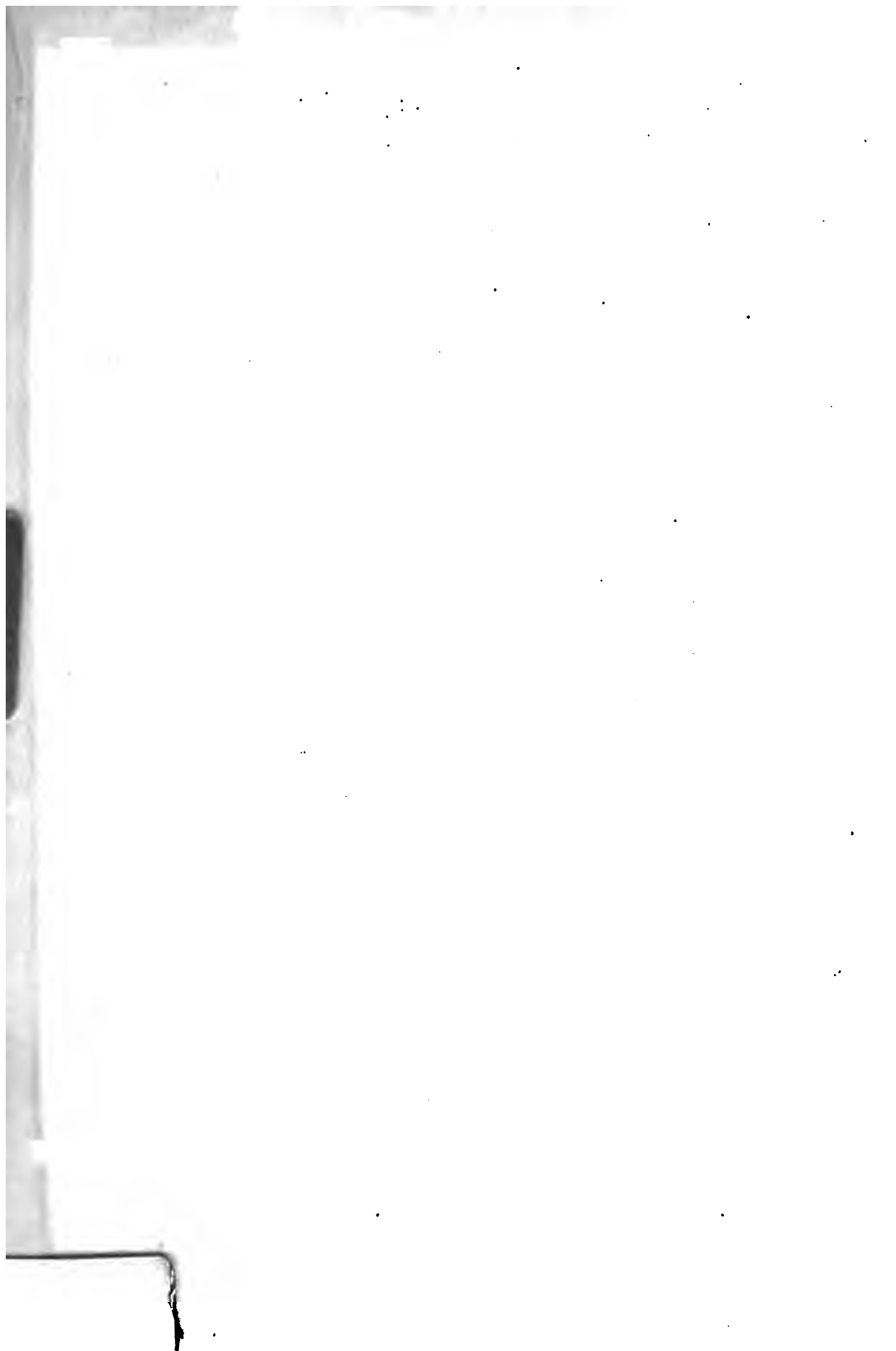
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A DIGEST OF THE DECISIONS

OF THE

SUPREME COURT OF IOWA

FROM ITS

ORGANIZATION UNTIL THE END OF THE JANUARY TERM, 1887, INCLUDING MORRIS' AND GREENE'S REPORTS, AND THE SERIES OF IOWA REPORTS UP TO AND INCLUDING VOLUME LXX, EXCEPT CASES THEREIN FIRST DECIDED AT THE MARCH TERM;

ALSO

OF THE FEDERAL COURTS IN IOWA AND OF THE SUPREME COURT OF THE UNITED STATES SO FAR AS THEY RELATE TO IOWA LAW OR SUBJECT-MATTER PECULIAR TO IOWA.

BY

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VOL. I.

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PREFACE.

The aim of this work is to present a complete digest, under one arrangement, of the decisions of the Supreme Court of the territory and state of Iowa from its organization in 1838 (the first case reported being decided, however, in 1839) until its March term, 1887. Cases finally decided at that term on rehearing are also given, so far as they are to appear in Volume LXX of Iowa Reports. All the cases in that volume are included except a few which were first announced at the March term.

In view of the fact that the federal courts in Iowa follow and administer the Iowa law so far as the determination of cases before them depends upon the construction or application of the state constitution or statutes, or upon state decisions which have become a settled rule of property, and that in certain classes of cases the decisions of the state Supreme Court are subject to review by the Supreme Court of the United States, it has been thought advisable to incorporate notes of all published opinions of such courts in cases tried in, or appealed from, Iowa, so far as they relate to Iowa law or to subjects peculiar to this state. Such cases will, it is believed, be found especially interesting and valuable in relation to assignments for the benefit of creditors, chattel mortgages, municipal bonds, and public land grants in Iowa.

The work is founded upon a thorough examination, one by one, of all the cases within the scope thus suggested. During this examination full and separate notes were made of every point in each case, and in the form in which it was thought the case ought to be stated under the title or subdivision to which the point related. When all the cases had been thus examined, and the notes written out, all the notes relating to each title were brought together, classified under convenient sub-headings and arranged in systematic order, and then entirely re-written with reference to each other, so as to form, as far as possible, a connected, consistent statement, in successive paragraphs, of the law as announced by the courts. The whole matter of the book has, therefore, been twice written, and has then been revised, before putting it in type, after which the proof was carefully read and the references were verified so that they might be made entirely accurate.

In choosing main titles under which to arrange the matter the author has not followed any theoretical notions of his own, but has yielded to general usage, so far as that is well established. Beyond this, the grouping of subjects in the Code has been given some weight, such arrangement having been in use, practically unchanged, since the adoption of the Code of 1851, and being, therefore, presumably well known to the profession. Thus, under ESTATES OF DECEDENTS are collected, in appropriate subdivisions, the cases relating to executors and administrators, distribution, descent and dower. Under the head of CRIMINAL LAW have been gathered the cases relating to the whole topic, including the general doctrines of criminal responsibility, the definitions of particular crimes with the rules as to allegation and proof peculiar to each, and the cases as to criminal procedure in the district court, and also in inferior courts. Under JUSTICE OF THE PEACE will be found the whole body of decisions relating to the jurisdiction and procedure of justices in civil cases, including proceedings on appeal from, or writ of error to, their courts. Under COURTS the organization and jurisdiction of particular courts of record are considered, as also their terms, records, rules, etc.

The body of the decisions relating to proceedings in courts of record in this state in civil cases is arranged under the following main heads, found in their proper alphabetical order, with other main headings, to wit: ACTIONS, relating to the form of action, survival, etc.; VENUE, or the place of bringing action, including change of venue; LIMITATION OF AC-

TIONS, or the time within which action must be brought; CONTINUANCE; PARTIES; ORIGINAL NOTICE, or the commencement of action; APPEARANCE; PLEADINGS; PROCEDURE, or the form and method of trial and the return of general and special verdicts in courts of original jurisdiction; INSTRUCTIONS; JUDGMENTS; DEFAULTS; EXECUTIONS, including levy, exemptions, sales, redemption and sheriff's deed; COSTS; EXCEPTIONS; NEW TRIALS; APPEALS, covering the entire subject of appeal to the supreme court in civil cases, and the procedure and practice on such appeal.

It has been thought best to arrange matter systematically, under well-known general heads, rather than divide it up under a number of smaller main titles not so likely to suggest themselves to all as proper heads under which to look for the subject-matter. Thus under MUNICIPAL CORPORATIONS are given the cases relating to public and quasi corporations, in general, and also, under proper sub-heads, those relating particularly to cities and towns, counties and townships, their organization and government, powers and liabilities. School districts are placed, however, with the rest of the school system, under SCHOOLS. Under NEGLIGENCE, the cases stating the general doctrines of that subject, including contributory negligence and negligence of fellow-servant, are placed, whilst under RAILROADS are collected the numerous cases relating to the liability of those corporations for negligence of their officers, agents and employees, as well as those relating to their organization, right of way, construction, operation, etc. The cases as to the peculiar rules determining the liability of carriers of goods and passengers, applicable to railroads in common with other corporations or persons engaged in the business of transportation, are all placed under the general head of CARRIERS.

The subject-matter embraced in each title is, where it is extensive enough to make subdivision desirable, classified under sub-headings and smaller divisions, all printed in analytical form under the main heading, and carried through at the top of the page by corresponding numbers and letters, so that any part of the subject may be readily found; and the matter is further subdivided and rendered accessible by catchwords, in bold-faced type, at the beginnings of paragraphs. These catch-words are applicable to succeeding paragraphs until other such words intervene.

In the endeavor to refer to each case on every point on which a lawyer might desire to see that opinion, it often happens that a case is cited to a proposition not to be found in the head-note. It also frequently happens that propositions are given from opinions where they are stated merely as *dicta*, or by way of argument. It has not seemed advisable to attempt to discriminate between cases as to their respective authority, and where they are inconsistent, that fact is made apparent, but the cases are allowed to speak, each for itself, unless one has formally overruled another, when that fact is stated. Sometimes a point discussed in a dissenting opinion, but not in the principal opinion in the case, is digested, but the fact that it is found in a dissenting opinion is always stated. Beyond this, no notice is taken of dissenting opinions, nor of the fact of dissent, that not being a matter of any importance in determining what cases it will be desirable to consult on any particular point. In short, this work is intended as a guide to the reported cases.

Where decisions are based upon statutory provisions, such provisions are either set out in foot-notes, or briefly referred to in the statement of the decision. If made under statutes different from those now in existence, that fact is stated. A few cases are upon statutory provisions so entirely obsolete that no statement thereof is made, and these and a few other cases in which, for peculiar reasons, no principle is discussed or decided, are not digested, although they are preserved in the table of cases.

In stating the cases the aim has been to give not merely the abstract legal proposition decided or referred to, but briefly the vital fact or facts to which such proposition is applied. While avoiding the prolix and complicated statements of facts which are sometimes made, tending to confuse rather than to enlighten, it has been sought to avoid also that bald announcement of legal rules, many of them long since trite and axiomatic, which are of but little assistance in guiding the lawyer to the cases really in point on the question under investigation. The utility of modern case law lies largely in the application of familiar

rules to peculiar states of facts rather than in the repetition of well established propositions; and while it has been the constant aim to secure the greatest practicable brevity, it has not been thought wise to sacrifice clearness.

Where a case relates to different subjects it has been unhesitatingly put under each, unless it forms one of a group of cases, closely related; in that event the aim has been to collect all together in one place and by a cross-reference incorporate them into other titles to which they may be pertinent, the object being not so much to economize space as to make it possible to bring all the cases relating to the same particular matter into one statement, and enable the person consulting the book to be sure, after following a limited and definite line of search, that he has found all the cases relating to the point in hand. General cross-references suggesting an indefinite and unlimited search, which will often prove fruitless, have been entirely discarded, except where the whole of the matter under another title is to be indicated, and cross-references are to definite sections or subdivisions where the very matter referred to is to be found.

It is sometimes thought that the alphabetical arrangement of the contents of a digest renders an index unnecessary; but it is evident that there are many subjects to which some reference is found under different titles, which cannot properly be made distinct titles in themselves, and yet to which it is important to be able to turn at once. For instance, there may be cases referring to crops under various titles, such as real property, executions, conveyances, mortgages, landlord and tenant, etc., but it would not be practicable to have that as a distinct title, bringing under it a heterogeneous collection of cases without any unity of principle. The references in the index under that word will show what sections of each subject relate to crops.

Cases are referred to by names of parties and volume and page of the report where the case commences. References to volume LXX of Iowa Reports are necessarily left blank in the first volume, which goes to press before that volume of reports is in type, but in the second volume many, if not all, of such references can be by pages, and probably the pages of all such cases can be inserted in the table of cases before it finally goes to press. In any event cases from that volume can readily be found by reference to the table of cases in the volume itself, when issued.

In view of a lack of uniformity in the reports as to the method of giving names of cases, some general rules have been adopted. In case of partnership names, or names of coparties, the first only is used. In case of corporate names the first significant word is given in full while others are abbreviated where practicable, enough being retained, if possible, to preserve the individuality of the name, but the name of the place is omitted where it is not the first word. Where a firm or corporate name commences with the christian name of an individual, that is discarded and the surname only is preserved. In giving names of counties, the name comes first followed by "county." Cities and towns are designated by name without prefixing or adding "city of" or "town of." The names of school districts being obscure, and seldom remembered, these corporations are designated as "District Tp," or "Independent Dist.," those being the first words of the names authorized by statute (Code, § 1716) for such corporations, a usual abbreviation being adopted for the second.

A table of all the cases in the Iowa Reports, and such cases decided by the federal courts as are included in this work, is added, the cases being arranged alphabetically, as to defendants' as well as plaintiffs' names. The peculiar features of this table are that, in the first place, it shows, by title and section, where each case is referred to in the digest, so that it is not necessary to look up each reference to find under what subject the case is stated; in the second place, it shows by volume and page each reference to that case on each particular subject, in subsequent Iowa cases, and whether in the subsequent case it is followed, cited, distinguished, questioned, or overruled. The subsequent history of the case, on the very point referred to, is thus shown. For instance, the case of *Sherman v. Western Stage Co.*, 24 Iowa, 515, has been cited a number of times with entire approval, as to points therein decided with reference to damages and negligence, while it has been lately overruled on a

point relating to limitation of actions. The table of cases accordingly shows on what subjects it has been cited and on what subject overruled. Much pains and great labor have been bestowed upon this feature, and it is believed it will be found exhaustive and very valuable. It combines under one alphabetical arrangement all the advantages of an ordinary table of cases and a table of cases cited, overruled, etc., such as is sometimes separately given.

This work was commenced by the author more than six years ago, and he has been continuously, though not exclusively, engaged upon it to the present time. He now offers it to the profession, believing it to be as full, complete, accurate and concise as he is able to make it.

In conclusion the author takes pleasure in acknowledging the kindness of Hon. E. C. Ebersole, the present Reporter of the state Supreme Court, by whom he has been favored with sheets of Volume LXIX of the state reports in advance of publication, and a list of cases to appear in Vol. LXX, thus enabling him to insert in their proper places the cases from those volumes. Promptness in the publication of the decisions has made it possible to bring this digest down to a very recent date.

Iowa City, June, 1887.

ABBREVIATIONS.

Mor.— Morris' Report of cases in the Supreme Court of the territory of Iowa from 1839 to 1846.

G. Gr.— G. Greene's Reports, four volumes, of cases in the Supreme Court of the state of Iowa, from 1847 to 1854.

-: Volumes of the series of Iowa Reports are referred to by giving the number of the volume and of the page separated by a dash.

R. S.— when used indicate Revised Statutes of the territory, of 1848.

Code of '51 — refers to the Code of Iowa of 1851.

Rev.— refers to the Revision of 1860.

Code— refers to the Code of 1873, being the one now in force, later compilations of statutes being only a reprint of this Code with additions and modifications, the original sectioning being retained.

G. A.— indicate an act of the General Assembly, the preceding number being that of the session, the following that of the chapter which the act forms in the published acts of that session.

Abbreviations used in the Table of Cases and Index are explained preceding the Table in the latter part of Volume II.

DIGEST
OF THE
DECISIONS OF THE SUPREME COURT OF IOWA,
FROM
ITS ORGANIZATION TO MARCH TERM, 1887 (MORRIS—LXX IOWA).

ABATEMENT.

As a defense, see PLEADINGS, V, a.

Pleas in abatement still allowed, see ACTIONS, § 14.

JUDGMENT on matter in abatement, see that title, §§ 20, 21.

Action not abated by death, see ACTIONS, IV.

ABORTION.

1. **Civil liability:** Where a wife had left her husband, being with child by him, and afterward a miscarriage was produced upon her by defendant, *held*, that the father had no civil right of action for the destruction of his offspring, unless for loss of services, and whether there would be any liability on that ground, doubted: *Kansz v. Ryan*, 51-232.

As a crime, see CRIMINAL LAW, II, 7, f.

ACCORD AND SATISFACTION.

See PAYMENT AND DISCHARGE.

ACCOUNT.

ASSIGNMENT of, see that title, §§ 24, 44-46.

LIMITATION OF ACTIONS on, see that title, §§ 131-134.

PLEADINGS in case of, see that title, §§ 38-40, 707-709.

REFERENCE in matters of, see that title, § 2.

Equitable jurisdiction in case of, see EQUITY, §§ 247-251.

Books of, as EVIDENCE, see that title, §§ 302-329.

Statement of, for MECHANIC'S LIEN, see that title, §§ 48-49.

Accounting, see that heading in Index.

1. **What constitutes:** A charge for money due on an executed contract may form one of the items of a running account: *Buford v. Funk*, 4 G. Gr., 498.

2. Items may be properly included as a part of a current account, although there exists between the parties a special contract as to the rate of charge for such items: *Mills v. Davies*, 42-91.

3. An objection that a finding in an action upon an account is not on an issue submitted, because it shows that several items were furnished under a contract between the parties, is not well founded, because a recovery could be had upon the account, although the items were furnished under a contract: *Haywood v. Woods*, 28-563.

4. The account in a particular case held to be an open account: *Wing v. Page*, 62-87.

ACKNOWLEDGMENT.

I. FORM AND EFFECT; WHO MAY TAKE.

II. WHO MAY MAKE THE ACKNOWLEDGMENT.

III. LIABILITY OF OFFICER.

IV. ACKNOWLEDGMENT OF TAX DEEDS.

As to the recording, see RECORDING ACTS.

I. FORM AND EFFECT; WHO MAY TAKE.

1. **Not essential:** While the acknowledgment is necessary for the admission of the

Form and effect.

instrument to record, it is not essential to its validity as between the parties or as to persons having notice in fact: *Gould v. Woodward*, 4 G. Gr., 82; *Miller v. Chittenden*, 2-315, 360; *Blain v. Stewart*, 2-378; *Dussaume v. Burnett*, 5-95, 104; *Brinton v. Seever*, 12-389; *Haynes v. Seachrest*, 13-455; *Carleton v. Byington*, 18-482; *Simms v. Hervey*, 19-273, 287; *Lake v. Gray*, 30-415; *Morse v. Beale*, 68-463.

2. The want of acknowledgment cannot be made a ground for objecting to the introduction of an instrument in evidence: *Jones v. Berkshire*, 15-248.

3. The instrument would be valid as between the parties, and also as to third parties, provided notice could be brought home to them: *Ibid.*

If not acknowledged, or the acknowledgment is defective, the instrument cannot be recorded; or, if recorded, the record will not impart constructive notice: See RECORDING ACTS, II.

4. Form of certificate:¹ What sufficient: The exact language of the statute need not be followed by the officer in his certificate, but words of the same import are sufficient: *Wickersham v. Reeves*, 1-413; *Tiffany v. Glover*, 3 G. Gr., 387; *Cavender v. Smith's Heirs*, 5-157.

5. Therefore, held, that the words "well known" were sufficient in place of "personally known," and the words "the within named," etc., sufficiently referred to the parties as being "the identical persons whose names are affixed," etc.: *Bell v. Evans*, 10-353.

6. A certificate which does not state that the party acknowledging the instrument was "personally known" to the officer "to be the identical person," etc., or use words of similar import, is fatally defective: *Reynolds v. Kingsbury*, 15-238; *Brinton v. Seever*, 12-389.

7. The omission of the word "personally" before "known" renders the certificate defective: *Gould v. Woodward*, 4 G. Gr., 82.

8. But such omission is not fatal where the other words used necessarily imply personal knowledge in the official: *Todd v. Jones*, 22-146; *Rosenthal v. Griffin*, 23-263.

9. The word "voluntary" is of the essence of the acknowledgment, and in the absence of that or an equivalent word the certificate will be invalid: *Wickersham v. Reeves*, 1-413; *Newman v. Samuels*, 17-523.

10. But the fact that the party acknowledged the instrument to be his voluntary act and deed may be shown by the tenor and form of the certificate, as well as by the use of the very words of the statute: *Dickerson v. Davis*, 12-353.

11. The essentials of a certificate of acknowledgment considered generally: *Bell v. Evans*, 10-353.

12. The omission of even an essential word, where it is apparently a mere clerical error, will not invalidate the certificate: *Scharfenburg v. Bishop*, 35-60.

13. The certificate is not to the genuineness of the signature, but to the fact that the party acknowledged the instrument, and the acknowledgment is sufficient although the signature may have been written by another for the grantee: *Morris v. Sargent*, 18-90.

14. Evidence: The certificate is *prima facie* evidence of the fact of acknowledgment, but is not conclusive, and may be overcome by other evidence, the burden being upon the party seeking to rebut the effect of the certificate: *Ibid.*; *Van Orman v. McGregor*, 23-800; *Borland v. Walrath*, 33-130.

15. If a mortgage is duly acknowledged, the introduction thereof in evidence, accompanied by the notes referred to therein as executed by the same party, is *prima facie* sufficient to establish the execution of the mortgage and also of the notes: *Mixer v. Bennett*, 70—.

16. The certificate of the officer, and his testimony as to the acknowledgment, are entitled to great weight. The presumption is

¹ Code, § 1938. The court or officer taking the acknowledgment must indorse upon the deed or other instrument a certificate setting forth the following particulars:

1. The title of the court or person before whom the acknowledgment was taken;
2. That the person making the acknowledgment was personally known to at least one of the judges of the court, or to the officer taking the acknowledgment, to be the identical person whose name is affixed to the deed as grantor, or that such identity was proved by at least one credible witness, naming him;
3. That such person acknowledged the instrument to be his voluntary act and deed.

Who may take.—Who may make.

very strong in his favor: *Bailey v. Landingham*, 53-722.

17. The certificate of the notary public as to the acknowledgment by the grantor, and the positive testimony of such officer as to the fact of such acknowledgment, will prevail over the denial, on the part of the grantor, of the fact of making such instrument. Deeds, mortgages and other instruments requiring an acknowledgment before an officer should not be set aside without clear and satisfactory evidence, and the seal and acknowledgment of the officer should in such cases be given proper consideration: *Herrick v. Musgrove*, 67-63.

18. Parol evidence: It is not proper to show by parol evidence, for the purpose of sustaining an acknowledgment, that matters required by statute to be done were done, although not shown by the certificate: *O'Ferrall v. Simplot*, 4-381.

19. But parol evidence may be introduced to show fraud in obtaining an acknowledgment, or when the certificate is alleged to be false, to show that the deed never was acknowledged: *Ibid*.

20. If the certificate does not recite the essential facts, it is not competent to prove such facts by extrinsic evidence: *Ibid*.

21. Therefore, under the provisions of the act of 1846, requiring the certificate of acknowledgments by married women to show that the wife was made acquainted with the contents of the conveyance, and that she relinquished her dower, held, that a conveyance by a married woman, in which the acknowledgment did not show such facts, was void as to her, and that the requisite facts could not be shown by parol testimony: *O'Ferrall v. Simplot*, 4 G. Gr., 162.

22. Effect of acknowledgment, in regard to the admission of the instrument in evidence, see EVIDENCE, §§ 578-584.

23. Who may take: An acknowledgment before a deputy clerk acting in the name of his principal is good: *Abrams v. Ervin*, 9-67.

24. An acknowledgment certified to by an officer interested therein (as a member of the firm of grantees) is void, and the record of such instrument will not impart notice: *Wilson v. Traer*, 20-231.

25. While the acknowledgment of an instrument taken before the grantee as an

officer will not be valid, yet the mere fact that the person for whom the acknowledgment is taken has an interest in the property conveyed, will not necessarily render the acknowledgment void, although it might be a circumstance tending to show fraud: *Dussaume v. Burnett*, 5-95.

26. Official title: The official title of a notary public is, "A. B., a notary public for — county," etc., and a failure to set forth the name of the county renders the certificate void. The fact that the name of the county appears from the impression of the seal will not remedy the defect: *Willard v. Cramer*, 36-22.

27. Notaries public in this state have jurisdiction only within the respective counties for which they are appointed, and the title of each must be defined to be a notary public of some county, naming it. The certificate must show the county of the notary public making it, and the failure of the certificate to so state will not be cured by the fact that the county appears in the seal, which is not required to show that fact: *Greenwood v. Jenswold*, 69-53.

28. But this rule does not apply to the official signature to the jurat of an affidavit: *Stoddard v. Sloan*, 65-680.

29. While the certificate should set forth the title of the court or officer before whom the acknowledgment is made, there is no requirement that the name of the officer shall be set out in the body of the certificate: *Fogg v. Holcomb*, 64-621.

30. When no seal of the officer or certificate as to his official character is attached to the certificate of acknowledgment, as contemplated by statute, it is not valid: *Jones v. Berkshire*, 15-248.

31. Amendment of certificate: Whilst a notary continues in office, it is competent for him to amend his certificate of acknowledgment, to supply a defect, by making a new one, provided it is in accordance with the real facts: *Chicago, B. & Q. R. Co. v. Lewis*, 53-101.

II. WHO MAY MAKE THE ACKNOWLEDGMENT.

32. Attorney in fact: Prior to the act of 1858 an acknowledgment of a chattel mort-

Liability of officer.—Tax deeds.

gage by an attorney in fact, as his voluntary act and deed, would be the acknowledgment, in law, of his principal: *Sourden v. Craig*, 26-158.

33. Municipal officer: Where a deed offered in evidence purported to have been executed by one Q., as mayor of the city of D., having the seal of the city affixed and duly attested by the recorder, and was properly acknowledged and recorded, the certificate of the officer taking the acknowledgment showing that Q. was personally known to him as the identical person whose name was affixed to the deed as president *pro tempore* of the city council, and acting mayor of the city of D., held, that such deed was *prima facie* proof that Q. was at the time acting mayor of the city, and, coupled with what the court might take judicial notice of on this subject, rendered the introduction of the deed in question competent without further proof as to the official character of the said Q.: *Middleton Savings Bank v. Dubuque*, 19-467.

34. Officers of corporation: Where an assignment of a judgment in favor of a bank was signed by persons designating themselves as president and secretary, but the acknowledgment thereof did not state that they were such officers, held, that the assignment was not sufficient to establish the official character of the persons whose names were attached thereto or show that they had authority to act for the bank: *Klemme v. McLay*, 68-158.

35. By married woman: Where the certificate of acknowledgment to a trust deed appeared regular and in due form, but the evidence showed that the notary had certified to the acknowledgment of the same by the wife without requiring her personal presence, but upon a previous verbal authority given by her, held, that the validity of the deed could not be questioned for that reason by the wife as against parties who had loaned money upon the strength of the security, regular upon its face: *McHenry v. Day*, 13-445.

III. LIABILITY OF OFFICER.

36. Negligence: The fact that a notary makes a false certificate as a result of negli-

gence will not render him liable. Whatever liability there is exists by reason of statute: *Scotten v. Fegan*, 62-236.

37. Wilful misstatement: In an action against a notary for damages under the statute, it must be alleged that he knowingly misstated a material fact: *Ibid.*

38. Damages: The officer is only liable for such damages as are caused by his wrongful act and necessarily connected with it: *Wyllis v. Haun*, 47-614.

39. Where it does not appear that the officer taking the acknowledgment knowingly misstated a material fact, as, for instance, that the person making the acknowledgment was the identical person whose name was affixed to the instrument, the officer will not be liable. The law does not make the officer taking the acknowledgment a guarantor that the person signing the instrument is the person who is the owner of the land referred to therein: *Browne v. Dolan*, 68-645.

IV. ACKNOWLEDGMENT OF TAX DEEDS.

40. Acknowledgment essential: The acknowledgment of a tax deed being essential to its validity, held, that such a deed acknowledged before a person who was county judge at the time of the abolition of that office, and who was, by provision of law, continuing to act as county auditor *ex officio* until a county auditor should be elected, was void: *Goodykoontz v. Olsen*, 54-174.

41. Legalizing acts: As the act to legalize defective acknowledgments (see Code, § 1966) applied only to cases where there was a legal deed antecedent to any attempt to acknowledge, it had no effect to render valid a tax deed which was previously invalid for want of acknowledgment: *Ibid.*

ACTIONS.

I. WHAT DEEMED AN ACTION; SPECIAL PROCEEDINGS; SUBMISSION IN ACTION AND WITHOUT ACTION.

II. FORM OF ACTIONS; PROCEEDINGS ORDINARY AND EQUITABLE; CHANGE OF KIND OF PROCEEDING; SEPARATE TRIAL OF EQUITABLE ISSUES.

As to trial of equitable defenses, see PRACTICE, II, d.

What deemed.—Form.

III. RIGHT OF ACTION, ACCRUES WHEN; COMMENCEMENT OF ACTION.

IV. SURVIVAL OF ACTIONS.

V. ACTIONS IN REM AGAINST BOATS OR VESSELS.

Assignment of causes of action, see ASSIGNMENT.

LIMITATION OF ACTIONS, see that title.

Action to recover REAL PROPERTY, see that title, II.

Action to recover personal property, see REPLEVIN.

I. WHAT DEEMED AN ACTION; SPECIAL PROCEEDINGS; SUBMISSION IN ACTION AND WITHOUT ACTION.

1. Civil actions include everything except those cases which come under the criminal jurisdiction of the court: *Tomlinson v. Hammond*, 8-40.

2. The term civil action includes ordinary proceedings and also proceedings in equity: *Kramer v. Rebman*, 9-114.

3. The granting of letters of administration by a county court held not to constitute another action pending so as to defeat the jurisdiction of the district court which would otherwise attach: *Waples v. Marsh*, 19-381.

4. Where a note provided for an attorney's fee, in case action was brought thereon, held, that filing the note as a claim against the estate, the claim being resisted, was sufficient bringing of action to entitle plaintiff to the attorney's fee: *Davidson v. Vorse*, 52-384.

5. Special proceedings: Proceedings to disbar an attorney are special proceedings: *State v. Clarke*, 46-155.

6. Under the statutory provision (Code, § 2520) that the provisions concerning the prosecution of a civil action shall be followed in special proceedings not otherwise regulated, so far as applicable, held, that proceedings to condemn property for a work of internal improvement should be governed, as far as practicable, by the rules governing ordinary actions: *Forney v. Ralls*, 80-559.

7. Thus it was held that the provisions of the civil code as to change of place of trial were applicable in an appeal in the circuit court in a proceeding to condemn land for a

right of way: *Whitney v. Atlantic Southern R. Co.*, 53-651.

8. This provision was applied also to proceedings to disbar an attorney: *State v. Clarke*, 46-155, 159.

9. Submission without action: Under statutory provision (Code, § 3408) for submission of a question in difference which might be the subject of a civil action without an action upon an agreed statement of facts, held, that pleadings were not necessary: *Donald v. St. Louis, K. C. & N. R. Co.*, 52-411.

10. The statutory provision that in such case it must be shown by affidavit that the controversy is real and the proceeding is in good faith to determine the rights of the parties, is jurisdictional, and in the absence of compliance therewith a court cannot take cognizance of the case: *Keeline v. Council Bluffs*, 62-450.

11. Submission in action: Where pending the trial of a cause the facts were agreed upon by the parties "to save expense and to simplify the issue" upon which the court should render judgment, held, that it was the duty of the court to give such judgment, whether legal or equitable, as the facts agreed upon should be deemed to warrant or require: *Logan v. Hall*, 19-491.

12. Where a party has submitted a cause upon an agreed statement of facts, the court should enter such judgment as to his rights under the facts agreed upon as will establish the respective rights of the parties: *Kraft v. James*, 64-159.

Submission to ARBITRATION, see that title.

II. FORM OF ACTION; PROCEEDINGS ORDINARY AND EQUITABLE; CHANGE OF KIND OF PROCEEDING; SEPARATE TRIAL OF EQUITABLE ISSUES.

As to trial of equitable defenses see PRACTICE, II, d.

13. All technical forms of action and of pleading are abolished: *Heichew v. Hamilton*, 3 G. Gr., 596.

14. Although forms of proceedings are abolished, yet pleas in abatement, such as to the jurisdiction, or of another action pending, are still proper and legitimate: *Rawson v. Guiberson*, 6-507.

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15. Under the equity procedure the distinction as to the form of stating an action of trespass and one of trespass on the case is immaterial: *Brown v. Hendrickson*, 69-749.

16. **Ordinary and equitable proceedings:** The legislature has no power to abolish the distinction between pleadings at law and in equity. Such distinction is defined and recognized by the constitution: *Claussen v. Lafrenz*, 4 G. Gr., 224.

17. By the provisions of the Code, it was intended to assimilate and make uniform the procedure in all law and equity cases. The changes introduced by the Code were to be applied equally to both: *Shepard v. Ford*, 10-502.

18. The term "civil actions" includes proceedings in equity as well as ordinary proceedings: *Kramer v. Rebman*, 9-114.

19. **What actions to be in equity; foreclosure of mortgage:** The provision (Code, § 2509) that an action to foreclose a mortgage shall be by equitable proceedings is not in conflict with the constitutional provision guarantying the right of trial by jury. Such right was never recognized in suits in equity: *State v. Orwig*, 25-280; *Clough v. Seay*, 49-111.

20. Action on a mortgage and to recover judgment on the note secured thereby is not an improper union of legal and equitable proceedings: *Cooley v. Hobart*, 8-358.

21. **To foreclose mechanic's lien:** All persons interested must be made parties to the proceedings before they can be affected by the decree: *Jones v. Hartsock*, 42-147, 153.

22. *Held*, that an action at law might, by consent of parties, be tried in connection with equitable actions to enforce mechanics' liens against the same defendant, and one judgment rendered therein adjusting all claims between them: *Hines v. Whitebreast Coal, etc., Co.*, 48-296.

23. Under Revision, § 4183, by which an action for a mechanic's lien was to be prosecuted as an ordinary proceeding, *held*, that subsequent incumbrancers need not be made parties, and that even though not made parties they could not bring action to redeem, and that in such cases there was no equity of redemption as in case of a mortgage: *State v. Eads*, 15-114; and see *Shields v. Keys*, 24-298, 308.

24. Even if in such action there is a misjoinder of causes of action, objection thereto is deemed waived unless made as provided elsewhere in reference to misjoinder of actions: *Flynn v. Des Moines & St. L. R. Co.*, 68-490.

25. **Divorce:** An action for divorce being equitable, the right to a trial by jury does not exist, and the parties are entitled to a trial *de novo* in the supreme court: *Sherwood v. Sherwood*, 44-192.

26. **Other cases of equitable relief:** Under the statutory provision (Code, § 2508) that plaintiff may prosecute his action by equitable proceedings in all cases where courts of equity, before the adoption of the Code, had jurisdiction, and must so proceed in all cases where jurisdiction was exclusive, *held*, that reformation of an instrument to correct a mistake could not be granted in an action at law: *Adams v. Commercial Nat. Bank*, 58-491.

27. The statutory provision (Code, § 3331) allowing a nuisance to be abated at law does not abrogate the equitable remedy before existing by way of injunction: *Bushnell v. Robeson*, 62-540.

28. Where plaintiff has an election to bring an action at law or in equity, and brings it in equity, it is error to transfer the cause on motion of the opposite party to the law docket: *Gribben v. Hansen*, 69-255.

29. Where the prayer of a petition in an action for the recovery of real property was for judgment establishing in plaintiff an estate in fee-simple in the land and giving him the immediate possession thereof, and determining and quieting the title, and for judgment for a specific sum, *held*, that as a judgment for possession, together with damages for detention, amounted, as between the parties, to all that was asked for in the prayer, it was not error to overrule a motion to transfer the cause to the equity docket: *Byers v. Rodabaugh*, 17-53.

30. Where an auxiliary injunction was issued to prevent garnishees from paying over money upon intervention under the statutory provisions for injunction in ordinary proceedings, and every issue made could be and was tried at law, *held*, that the auxiliary injunction did not change the action from one by ordinary to one by equitable

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proceedings, and the court might try the case as an action at law: *Pool v. Paul*, 23-421.

31. Habeas corpus proceedings: Under the statutory provision (Code, § 2513), that in all cases not otherwise provided for, plaintiff must prosecute his action by ordinary proceedings, the action for the writ of *habeas corpus* was to be tried as an ordinary action at law: *Shaw v. Nachtwey*, 43-633; *Drumb v. Keen*, 47-435.

32. Effect of error as to proper form of proceeding: An action erroneously brought at law may be changed to an action in equity without leaving the court: *Holmes v. Clark*, 10-423, 427.

33. Relief will not be denied because plaintiff has addressed his petition to the wrong side of the court if he is entitled to relief: *McDole v. Purdy*, 23-277.

34. The fact that plaintiff has improperly commenced his action by equitable proceedings when it should have been by law will not prevent his having an injunction under the provisions of the statute in such cases applicable to law actions: *Mills v. Hamilton*, 49-105.

35. Error, how remedied: An error in commencing an action in equity instead of at law, or *vice versa*, should be corrected by motion (Code, §§ 2514-2516). It is not a ground of demurrer: *Conyngham v. Smith*, 16-471; *Brown v. Mallory*, 26-409; *Wright v. McCormick*, 22-545; *Pella v. Scholte*, 21-463.

36. That plaintiff has a full, speedy and complete remedy at law is not proper ground for demurrer. The remedy is by motion to have the action changed into the proper proceeding: *Savery v. Browning*, 18-246; *Traer v. Lytle*, 20-301; *Gray v. Coan*, 23-344; *Gibbs v. McFadden*, 39-371; *Independent School Dist. v. Independent School Dist.*, 41-321.

37. Where an amendment is made during the trial, changing the nature of the action, motion to change the cause to the proper docket should then be made, and not a motion to strike the amendment from the files, on that ground: *Weaver v. Kintzley*, 58-191.

38. The fact that an action is in equity instead of at law is not fatal. Defendant may have the action tried as an action at law, and failing to avail himself of that right he cannot complain: *Lewis v. Soule*, 52-11.

39. A party who fails at the proper time to object to the prosecution of an action in equity which should have been at law, by moving to transfer it to the law docket, is presumed to have waived objection on that ground and to have assented to the cause proceeding as an equitable action, and in such case such relief as equity might render in a proper case might be given: *Richmond v. Dubuque & S. C. R. Co.*, 33-422, 504.

40. Change of proceeding to proper docket: The motion to change the case to the proper docket, as authorized by Code, §§ 2514-2516, cannot be made after filing an answer, nor at the time of filing an answer to an amended petition, when the fact of error in the proceedings was apparent but not taken advantage of at the time of filing an answer to the original petition: *Moore v. District T'p*, 28-425.

41. Objection that the action was brought by the wrong kind of proceedings cannot be taken advantage of after judgment: *Hatch v. Judd*, 29-95.

42. If the proper steps to effect the change are not taken in the court below, the remedy is regarded as waived: *Parshall v. Moody*, 24-814; *Green v. Marble*, 37-95; *Knott v. Tinker*, 39-628.

43. Generally a judgment in an equitable proceeding may be sustained if objection to the form of proceeding has not been made in the manner prescribed by the statute, though the action should have been by ordinary proceeding; but if upon the merits of the case the relief granted would have been denied at law and ought not to have been given in an equitable proceeding, the judgment will not be sustained: *Richmond v. Dubuque & S. C. R. Co.*, 33-422, 489.

44. Where an action is improperly prosecuted by equitable proceedings, a failure to object thereto as provided in Code, § 2516, operates as a waiver of a jury trial: *Ibid.*, 490.

45. Probate proceedings: Under the statutory provision (Code, § 2519) that an error as to the kind of the proceedings is waived by a failure to move for its correction at the proper time, *held*, that where proceedings in the circuit court, which should have been brought in probate, are entitled in equity or at law, a motion to change to the proper

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docket is the only remedy: *Ashlock v. Sherman*, 56-311; *McName v. Malvin*, 56-362; *First Nat. Bank v. Green*, 59-171; *Goodnow v. Wells*, 67-654.

46. On appeal: An objection to the form of the proceeding cannot be first raised on appeal: *Tugel v. Tugel*, 38-349; *Gould v. Hurto*, 61-45.

47. Error of the court in sustaining a motion to transfer to the equity docket will not be ground of reversal on appeal, where it does not appear that the party excepted to such action or demanded a jury trial: *State v. Craig*, 58-238.

Further as to form of action on APPEAL, see that title, §§ 993-995.

48. Equitable issues:¹ The issue must be made before the transfer to the chancery docket can be ordered by the court. The discretion of the court is a legal one and is reviewable: *McHenry v. Sypher*, 12-585.

49. A case properly commenced by ordinary proceedings is not to be transferred to the equity docket on filing an answer setting up equitable defenses, but either party may have such equitable issues tried by equitable proceedings: *Byers v. Rodabaugh*, 17-58.

50. Where defendant in an action to recover real property brought his bill in equity, setting up certain equitable defenses, and asking that the action at law be enjoined until the determination of such equitable defenses, *held*, that it was not necessarily an improper exercise of discretion to postpone the legal action: *Purington v. Frank*, 2-565.

51. The equitable issues which either party elects to have tried by equitable proceedings may be, and under ordinary circumstances should be, first tried and settled: *Hackett v. High*, 28-589.

52. After the equitable issues are thus tried, any legal issues remaining are to be disposed of in the manner provided for the disposal of such issues: *Rosierz v. Van Dam*, 16-175; *Van Orman v. Spafford*, 16-186; *Kramer v. Conger*, 16-434; *Corbin v. Woodbine*, 33-297.

53. But it is not imperative that the equitable issue be tried first. That issue should be first tried which may result in rendering a further trial unnecessary: *Morris v. Merritt*, 52-496.

54. To entitle a defendant to a trial of such equitable issue by equitable proceedings, such issue must be one heretofore exclusively cognizable in equity. (Decided under Rev., § 2617): *Walton v. Gray*, 29-440.

55. In a particular case, *held*, that the issues raised by defendant were such as to entitle him to have them tried in equity: *Marling v. Burlington, C. R. & N. R. Co.*, 67-331.

56. Where parties who are made defendants interpose a defense that is purely equitable, the case may properly be tried as an equitable action: *Gresham v. Chantry*, 69-728.

57. Where plaintiff seeks to recover real property in an action at law, he cannot recover upon proof of an equitable title, and if he asks any equitable relief it is not error to hold his petition insufficient on demurrer, and it would be unavailing in such case to transfer the cause to the equity docket: *Kittingham v. Blair Town Lot, etc., Co.*, 60-280.

As to interposing equitable defenses in an action at law, see PLEADING, V, f.

58. Where an answer to a petition at law set up both legal and equitable defenses, and no separation of the legal and equitable issues was had on the trial, *held*, on appeal, that it would be treated as an equitable action: *Van Orman v. Merrill*, 27-476.

And see APPEAL, §§ 993-995.

59. Joinder of legal and equitable actions: By agreement parties may have proceedings in a law action joined to and tried with those in an equitable action in which the parties are not the same, but the action still remains one at law: *Hines v. Whitebreast Coal, etc., Co.*, 48-296.

As to joinder of causes of action in general, see PLEADING, IV.

¹ Code, § 2517. Where the action has been properly commenced by ordinary proceedings, either party shall have the right, by motion, to have any issue heretofore exclusively cognizable in equity tried in the manner herein-after prescribed in cases of equitable proceedings; and if all the issues were such as were heretofore cognizable in equity, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings.

Right accrues, when.—Survival.

III. RIGHT OF ACTION ACCRUES, WHEN;
COMMENCEMENT OF ACTION.

As to the time limited for bringing actions, see **LIMITATION OF ACTIONS**.

As to the method of commencing actions, see **ORIGINAL NOTICE**.

60. Action accrues, when: A right of action does not accrue for a wrongful act until the party complaining has suffered injury therefrom. Therefore *held*, that action against a clerk for taking an insufficient stay bond did not accrue until the stay expired: *Steel v. Bryant*, 49-116; *Moore v. McKinley*, 60-367.

61. An action on a promissory note brought before the expiration of the days of grace cannot be maintained: *Seaton v. Hinneman*, 50-395; *Whitney v. Bird*, 11-407.

62. Demand: It is only in case where demand is necessary to the creation of plaintiff's right that it is necessary to allege a demand. Where the duty for the breach of which suit is brought arises without demand, such demand need not be pleaded in order to show a cause of action accrued: *Zimmerman v. National Bank*, 56-133.

As to when demand must be alleged and proven in an action of **REPLEVIN**, see that title, §§ 18-26.

63. When action deemed commenced: An action may be considered as begun for some purposes when the petition is filed; for instance, for the purpose of issuing a writ of attachment: *Hagan v. Burch*, 8-309; *Reed v. Chubb*, 9-178; *Elliott v. Stevens*, 10-418.

64. In general an action is deemed commenced when the notice is served upon defendant and not when placed in the hands of the officer for service: *Parkyn v. Travis*, 50-436.

65. Thus, where the notice was placed in the sheriff's hands for service April 1st, but it was not served until April 3d, and the right of action accrued April 2d, held, that the cause of action had accrued before suit was commenced: *Ibid*.

And see further, **ORIGINAL NOTICE**, §§ 58, 59, and **ATTACHMENT**, §§ 5-7.

For the purpose of determining whether action is commenced within the period al-

lowed by the statute of limitations, it is deemed commenced when the notice is placed in the hands of the sheriff for service with intention that it be served immediately: See **LIMITATION OF ACTIONS**, §§ 171-177.

Presentation of claim against county: An action against a county on an unliquidated demand cannot be brought until the claim has been presented to the board of supervisors: See **MUNICIPAL CORPORATIONS**, §§ 188-208.

IV. SURVIVAL OF ACTIONS;¹ ASSIGNMENT.

66. Right of action or defense survives: Any rights of remedy or defense existing in a party pass to his representatives on his death: *Harper v. Drake*, 14-533.

67. An action for libel will survive: *Carson v. McFadden*, 10-91.

68. Although an action for slander will survive against the personal representatives of defendant, the plaintiff cannot recover, as against such representatives, exemplary or punitive damages: *Sheik v. Hobson*, 64-146.

69. An action for injury to the person will survive: *McKinlay v. McGregor*, 10-111.

70. A servant's right of action for personal injury against his master survives the death of the servant: *Mumm v. Owens*, 2 Dillon, 475.

71. An action for seduction brought by the female herself survives: *Shafer v. Grimes*, 23-550.

72. An action for divorce is abated by the death of the parties, and with it all claim for alimony: *Barney v. Barney*, 14-189; *O'Hagan v. O'Hagan's Ex'r*, 4-509.

73. If a counter-claim is properly maintainable in favor of two defendants, the death of one of them will work no abatement thereof: *Moorehead v. Hyde*, 38-382.

74. A deposition taken after plaintiff's death upon notice served before his death cannot be used in subsequent proceedings in which the personal representatives are substituted, and should be stricken from the files on motion: *Kershman v. Suchela*, 59-93.

¹ Code, § 2525. All causes of actions shall survive, and may be brought, notwithstanding the death of the person entitled or liable to the same.

Assignment.—Against boats and vessels.

75. Assignment: All causes of action which survive under the statutory provision above referred to are assignable: *Gray v. McCallister*, 50-497.

76. A cause of action for a personal tort is assignable: *Ibid.*; *Weire v. Davenport*, 11-49; *Vimont v. Chicago & N. W. R. Co.*, 64-518.

77. An assignment absolute in form vests plaintiff with the title and property in the claim, and is sufficient to enable the assignee to bring action thereon in his own name, although the assignment to him is merely in trust: *Goodnow v. Litchfield*, 63-275.

And further as to assignment of causes of action, see ASSIGNMENT.

78. Right of action for injuries causing death:¹ In determining whether the cause of action accrues to the person injured or only to his legal representatives, the test is, whether he lived after the injury, and not the length of time he lived thereafter. If he lived but a short time, the cause of action accrued to him as actually as it would have done, had he lived a month or a year thereafter. (Overruling *Sherman v. Western Stage Co.*, 24-515): *Kellow v. Central Iowa R. Co.*, 68-470; *Ewell v. Chicago & N. W. R. Co.*, 29 Fed. Rep., 57.

79. At common law, no action could be maintained for an injury resulting in death, and the right of recovery for such injuries exists, if at all, only by reason of the law of the place of the injury: *Hyde v. Wabash, St. L. & P. R. Co.*, 61-441.

80. Under laws of another state: Therefore, *held*, that the personal representatives of the person whose death was caused by an injury in Missouri, where the statute does not authorize a recovery in such cases by the personal representatives, could not maintain an action for such injury in the courts in Iowa: *Ibid.*

81. A right of action for personal injury arising under the laws of this state, being assignable in this state, an action may be brought here by an assignee thereof, although the assignment is made in a state where the common law rule prohibiting such assign-

ments is still in force: *Vimont v. Chicago & N. W. R. Co.*, 69-296.

82. Where the right of action accrues by virtue of the statute of one state, the action may be maintained in another state, if not contrary to the public policy or laws of the place where suit is brought: *Morris v. Chicago, R. I. & P. R. Co.*, 65-727.

83. Therefore, where the death which was the subject of the action was caused in the state of Illinois by the negligence of a railway company, and the statutes of Illinois gave to the administrator of deceased the right of action for such injury, *held*, that the courts of Iowa, within which defendant was also operating its line of railroad, might obtain jurisdiction, and appoint an administrator to maintain a suit for the recovery of the damages allowed by the statutes of Illinois: *Ibid.*

84. Action against corporation: A corporation is liable in a civil action for wrongful acts of its servants, done in its employment and producing death. Its liability, however, would not probably be held to exempt the immediate agent from liability: *Donaldson v. Mississippi & M. R. Co.*, 18-280.

85. Where an employee of a railroad company received injuries through the wrongful act of a co-employee, resulting in death, the company was held to be the "perpetrator" within the language of Rev., § 4111, and civilly liable: *Philo v. Illinois Cent. R. Co.*, 33-47.

Measure of damages: See DAMAGES, II, g.

V. ACTIONS IN REM AGAINST BOATS AND VESSELS.

86. State jurisdiction: The jurisdiction of federal courts of admiralty is exclusive of the jurisdiction of the state court to entertain a proceeding *in rem* against a boat on a cause of action cognizable in admiralty, and the provisions of the Revision (corresponding to Code, § 3432 *et seq.*) assuming to confer such jurisdiction upon the state courts are unavailing for that purpose. (Overrul-

¹ Code, § 2526. The right of civil remedy is not merged in a public offense, but may, in all cases, be enforced independently of, and in addition to, the punishment of the latter. When a wrongful act produces death, the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts.

Against boats and vessels.—Signature.

ing *Trevor v. Steamboat Ad. Hine*, 17-349); *The Hine v. Trevor*, 4 Wall., 555; *Walters v. Steamboat Mollie Dozier*, 24-192.

87. Petition: Under the provisions of the Revision, *held*, that the petition in such a proceeding *in rem* need not aver that the boat was within the jurisdiction of the state at the time suit was commenced. It is the service of the warrant that brings the property within the jurisdiction of the court. If the contract for the breach of which action is brought is violated within the waters of this state, and the boat is seized under warrant properly issued, the court will have jurisdiction although such contract was made elsewhere: *Baker v. Steamboat Milwaukee*, 14-214.

88. What charges enforceable: Under the provisions of Code of '51, which made certain charges a lien against the boat, *held*, that the seizure and sale of the boat under the laws of another state did not divest it of such lien: *Haight v. Steamboat Henrietta*, 4-472; *Ogden v. Ogden*, 13-176.

89. Also, held, that the boat was liable for money collected from consignments of goods for freight due a railroad company from whom the goods were received to be forwarded to their destination, and that such transaction was a "contract relative to the transportation of" freight: *Chicago, B. & Q. R. Co. v. Steamboat Woodsides*, 10-465.

90. The use of a barge may constitute a supply for which a claim against the boat may be enforced in such proceedings: *Steamboat Kentucky v. Brooks*, 1 G. Gr., 398.

91. It is sufficient to allege that the contract was made with the boat: *West v. Barge Lady Franklin*, 2-522.

92. Under the provisions of Code of '51, *held*, that the remedy intended was not designed solely for the benefit of the party furnishing the supplies, but that a lien could be transferred by assignment and enforced by the transferee: *Strother v. Steamboat Hamburg*, 11-59.

93. Under the provision (Code, § 3445) that any raft found in the waters of the state shall be liable for all debts contracted by the owner, agent, clerk or pilot thereof on account of work done or service rendered for such raft, the lien referred to will attach under a contract with the pilot, although be-

tween him and the owner there is an agreement that the former shall bear all the expenses: *Hanson v. Hiles*, 34-350.

94. Jurisdiction: A warrant and seizure of a boat thereunder is essential to confer jurisdiction upon the court. The proceeding is one *in rem*: *Ham v. Steamboat Hamburg*, 2-460.

95. Discharge of lien: Under the statutory provisions for a discharge, *held*, that a formal entry of discharge under the bond was not necessary to render the principal and sureties liable thereon. Nor need the bond be formally approved if it is accepted by the officer and the boat released: *White v. Tisdale*, 12-75.

96. A judgment may be rendered against the boat, and at the same time against the sureties on a bond on which the boat has been discharged: *Ogden v. Ogden*, 13-176.

ADMINISTRATORS.

See ESTATES OF DECEDENTS.

AD QUOD DAMNUM.

See RAILROADS, III.

ADVERSE POSSESSION.

See REAL PROPERTY.

AFFIDAVITS.

1. Signature: An affidavit is defined by statute (Code, § 3689) to be a written declaration under oath. This clearly implies that it should be signed by the affiant: *Crenshaw v. Taylor*, 70—.

2. The jurat or certificate need not state the name of the person signing or swearing to the affidavit: *Stone v. Miller*, 60-243.

3. It is not necessary that the jurat expressly show that the person sworn is the person who subscribed to the affidavit. A jurat in the following form: "subscribed in my presence and sworn to before me," giving the date, *held* sufficient: *Stoddard v. Sloan*, 65-680.

4. The signature to a jurat by an officer writing his name with the designation, "No-

Appointment and revocation.

tary Public," is sufficient without adding the name of the county in and for which he is a notary. The court will take judicial notice of the fact that he is a notary for that county: *Ibid.*

5. Where an affidavit is headed with the name of the state and county, and the signature of the notary is authenticated with a seal, such signature is sufficient if it contains the name of the notary with the addition "Notary Public," without stating the state or county for which he is notary: *Stone v. Miller*, 60-248.

6. Where the venue of the affidavit is not indicated, it will be presumed that the oath was administered within the county in which the justice of the peace administering it had jurisdiction, that being the county in which the action was pending and in which the pleading was filed: *Snell v. Eckerson*, 8-284.

7. Although, in the caption, the affidavit is entitled of one county, while it appears to have been sworn to before a notary public in another county, the presumption is that the notary public took the affidavit within his own jurisdiction, and the caption will not be sufficient to show that it was sworn to without such jurisdiction: *Goodnow v. Litchfield*, 67-691.

8. Taken out of state: The fact that the officer before whom an affidavit is made, out of the state, is authorized to administer oaths may be established *aliunde*: *Levy v. Wilson*, 43-605.

9. While the laws of other states will be presumed to be the same as the laws of this state, requiring the seal of the notary to have engraved thereon the name of his state, yet where the court receives and acts upon an affidavit for change of venue sworn to before a notary public of another state, whose seal does not bear the name of his state, it will be presumed that some showing was made that the seal was such as required by the laws of the state where the jurat was executed: *Goodnow v. Litchfield*, 67-691.

10. Amendment: Where an affidavit offered in evidence is authenticated by the signature and seal of a notary public, but the jurat does not refer to the seal, the notary may amend the jurat: *Hallett v. Chicago & N. W. R. Co.*, 22-259.

AGENCY.

I. APPOINTMENT AND REVOCATION.

- a. *General fact of agency.*
- b. *Revocation in general and effect thereof.*
- c. *Revocation by death of the principal.*

II. EXTENT OF AUTHORITY.

- a. *In general.*
- b. *Powers of agents construed.*
- c. *Delegation of authority to agent.*

III. LIABILITY OF PRINCIPAL AND AGENT RESPECTIVELY TO THIRD PARTIES.

- a. *By contract.*
- b. *By conduct in general.*
- c. *Declarations, res gestæ.*
- d. *Notice to, and knowledge of, agent.*

IV. RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND AGENT.

- a. *Duties and liabilities of agent towards principal.*
- b. *Compensation of agent.*
- c. *Good faith from agent to principal.*

V. RATIFICATION, WHAT CONSTITUTES; EFFECT.

As to powers and duties of ATTORNEYS, see that title.

I. APPOINTMENT AND REVOCATION.

- a. *General fact of agency.*

1. Assent of parties necessary to agency: The relation of principal and agent cannot be created unless by contract. Therefore, in a particular case, where it was sought to hold a corporation as agent, and the evidence merely showed that three of its officers had acted as such agent, the fact was held not to be sufficiently established: *Storm Lake Bank v. Missouri Valley L. Ins. Co.*, 66-617.

2. To constitute a person an agent, there must be consent on the part of the agent, either expressed or by words, or inferable from something done: *First Nat. Bank v. Free*, 67-11.

3. Loan agent is the agent of the borrower: The party from whom an application is made to a loan and trust company for the purpose of effecting a loan, is the agent of the borrower and not of the company. Notice to such an agent would not therefore be

Appointment and revocation.

notice to the company: *Thomas v. Desney*, 57-58.

4. Messenger taking money to creditor: The fact that a creditor accepts money sent him by a debtor through a messenger does not constitute the messenger the agent of the creditor in such sense that, if such messenger subsequently receive money from the debtor and fail to pay it over, the loss will be that of the creditor: *Fisher v. Schiller Lodge*, 50-459.

5. Finding customer: Where a dealer in agricultural implements took orders or propositions, as he had opportunity, for the sale of a particular threshing machine, and forwarded them to the manufacturer, who either accepted or rejected them, and, if he accepted, shipped the machine to such dealer, who delivered to the purchaser and accepted the payment, forwarding the money or notes received to the manufacturer, *held*, that the dealer was, as to sales effected, the agent of the manufacturer; and that any suit growing out of such a sale was a suit growing out of or connected with the business of such agency: *Milligan v. Davis*, 49-126.

6. Declarations of the agent to prove agency: To bind a person by the representations of one claiming to be his agent, such agency must be shown otherwise than by the agent's own declarations. One may prove his agency by his own oath, if the authority is conferred by parol, or it may be established in many ways, as by the declarations or admissions of the principal; but it cannot be by the declarations alone of the person assuming thus to act: *Moffitt v. Cressler*, 8-122.

7. Acts and declarations of the agent are not admissible for the purpose of proving the agency: *Clanton v. Des Moines, O. & S. R. Co.*, 67-850.

8. The extent of the power and authority of an agent cannot be established by declarations of the supposed agent: *Bigler v. Toy*, 68-687.

9. Before the declarations of an alleged agent can be admitted in evidence against his principal, some evidence that he was authorized to act for his principal in relation to the matter in hand must be introduced: *Drake v. Chicago, R. I. & P. R. Co.*, 70-—.

10. For the purpose of supporting a contract made by an agent, the fact of agency cannot be proven by the admissions of the person claiming to act as agent: *Whitescarver v. Bonney*, 9-480.

11. The authority of an agent cannot be proved by the agent's declarations alone; they are not admissible for that purpose: *Graul v. Strutzel*, 58-712; *Renwick v. Bancroft*, 56-527.

Further as to admissibility of declarations of agent, see EVIDENCE, §§ 240-254.

Further as to how far declarations of the agent are binding upon the principal, see *infra*, III, c.

12. A party cannot be bound by the claim of another that he is acting as his agent, without knowledge that he was so claiming. Nor will the understanding in the community as to the fact of agency be conclusive as against the party sought to be held as principal: *Milligan v. Davis*, 49-126.

13. Admissible evidence to prove agency: Where a party attempts to escape liability for the non-delivery of goods by proving delivery to an agent, he is not limited to showing that he had sufficient reason to believe the existence of the agency, but may show circumstances tending to prove the agency of which he had no knowledge at the time. It is the fact of agency, and not the knowledge of that fact, which is in controversy: *Angle v. Mississippi & M. R. Co.*, 9-487.

14. While the authority of a supposed agent cannot be established by his own declarations, yet if the agency has been otherwise proved, then the declarations of the agent, within the scope of his authority, which constitute a part of the transaction or *res gestæ*, are admissible: *Winch v. Baldwin*, 68-764.

15. Several instances of employment as a special agent would not be sufficient to prove a general agency: *Ibid*.

16. Authority to do one act: Authority given at one time to an agent engaged in making repairs on defendant's house is not sufficient to authorize one to presume, a year afterwards, that the authority still continues: *Green v. Hinkley*, 52-833.

17. Authority to bind by note, how shown: The authority to make, indorse, renew or accept negotiable paper may be in-

 Appointment and revocation.

ferred from the course of business, and from the fact that similar transactions have been repeatedly recognized by the principal as done by his authority; the general rule being that the principal is bound by actually authorizing the act, or by leading those with whom the agent actually dealt in his behalf to believe, as reasonable men, that authority had been actually given, or by subsequent ratification: *Whiting v. Western Stage Co.*, 20-554.

18. While the fact of agency cannot be inferred from the acts of the agent alone, yet, as bearing upon that question, such acts are proper to be considered in connection with his testimony and other facts: *Hall v. Aetna Mfg. Co.*, 30-215.

19. Present authority not inferable from former: The declarations or admissions of an agent bind the principal only when made during the continuance of the agency in regard to a transaction then pending. An authority to make an admission is not necessarily to be implied from an authority previously given in respect to the thing to which the admission relates: *Osgood v. Bringolf*, 32-265.

20. Former approvals: Under the facts of a particular case, *held*, that an agent for the sale of land was not given authority to sell, except on the approval of the contract by the principal. In such case the fact that former sales have been approved as made, would not give rise to authority to make further sales without approval: *Burlington, C. R. & N. R. Co. v. Sherwood*, 62-309.

21. Agency distinguished from loan: Money was furnished to a party with which to purchase grain, and the understanding was, that his compensation should be a share of the profits remaining, after paying back the sum furnished, with eight per cent. interest. *Held*, not to be a loan, but a contract of agency, and that the grain, when purchased, belonged to the person who furnished the money: *Van Sandt v. Dows*, 63-594.

22. Fact of agency is for the jury: Where it is sought to bind a party by the acts of another as his agent, the fact of the agency, if controverted, should be submitted to and passed upon by the jury: *Patton v. Bond*, 50-508.

b. *Revocation in general and the effect thereof.*

23. Change of the firm name does not annul an agency which was conferred upon the same persons under another name: *Billingsley v. Dawson*, 27-210.

24. Power coupled with an interest: The power of sale conferred upon a creditor by a trust deed is a power coupled with an interest, which is not revoked by the death of the trustee, but may be executed by his administrator: *Collins v. Hopkins*, 7-468.

25. An agency is revocable at the will of the principal, unless the power conferred upon the agent be given for a valuable consideration, or as a security, or is coupled with an interest. Where the principal had given to the agent authority to raise a donation for a particular purpose, with an agreement that the agent should be entitled to a certain per cent. of the subscriptions as compensation, *held*, that the agency was not coupled with an interest and might be revoked at pleasure: *Smith v. Cedar Falls & M. R. Co.*, 30-244.

26. Presumption as to continuance: Whether the agent's authority is general, or special and unlimited as to time, the presumption as to those previously dealing with him is, that it continues until there is notice of revocation: *Whiting v. Western Stage Co.*, 20-554.

27. Notice of revocation: A revocation of the power of attorney by act of the principal does not take effect until notice of the revocation is given; but dissolution of such power by act of law, as by the death of the principal, takes place instantly upon such death, and the estate vests in the heirs, or devisees, or creditors, and their rights cannot be impaired by an act of the agent after the principal's death: *Vance v. Anderson*, 39-426.

28. Completion of agency: An agency terminated by the completion of the business for which it was organized is completed by operation of law. Where an agent for the purchase of land turned over to the principal the contract for the conveyance, and received his fees, *held*, that his agency terminated, and was not revived by the fact that the vendor sent to him the note for the balance of the purchase money for collection.

Revocation.— Authority.

Such an agent is not therefore estopped from acquiring a tax title to the premises after transferring the contract for the same to the principal: *Moore v. Stone*, 40-259.

29. Power to bind after revocation: The doctrine that a discharged agent may, under some circumstances, bind his former principal to the extent of his former authority, has no application beyond the claims the agent himself has upon the property, or rights formerly intrusted to him: *Baudouine v. Grimes*, 64-370.

30. Revocation amounting to a breach of contract: The principal cannot violate a written contract of agency before there has been a breach on the part of the agent. If an agent undertakes to sell within a limited time, and at certain rates, and for a compensation agreed upon, and makes reasonable endeavors to effect a sale, the owner of the property cannot, during the time mentioned, revoke the authority conferred, or sell the property himself, without making to the agent compensation for the services rendered. If it is shown that by an act of the owner a sale, which the agent might have made, was hindered or prevented by the owner, the agent will be entitled to all the compensation that such sale, if made, would have entitled him to receive: *Attix v. Pelan*, 5-836.

c. Revocation by death of principal.

31. Power of attorney to convey: An agency to sell and convey land in the name of the principal, not coupled with an interest, is revoked by the death of the principal, and a sale and conveyance made thereafter by the agent, although without notice of such death, is void: *Lewis v. Kerr*, 17-73; *Vance v. Anderson*, 39-426.

32. Agency intended to continue after death: An agency intended to continue after the principal's death, while it may be valid as far as executed during his life-time, is discontinued after the death of the principal, and the agent thereafter will become a mere custodian of the property remaining in his hands, without any rights thereto against a duly appointed administrator: *Crispin v. Winkleman*, 57-523.

33. Effect on collateral securities held by agent: Where negotiable notes were

turned over to an agent to be held as collateral security for the payment of notes which such agent held for collection against the principal in behalf of other parties, held, that the death of the original owner did not terminate the agency so as to entitle his administrator to recover from such agent the proceeds of the notes, for the reason that the notes in the hands of such agent were thereby in the possession of the parties for whose benefit they were held: *Bennett v. Stoddard*, 58-654.

34. A collection agent cannot enforce the collection of his principal's notes after the death of the principal, and is not liable for failure to collect such notes where the makers became insolvent after the principal's death. *Darr v. Darr*, 59-81.

II. EXTENT OF AUTHORITY.

a. In general.

35. Acts done in the scope of authority: A principal is only liable for the acts of the agent done in the scope of his authority, and not for other acts of the same person, done as the agent of another: *Jones v. Turck*, 33-246.

36. In order to bind the principal it is necessary that the contract of the agent shall be within the scope of his authority as agent; it is not enough that the contract be made in regard to the business of the agency: *Richmond v. Greeley*, 38-666.

37. General authority: Though as between the principal and agent the powers of the agent may be limited, it frequently occurs that his powers are not limited, when the rights of third persons intervene, if the principal has so acted as to induce third persons to act upon the assumption of more extended or unlimited powers: *Keenan v. Missouri State Mut. Ins. Co.*, 12-126.

38. Private instructions: The authority of a general agent may be regarded by the public as measured by the usual extent of his general employment. So far as the public is concerned, his authority cannot be limited by private instructions as to the manner of executing his agency: *Davenport v. Peoria M. & F. Ins. Co.*, 17-276; *Bartholomew v. Merchants' Ins. Co.*, 25-507.

Extent of authority.

39. General business authority; negotiable paper: The general authority of an agent to transact business will not be held to confer the power to make the principal a party to negotiable paper. And the power to do some things with reference to such paper cannot be enlarged by construction to authorize the agent to do other, though somewhat similar, things: *Whiting v. Western Stage Co.*, 20-554.

40. But the authority to make, indorse, renew or accept negotiable paper may be inferred from the course of business, and from the fact that similar transactions have been repeatedly recognized by the principal as done by his authority, the general rule being that the principal is bound by actually authorizing the act, or by leading those with whom the agent dealt in his behalf to believe, as reasonable men, that authority had been actually given, or by subsequent ratification: *Ibid.*

41. General scope of business: The doctrine which protects third persons, who have been injured by an agent's acts in excess of his authority, does not apply, unless the agent is acting in the business intrusted to him, and substantially according to the instructions of his principal: *Mather v. Gilliss*, 1-242.

42. An agent authorized to make purchases for his principal will bind his principal to purchases of the general kind and class authorized, unless the person dealing with the agent knows that the agent is violating special instructions: *Adams v. Boies*, 24-96.

43. The principal is bound by the unauthorized acts or engagements of a general agent only when they are entered into within the apparent scope of his employment: *Huker v. Myrick*, 69-189.

44. Power to warrant: Where an agent has general powers for the sale and warranty of machines, his authority cannot be restricted to the making of warranties in writing, unless it is shown that the parties with whom he dealt had notice of such restriction: *Murray v. Brooks*, 41-45.

45. Established agency; presumption: Where a general agency is established, the person contracting therewith will not be required to prove that the agent intended to bind his principal by a transaction within

the scope of his authority: *Brett v. Bassett*, 63-340.

46. Presumption from the class of agency: If a party has but one class of agents, the appointment of a person as agent may be regarded as conferring the powers usually exercised. If there are different classes of agents, with distinct powers, the mere appointment of a person as agent will not confer on him any greater powers than those of the class to which he is shown to belong: *Strickland v. Council Bluffs Ins. Co.*, 66-466.

47. Custom; when admitted to show authority: The custom of other insurance companies with reference to appointment of agents is not admissible to show the extent of the power granted to an agent by his company, where it is not shown that the party dealing with the agent had knowledge of such custom, or that the custom was so general that knowledge of it must be presumed: *Bradford v. Homestead F. Ins. Co.*, 54-598.

48. Bank as collecting agent: One who deposits with a bank for collection negotiable paper, payable at a distant place, is chargeable with the custom of banks to intrust it to other banks for collection at the place where payment is to be made. The bank receiving the paper becomes responsible to the principal as agent, with authority to employ another bank to collect it, and is not liable for the negligence of its correspondent in making such collection, if it has used reasonable care in the selection of the correspondent: *Guelich v. National State Bank*, 56-484.

49. Custom to sell on credit: A party relying upon authority of an agent to sell on credit, based upon commercial custom in a particular business, has the burden of showing such custom and proving that the credit given was not unreasonable: *Payne v. Potter*, 9-549.

50. General custom: One who deals with an agent in a manner different from the general custom of such agent has the duty upon him to ascertain the extent of the agent's authority in such dealing: *Tidrick v. Rice*, 13-214.

51. Evidence of custom will not be admitted to vary the express terms of the authority

Authority.— Powers.

given the agent: *Wanless v. McCandless*, 38-20.

52. Authority of special agent: Where an agent acts under express or special authority, whether written or verbal, the party dealing with him is bound to know what the authority of the agent is, and its legal effect; and if the agent exceed the boundary of his legal power, the act as concerning his principal is void: *Payne v. Potter*, 9-549.

53. It is incumbent on the persons dealing with a special agent to ascertain the scope and extent of his powers: *Roberts v. Rumley*, 58-301.

54. The exercise of power by a special agent is restricted to limits prescribed by the principal; and one dealing with such agent, with knowledge of a limitation on his power, cannot enforce a contract made by him for his principal which is beyond such limitation: *Siebold v. Davis*, 67-560.

55. The character of an agency is a question of fact for the jury, and even upon the evidence submitted to them, it is not proper for the court to instruct that, if the agent is not shown to be a limited agent, the jury should find that he was a general agent: *Dickinson County v. Mississippi Valley Ins. Co.*, 41-286.

56. Knowledge of contracting party: Where the extent of the agent's authority is in question, it is error to instruct the jury in such a way as to make the knowledge on the part of the contracting party as to the agent's authority the real point in issue: *Ibid.*

57. Power of attorney; defective execution: An agreement by an attorney for a principal, inoperative at law for want of a formal execution in the name of the principal, is binding in equity, if the attorney had authority. But not so if the agreement was never executed formally or otherwise, in the principal's name, or in the name of any person for him: *Wilkinson v. Getty*, 13-157.

58. Particular circumstances: Evidence in a particular case held not sufficient to show express or implied authority to bind the supposed principal to a contract entered into by the alleged agent: *Cobb v. Hall*, 49-366.

59. Acts of agent under particular circumstances found to be beyond scope of authority: *Taylor v. White*, 44-295.

b. Powers of agents construed.

60. Power of attorney: The rule that the terms of a power of attorney are to be construed strictly against the principal is not designed to enlarge or extend the power conferred, nor to change the construction of such power: *Mathews v. Gilliss*, 1-242.

61. Sale and exchange: Authority given to an agent to sell does not authorize him to exchange for other property: *Haas v. Damon*, 9-589; *Hampton v. Moorhead*, 62-91.

62. If such exchange is shown, it amounts to a proof of conversion without any proof of demand but the bringing of suit: *Haas v. Damon*, 9-589.

63. Sale on credit: Authority to sell does not, unless by custom in a particular business, authorize a sale on credit: *Payne v. Potter*, 9-549.

64. Where no authority for sale upon credit has been given by the principal, it will be sufficient excuse for a factor in failing to accept a proposition that the offer was for a sale upon credit: *Durant v. Fish*, 40-559.

65. An instrument authorizing an agent to sell all the land of his principal at a certain price per acre, a part to be paid at once, the rest on time, does not bind the principal, if the agent requires no part of the price to be paid at once: *Mathews v. Gilliss*, 1-242.

66. Receiving proceeds of sale: The authority to make a contract for the sale of lands will authorize an agent to receive so much of the purchase money paid in hand as the terms of the sale require: *Alexander v. Jones*, 64-207.

67. Authority to sell property and take a note in payment would not of itself include authority to receive payment after the note has been delivered to the principal. Payment of the note to the agent who accepted it would not of itself bind the principal to deliver it up: *Draper v. Rice*, 56-114.

68. Where an agent was authorized to sell land upon the payment of one-third of the purchase price in cash, held, that a contract of sale contemplating a payment of the cash portion of the purchase price at a future day was not within the authority of the agent, and was not binding upon the principal: *Wanless v. McCandless*, 38-20.

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69. Also held, in such case, that an offer

Powers construed.

by the agent to advance the money did not validate the sale: *Ibid.*

70. In cases like the above, evidence of the custom that the cash purchase money should not be paid until the tender of the deed will not be admitted to vary the express terms of the agency: *Ibid.*

71. **Receiving payment:** If an agent or attorney holds a note for collection, he has no right to receive anything in payment but money, unless especially authorized to do so: *Drain v. Doggett*, 41-682.

72. **Payment to a creditor's agent:** If one who owes money on a written security pays to or settles with another as agent of his creditor, he must, at his peril, either see that such person is in possession of the security, or has special authority, or has been represented by the creditor to have such authority, although not in possession of the security: *Tappan v. Morseman*, 18-499.

73. **Assignment by an attorney:** It is incumbent upon the party relying upon an assignment, purporting to be executed by an attorney, to prove the authority of such attorney. As to the form of executing assignment by attorney, it is sufficient if he sign his name, adding the words "Attorney for ——" *Ford v. Independent Dist.*, 46-294.

74. **Waiver of stipulations:** The stipulations of a contract cannot be waived by an agent who has no power or authority to waive them. Statements of such agent as to matters outside of the line of his employment will not be binding upon the principal: *Davis v. Robinson*, 67-355.

75. **Signing name:** In a particular case, *held*, that the agent or clerk of a partnership had not sufficient authority to bind the firm by signature of its name to a promissory note: *Miller v. House*, 67-737.

76. **Sale of land:** Where a land-owner gave an agent the terms upon which he would sell it, but refused to put the land exclusively into his hands, reserving the right to sell through other parties, if satisfactory propositions should be made, *held*, that a contract of sale made by such agent, upon the specified terms, was binding upon the principal, there being no intervening sale to any other party: *Hopwood v. Corbin*, 63-218.

77. **To release mortgage:** An agent having authority to lease property, to contract

for the erection of buildings thereon, etc., and negotiate for the sale of the property, *held* not to have authority after such sale to release a mortgage given to secure the purchase money, nor to accept other property in part payment of such purchase money: *Hakes v. Myrick*, 69-189.

78. An agent having authority to collect is not authorized to release a mortgage securing the indebtedness upon the substitution of a new note for the one secured, nor to accept property instead of money in payment: *Ibid.*

79. **To manufacture is not to sell:** The authority to sell cannot be implied from the general authority to purchase hides and superintend the manufacture of same into leather: *Holbrook v. Oberne*, 56-324.

80. **To sign checks is not to borrow:** An authority given to an agent to sign checks on the bank for stock purchased would not of itself authorize a finding that the borrowing of money on credit was an act within the scope of the agency: *Mordhurst v. Boies*, 24-99.

81. **To loan is not to collect:** The authority to collect money cannot be inferred from the power to make a loan and to receive securities therefor: *Austin v. Thorp*, 30-376.

82. **Power to sue:** The power of an agent to contract in the name of his principal does not include, by implication, the power to bring an action upon such contract; *Markham v. Burlington Ins. Co.*, 69-515.

83. **To invest is not to sell:** Authority given to an agent to invest money and look after the business generally, would not authorize the agent to sell the principal's property, even such as might be acquired as the result of the investment: *Smith v. Stephenson*, 45-645.

84. **To use is not to sell:** The fact that a woman, the owner of a team, allowed her son to use and to control the same, *held* not to raise any presumption of the right or authority of the son to sell the same without her consent: *Hinkson v. Morrison*, 47-167.

85. **To sell is not to guaranty:** An agent authorized to sell notes is not thereby authorized to guaranty them. All that will be implied from an authority to sell and dispose of notes is authority to sell in the ordinary and usual manner, that is, by the ordinary indorsement: *Graul v. Strutzel*, 53-712.

Powers construed.—Delegation of authority.

86. To waive incidents of breach of warranty: An agent having authority to make a sale and give a warranty, in which it is provided that the article is to be returned within a specified time, or the warranty will be deemed fulfilled, will bind his principal to the warranty if the purchaser offers to return the article within the specified time, but the agent waives the return strictly within the time: *Pitsinowsky v. Beardsley*, 37-9.

87. Authority to exceed printed warranty: Where machines are sold by an agent under a printed warranty, and there has been no breach of the terms of the warranty, the presumption is against the authority of the agent to extend the terms of the warranty. The presumption is that the agent's power to sell is to be strictly limited by the published terms of the sale given to each purchaser: *Richmond v. Greeley*, 38-666.

In general, as to power of agent to warrant, see SALES, IV.

88. Joint action of two or more agents: An authority conferred upon two or more agents can be performed by them only jointly unless a contrary intent appears. But if the instrument conferring the power shows an intention that a part of the agents may execute it, such execution is sufficient. In a particular case, where agents were given discretionary power in completing a contract, *held*, that they could transfer the contract under their power without assignment, and as it was necessary that the contract should be stamped to give it validity, it was presumed that the power to affix and cancel stamps was conferred: *Cedar Rapids & St. P. R. Co. v. Stewart*, 25-115.

89. Where power is intrusted to two or more persons, without the express provision that either one of them may exercise it, it can be exercised only by the concurrent action of at least a majority: *Sioux City v. Weare*, 59-95.

90. Power of physician of railroad: Where it was sought to recover from a railroad company a compensation for meals furnished to nurses and the relatives of an injured employee at the direction of the physician, *held*, that such recovery could not be supported without evidence of express authority of the physician to make such con-

tract: *Bushnell v. Chicago & N. W. R. Co.*, 69-620.

Station agent: As to powers of station agent to bind railroad, see CARRIERS, §§ 1-3.

c. *Delegation of authority by the agent.*

91. Acts of sub-agent: As a rule, where the employment of a sub-agent is necessary, the agent, if he makes a fit and proper selection, is not responsible for the default of such sub-agent. But a factor or broker cannot delegate his authority. The principal may confer the power of delegation or substitution, and if that is shown, he must look to the substitute: *Loomis v. Simpson*, 13-532.

92. It is not necessary that a sub-agent should be known to his principal, or in any way recognized by his principal, in order to bind the latter. Authority is sometimes implied, from the very nature of the duties and powers committed to a general agent, to employ sub-agents, and when this is the case the principal is bound by the acts of the sub-agent: *Gum v. Equitable Trust Co.*, 1 McCrary, 51.

93. Accountability for acts of sub-agent: A sub-agent is accountable to his superior agent when employed without the assent or direction of the principal. But if employed with the express or implied assent of the principal, the superior agent will not be responsible for his acts: *Guelich v. National State Bank*, 56-434.

94. Fellow-servant: Where it appeared that a railway company had a night clerk at its station in addition to the regular agent, *held*, that the agent was not responsible for the acts of the night clerk as a sub-agent: *Robinson v. Illinois Cent. R. Co.*, 30-401.

95. Attorney engaging officer: Where an attorney procures an officer to render services for his client, the attorney is merely the agent of the party requiring the services, and, his agency being known, he cannot be held liable in the absence of an express contract to that effect: *Doughty v. Paige*, 48-483.

Bank collections: That a bank receiving paper for collection is not liable for negligence of correspondent to whom paper is sent: See *supra*, § 48.

96. Purchaser procured by sub-agent: Authority to sell real property at the agent's

 Liability.—By contract.

own discretion as to the price and terms of sale, authorizes the agent to employ a sub-agent to procure a purchaser at reasonable terms, and the principal will be bound by a sale so made: *Renwick v. Bancroft*, 56-527.

97. Attorney cannot delegate: An attorney-at-law cannot delegate to another attorney, authority to act for the principal in a matter confided to the care of the first attorney: *Antrobus v. Sherman*, 65-230.

III. LIABILITY OF PRINCIPAL AND OF AGENT RESPECTIVELY.

a. By contract.

98. Principal alone bound: If the agent has authority to make the contract, and does so in writing, disclosing therein his principal, and his own relation as agent, the principal alone will be bound, unless the intention is clearly expressed to bind the agent personally, notwithstanding the aforesaid relation: *Baker v. Chambles*, 4 G. Gr., 428; *Harkins v. Edwards*, 1-426.

99. The question of liability does not turn generally upon the form of the signature, but upon the fact whether the relation of principal and agent is fairly disclosed upon the face of the paper: *Harkins v. Edwards*, 1-426.

100. Agency not presumed: The legal presumption is, that where a party contracts, he binds himself personally, unless it is shown affirmatively that he acted and promised for a principal: *Curts v. Scoles*, 1-471.

101. Must act in the name of the principal: A contract by an agent is not valid against the principal, unless it appears that the agent had either a general or special authority to make such contract for the principal, and that he made it in the name of the principal: *Lucas v. Barrett*, 1 G. Gr., 510.

102. Agent bound: Where one having authority as agent signs a contract or promise, and his authority appears on the face of the instrument, he is not personally liable; but, if it does not appear that he acted as agent, or he had not authority, he renders himself personally responsible. An executor or administrator is personally responsible on a note given by him in that capacity, as he has no authority to bind the estate: *Winter v. Hite*, 3-142.

103. Where one contracts in his own name for the act of another, he becomes thereby personally bound, unless it appears from the contract itself that he did not intend to bind himself personally. Therefore, where it appeared that a party signed his name to a subscription for stock in a corporation, adding words indicating that it was to be paid for by another, *held*, that he was personally liable upon such subscription: *Langford v. Ottumwa Water Power Co.*, 59-283.

104. Payment to agent without knowledge of agency: Where the purchaser of property from an agent, without notice or knowledge of the agency, allowed judgment to be rendered against himself in garnishment as debtor of such agent for the purchase money unpaid, *held*, that he was not liable to the principal for the same debt in another action: *Eclipse Wind Mill Co. v. Thorson*, 46-181.

105. Agent holding himself out as principal: A person dealing with an agent in regard to personal property intrusted to him by his principal, without knowledge that the agent is not the real owner, but supposing him to be such owner and the principal in the transaction, will possess all the rights that he would have acquired had the transaction been with the real principal: *Erickson v. Bell*, 53-627.

106. Pretended principal: An agent, who attempts without authority to make a contract binding upon a principal, binds himself thereby: *Andrews v. Tedford*, 37-314.

107. An agent contracting in behalf of a principal having no legal existence renders himself liable. So *held* in a case of contract, entered into by defendants as executive committee of an unincorporated association: *Lewis v. Tilton*, 64-220.

108. Undisclosed principal; rights and liabilities: A principal may be held liable for money had and received on a bill of exchange drawn by his agent without disclosing the principal: *Thurston v. Mauro*, 1 G. Gr., 231.

109. The right of a party to maintain a suit in equity against an unnamed principal, when the agent acted within the scope of his authority, seems to be well founded: *Davison v. Davenport Gas, etc., Co.*, 24-419.

Liability.—By contract.

110. A contract by an agent in his own name, which would not be binding on the principal, may nevertheless be enforced by the principal against the party contracted with: *Darling v. Noyes*, 32-96.

111. It is not improper for an agent, in the absence of instructions on that point, to act without disclosing his agency, and the fact that he does so will not release the principal from responsibility to the agent himself for the liability incurred in so acting: *Nixon v. Dorney*, 49-166.

112. The mere fact that the principal is not disclosed by no means prevents him from being bound by the contract, provided it is understood that the agent is acting as such and not as principal: *Young v. Hartford F. Ins. Co.*, 45-377.

113. Agent's signature: A person cannot be rendered liable on a bill of exchange or promissory note, unless his name or the style of his firm is subscribed to some portion of it as a party. Simply the signature of a person acting as agent, with the word "agent" added to such signature, will not render the undisclosed principal liable thereon: *Thurstow v. Mauro*, 1 G. Gr., 231.

114. Descriptive words; consideration: A note given for a policy of insurance, not appearing on its face to be other than the individual note of the makers, and signed with individual names, to which are affixed the words of official designation, "president," "secretary," "director," etc., is personally binding upon such makers as individuals, even though it be shown that the policy was issued to a school district, and that the makers were the officers of such district. The fact that it has been given for such purposes will not defeat it for want of consideration: *American Ins. Co. v. Stratton*, 59-606.

115. Face of note showing official capacity: Where the note shows upon its face that it is executed in an official capacity, the maker is not personally liable, although his signature is not supplemented with his official designation: *Lyon v. Adamson*, 7-509; *Harvey v. Irvine*, 11-82.

116. A note in which the signers were described as "committeemen for the erection of a school-house in district," etc., but which was signed simply with the ordinary names

of such officers without the official designation, and did not purport to bind the district, held binding upon the makers individually, and not upon the corporation: *Bayliss v. Pearson*, 15-279.

117. Signature in official capacity: Where a note in which the obligatory words were "we promise," was signed "for the Dubuque Times Co., Ferd. S. Winslow, Treasurer," there being such a corporation in existence, capable of contracting and appointing an agent, held, that the note was that of the company and did not bind the treasurer individually: *Wheelock v. Winslow*, 15-464.

118. So where a similar note was signed "Ferd. S. Winslow, Treas. Dub. T. Co.," held, that the case was one of those where the agent disclosed his principal and purported to bind him only, and did not become personally liable: *Ibid*.

119. Agent not bound: If the name of the principal and the relation of agency be stated in the writing, and the agent is authorized, the principal alone is bound, unless the intention is clearly expressed to bind the agent personally: *Harkins v. Edwards*, 1-426.

120. Parol evidence to bind agent: Parol evidence is not admissible to show that an agent who signs in his representative capacity so as to bind the principal intended thereby to bind himself, although parol proof may be admitted to show that the execution of the instrument is without authority, and hence not binding on the principal: *Ibid*.

121. Parol to vary the meaning of signature: The agent of an undisclosed principal cannot vary the meaning of his signature to a written contract by parol evidence tending to show that it was understood he acted only for an unnamed principal and was not personally liable: *Bryan v. Brazil*, 52-850.

122. Where a person in executing a contract describes himself as agent, without disclosing his principal, the contract becomes a personal obligation of the maker and no one else. So where a contract was signed by defendants designating themselves as officers of the "school board," but not purporting to bind any school district, nor describing themselves as officers of any particular school district, held, that parol evidence was not admissible to show that the contract was intended to be that of the school district of

 Liability.—By conduct in general.

which they were officers: *Wing v. Glick*, 56-473.

123. Parol to explain signature to order: Parol evidence is admissible to explain that the person who signed orders for the delivery of goods was acting as the agent of another party, to whom the goods were delivered: *Lyons v. Thompson*, 16-62.

124. Parol to explain abbreviations affixed to name: Where the maker of a note affixes initials to his name, he may show by parol evidence the meaning of the initials if unintelligible. He may thus show them to mean that he signed the note as the president of the corporation, in whose office the note purported to be executed, and that the instrument is the obligation of such corporation: *Lacy v. Dubuque Lumber Co.*, 43-510.

125. Note need not show agent's authority: In case of an indorsement by an agent whose authority is conferred by parol or by independent writing, it is not necessary to show upon the face of the instrument how the agent came by his authority: *Bettis v. Bristol*, 56-41.

Attorney: As to individual liability of attorney when acting for his client, see ATTORNEYS, §§ 77-84.

b. *By conduct in general.*

126. Knowledge of agency: If one, acting under direction of another, takes possession of property which he has no right to, he will be liable to the owner of such property in an action to recover it, unless the owner has knowledge that the wrongful act was done by such person as the agent of another, in which case the owner must look to the principal: *Robertson v. Phillips*, 3 G. Gr., 220.

127. If a party deals with an agent knowing him to be such, but in form treats him as a principal, and is defrauded by such agent, he is not entitled to look to the principal to make good the loss but to the agent simply: *Hiskey v. Williams*, 40-499.

128. Fraud of agent: One who is induced by the fraud of an agent to give a receipt in full, when only part of the debt is paid, is not estopped from asserting his claim against the principal, by the fact that a settlement was made between the principal and such agent, based upon the receipt, in which the agent

was allowed the full amount of the receipt: *Noble v. Steamboat Northern Illinois*, 23-109.

129. Where the agent is acting in the direct line of his employment, his acts must be considered as the acts of his principal. The principal is liable for the act of his agent in procuring a signature to a note made payable at a different date from that represented to the persons signing the note: *Hopkins v. Hawkeye Ins. Co.*, 57-203.

130. If the party dealing with the agent suffers by reason of the fraud of the agent in a transaction which has been ratified and affirmed by the principal, the principal is bound to make him compensation for the injury sustained; but, in order to recover from the principal, it must be shown that the party dealing with the agent was injured by reason of the fraud: *Mitchell v. Donahay*, 62-376.

131. An agent having authority to sell with a certain warranty may yet bind the principal to a different warranty, when it appears that the agent made a contract under such different warranty, and sent to the principal an order for the goods, which were shipped by the principal, who through the fraud of the agent did not know of the change in the warranty: *Davis v. Danforth*, 65-601.

132. Fraud upon agent: Where an agent is deceived by the false entries of a public officer, the law will treat the principal as the one really deceived, and, in the absence of any evidence to the contrary, will hold the officer liable to the principal in damages: *Perkins v. Evans*, 61-35.

133. Authorized acts: A person known to be an agent of an incorporated society, and receiving money in its behalf, is not personally responsible for his authorized acts: *Emonds v. Termehr*, 60-92.

134. A mere agent should not be made defendant to a suit against his principal, for acts done by him in the scope of his authority, unless the agent is charged with fraud: *Lyon v. Tevis*, 8-79.

135. Demand by agent; replevin; authority: In an action for the recovery of personal property, where demand was made by plaintiff's agent for the property, held, that such agent was not required to show his authority for making the demand, unless demand was made upon him to do so, and

Declarations and admissions.

his authority questioned by the defendant: *Barlow v. Brock*, 25-308.

136. Discharge of principal: The fact that in an action against the principal upon a contract made in his name by an agent, the principal is held not liable, for the reason that the agent has not so executed the contract as to bind the principal, does not show, in an action against the agent who was not a party to the former proceeding, that he is liable in his individual capacity: *Armstrong v. Borland*, 35-537.

137. Assumed principal liable by estoppel: Where a contract was made by an agent without disclosing his agency, and afterwards another party assumed to be the principal in the transaction, and acted as such, *held*, that such party could not afterwards be heard to deny that he was so in fact: *Flynn v. Des Moines & St. L. R. Co.*, 63-490.

138. Torts of agent: A master is not liable for the torts of his servant committed after the service for which he was employed is ended, and he has received his discharge, and this rule is not affected by the fact that the tort was committed soon after the employment had ceased: *Yates v. Squires*, 19-26.

139. Where a servant employed to guard a brewery, and for that purpose furnished with a pistol, shot and killed a person who had been creating a disturbance therein, but was at the time of the shooting outside the building and retreating therefrom, *held*, that the act was not in the line of the servant's duty, and the master was not responsible: *Golden v. Neubrand*, 52-59.

c. *Declarations and admissions; res gestæ.*

140. Admissions or declarations: The admissions of an agent are not receivable in evidence against his principal, unless they constitute a part of the *res gestæ*: *Verry v. Burlington, C. R. & M. R. Co.*, 47-549; *Treadway v. Sioux City & St. P. R. Co.*, 40-526.

141. Declarations of an agent not made at the time of a transaction, nor in relation to it, are not admissible as evidence against the principal: *Lucas v. Barrett*, 1 G. Gr., 510.

142. Declarations of a conveyancer, em-

ployed only for that purpose, are not binding upon the party employing him: *Hurd v. Gallaher*, 14-394.

143. Declarations of a railway engineer, made after the happening of an accident which it was claimed caused an injury, as to such accident, *held* not binding upon the principal, although he was still in the employ of the principal: *Treadway v. Sioux City & St. P. R. Co.*, 40-526.

144. In order that the principal shall be bound by statements and representations of his agent, they must be made while he is engaged in the business of the agency and must relate to that business: *Hakes v. Myrick*, 69-189.

Further as to how far acts and declarations of agent are admissible against the principal and how far they are part of the *res gestæ*, see EVIDENCE, §§ 240-254.

145. A declaration in regard to a charge being excessive, made by a person authorized to collect such charge, is proper to be shown in evidence in connection with the inquiry whether or not the payment was voluntary: *Fuller v. Chicago & N. W. R. Co.* 31-187.

146. Within scope of authority: An agent will not bind his principal by representations made in a matter not within the scope of his authority: *State v. Haskell* 20-276.

147. Declarations of an agent, authorized to receive a bond from one upon whom an agency is being conferred, and shown to be a part of that act, will be received in evidence as against the principal, notwithstanding any special limitations upon the authority of such agent, not brought to the knowledge of the party dealing with him: *Howe Machine Co. v. Snow*, 32-433.

148. Where it appeared that a railway superintendent had charge of the operation and repairing of the road, *held*, that a letter by him with reference to a cattle-guard was not within the scope of his authority, and did not constitute an admission binding upon the company: *Livingston v. Iowa Midland R. Co.*, 35-555.

149. The declarations of one of defendant's car repairers as to his knowledge of defects in such car, made while he was standing by, after the occurrence of the accident resulting

Declarations and admissions.— Notice.

from such defect, and while not engaged in the performance of any duty for the defendant, *held* not to be declarations made in the line of his duty, and in relation to matters under his charge, in such sense as to be binding upon defendant as showing knowledge by it of the defects causing the injury: *Verry v. Burlington, C. R. & M. R. Co.*, 47-549.

150. Where an agent acted only as a messenger of insured to procure policies of insurance, which were already contracted and paid for, his representations that the property was not occupied were held not to be binding, and that something more than the representations of the supposed agent were necessary to establish his authority: *Williams v. Niagara F. Ins. Co.*, 50-561.

Further as to how far agent may bind insurance company by declarations, waivers, etc., see INSURANCE.

151. Injury by railroad; agent's offer to arbitrate: The tort of the principal cannot be proven by evidence of the statements of an agent in connection with his offer to arbitrate. The declarations of a road-master of a railroad, while offering to submit to arbitration the liability of the company for injuries to stock, are not admissible in evidence: *Mundhenk v. Central Iowa R. Co.*, 57-718.

152. Declarations of agent who was present but took no part: An agent who was present at a negotiation but took no part therein, and is intrusted with no duty in reference thereto, cannot bind his principal by any statement or representation which he may afterwards make with reference to such transaction: *Wolf v. Des Moines & Ft. D. R. Co.*, 64-380.

153. While the business continues: The declarations of an agent, to bind his principal, must be made during the continuance of the agency, and in regard to a transaction then depending, *et dum fervet opus*: *Peck v. Parthen*, 52-46.

154. A party who authorizes another to negotiate a sale for him, even though the latter is not authorized to complete the sale, is bound by representations made in the course of such negotiations: *Hornish v. Peck*, 53-157; *Lindmeier v. Monahan*, 64-24.

155. The agent's declarations are only binding upon the principal when made about a matter within the scope of his em-

ployment, and when actively engaged in the duties of that employment: *Gimbel v. Salomon*, 54-389.

156. The above doctrine applied in regard to the statement of an agent that his principal was a member of a certain firm: *Ibid.*

157. Estoppel by declarations of agent: Where a note was left with an agent for collection, and upon inquiry of such agent by the surety, it was stated that the note had been paid by the principal, *held*, that if the surety had suffered detriment by reason of such representation, the principal would be estopped thereby from recovery against the surety: *Thornburgh v. Madren*, 88-380.

And see ESTOPPEL, §§ 102-109.

d. Notice to, and knowledge of agent.

As to NOTICE in general, see that title.

158. Notice to an agent, while acting within the sphere of his agency, is notice to the principal: *Warburton v. Lauman*, 2 G. Gr., 420; *Jones v. Bamford*, 21-217; *Thompson v. Merrill*, 58-419.

159. Where the agent of a railway company received, accepted and paid for ties sold to the company, after notice of a lien by express contract upon the ties for the purchase money of the land from which they were cut, *held*, that the company was affected by such notice, and took the ties subject to the obligation to pay the amount of the lien: *Slater v. Irwin*, 88-261.

160. Knowledge of an agent of facts connected with the negotiation in which he acts for his principal is to be deemed the knowledge of his principal: *Huff v. Farwell*, 67-296.

161. Where a draft was sent to a bank for collection, the knowledge acquired by the bank in connection with the collection of such paper, and affecting its validity, was held to be the knowledge of the principal: *Delaware County Bank v. Duncombe*, 48-488.

162. Notice to an agent, who is procuring the conveyance of land held under a tax title, that there was fraud in the tax sale, rendering it void, is notice to the principal: *Crumb v. Davis*, 54-25.

163. Although knowledge of the agent is regarded as the knowledge of the principal, the rule must be confined to the particular

Rights and liabilities.—Duties and liability.

transaction in which the agent is authorized to act: *Second Nat. Bank v. Curren*, 86-555.

164. Knowledge acquired by a notary public, not in connection with his business as an insurance agent nor while acting as such, but merely incidentally while transacting other business, and not sufficiently near to the time of his acting as insurance agent to justify any inference that he had the knowledge acquired as notary public in mind and acted upon it, will not impute notice to the insurance company of facts thus known to the agent as notary public: *Stennett v. Pennsylvania F. Ins. Co.*, 68-674.

165. Where a land agent and abstractor, through whom a loan was effected, and mortgage taken as security, had knowledge of a mortgage by a prior owner of the land, which he had reason to believe was by mistake executed on other premises, instead of the premises in question, *held* that his principal, the mortgagee, would be bound by such prior mortgage, and it might be reformed as against him: *Sowler v. Day*, 58-252.

166. Information gained before agency: Information acquired by an agent long before the existence of the agency, and not in connection with any business of the principal, and not retained by him at the time of transacting the business of the principal, cannot be considered notice to the principal: *Yerger v. Barz*, 56-77.

IV. RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND AGENT.

a. *Duties and liability of agent towards principal.*

167. Belong to principal: One who holds a note in judgment in his own name as agent for another is not the owner of such property, but the ownership is to be deemed to be in the principal: *Beaver Valley Bank v. Cousins*, 67-310.

168. Misrepresentation as to money received: Where an agent, who has received money or notes in payment for property sold, re-invests the same in land at an overvaluation, and leads the principal to suppose that the land bought was in full exchange for the value of the property sold, he will be answerable for the amount actually received

from the sale, although he is not guilty of any fraudulent representations: *Briggs v. Hartman*, 10-63.

169. Demand upon agent for funds: Where money has been properly received by an agent for his principal, he is not liable in an action until a demand has been made therefor by his principal: *Alexander v. Jones*, 64-207.

170. Agent's mistake: If one who is an agent for compensation, by mistake satisfies a mortgage of his principal upon receipt of a less sum than that actually due, he is liable to his principal for the difference. In such case the principal may recover from the debtor the amount unpaid, but if the agent pays it, he may have the same right to recover it from the debtor: *Kempker v. Roblyer*, 29-274.

171. If the land owner justly relies upon his agent to whom he has furnished money to discharge an incumbrance, and the land is lost without his knowledge and wholly by the fault of the agent, the agent will be liable for the full value of the land at the time it is lost: *Blood v. Wilkins*, 43-565.

172. Negligence of factor: Under the circumstances of a particular case, a factor, who sold his principal's grain for future delivery, was held guilty of negligence in not requiring a margin to be advanced in accordance with the custom of the board of trade where the sale was made: *Howe v. Sutherland*, 39-484.

173. Principal's negligence: A principal cannot recover, from his agent, money paid out by the latter through mistake or oversight, if it appears that no loss would have resulted to the principal if he had used due care to protect himself: *Sioux City & P. R. Co. v. Walker*, 49-273.

174. Violation of instructions: Where a principal furnished his agent machines to be sold on condition that payment was to be secured by "undoubted paper," and that the agent should take, along with the negotiable paper, property statements, *held*, that it was not enough for the agent to rely wholly upon such statements, without regard to their truth or falsity, and that the fact that the agent did so was no defense to an action brought against him by the principal to recover the amount of a worthless note ac-

Duties and liability.—Compensation.

cepted by the agent: *Robinson Machine Works v. Vorse*, 52-207.

175. Care of goods: If a principal ships a machine to his agent, who receives it in good order, the agent will be liable for all damage done to it, in the absence of reasonable care on his part: *Bartle v. Phelps*, 89-498.

176. Loss without fault of agent: In an action against an agent to recover a sum of money alleged to have been received from the principal and to be still in the possession of the agent unaccounted for, *held*, that it was error to render judgment against the agent for the whole amount, when it appeared that a part of the money had been expended upon the work for which the money was intrusted to the agent to expend, although the result of such expenditure had been destroyed without the fault of the agent: *Iowa County v. Huston*, 89-823.

177. Property set apart for principal: If an agent in good faith sets apart a sum of money or chose in action, and treats it as the property of and belonging to his principal, equity will regard it as the property of the principal, so far as it concerns the parties, or a third person who has not acquired a prior or paramount lien. In setting apart a note as the property of the principal in this manner, assignment by indorsement is not necessary. Any act, whether in writing or not, showing clearly that the title has passed from the agent to the principal is sufficient. Hence the creditors of an agent cannot subject to the payment of his debts, property which the agent has already equitably transferred to his principal, by procuring title to be made directly in the principal's name, the principal having accepted the transaction, although the agent may have acquired the property in payment of an indebtedness due himself: *Perry v. Smith*, 15-202.

178. Conversion and sale of principal's property by agent: Where plaintiffs shipped to an agent certain plows, to be sold on commission, and the agent turned the same over to the defendants in payment of his own pre-existing indebtedness, *held*, that the plaintiffs might replevin the property from the defendants: *Thompson v. Barnum*, 49-392.

179. Burden of proof: The allegation that an agent whose duty, by virtue of his

employment, is to disburse or account for funds received, did receive a certain sum, and that a portion thereof has not been accounted for or returned, is sufficient to throw upon the agent the burden of showing that the amount was lost without fault or negligence on his part. The burden of proof as to any particular fact in such a case is upon one party or the other, depending upon whether it relates to the cause of action or to the defense: *Becket v. Iowa Improvement Co.*, 67-387.

180. Offsetting agent's claims: When a principal seeks relief in a court of equity, against an agent, for misappropriation of money, etc., the latter is entitled to affirmative relief, in the same suit, relative to his accounts and transactions as agent: *Clark v. Lee*, 21-274.

Trust relation: That an attorney occupies a trust relation towards his client, preventing him from acquiring any adverse rights, see ATTORNEYS, §§ 63-74.

b. Compensation of the agent.

181. Compensation forfeited by fraud: When the agent is guilty of an intentional gross fraud upon the principal, in the transaction of his agency, and the principal is put to the expense of litigation to secure his rights, the agent forfeits his rights to compensation for his services. But this does not apply to money paid to third persons for their services: *Vennum v. Gregory*, 21-328.

182. Advances by a commission merchant: Where advances are made by the consignee, or commission merchant, the consignor cannot direct a sale at his pleasure. In the absence of express agreement, the consignee has the right to sell at such time as he sees proper, to the extent and in payment of his advances: *Butterfield v. Stephens*, 59-596.

183. No lien without possession: The lien of a factor upon goods consigned to him under an agreement that he is to sell them and apply the proceeds to repay previous advances to the consignor, does not attach to specific property, until it comes either actually or constructively into his possession. Therefore, where plaintiffs, as commission merchants, had made advances to one V. on the strength of consignments to be made by

Compensation.— Good faith.

him, and afterward, before the property intended to be consigned was actually shipped, and before the shipping receipts were forwarded to plaintiffs, it was seized by defendants under an attachment against V. as his property, *held*, that plaintiffs had no lien which they could enforce against the defendant's attachment: *Hodges v. Kimball*, 49-577.

184. **Commission for sale of land:** Facts in a certain case *held* sufficient to support a finding allowing plaintiff commission for the sale of certain land of defendant: *Dubois v. Dubois*, 54-216.

185. An agent or broker who is employed to sell property, at a designated price and upon stated terms, is entitled to his commission, when he has found a customer who is able and willing to take the property upon such terms, whether the sale is consummated or not: *Blodgett v. Sioux City & St. P. R. Co.*, 63-606; *Cassady v. Seeley*, 69-509.

186. Where the agent is simply to find a purchaser, he will be entitled to his commission, when he produces a customer who is ready and willing to buy, and with whom the principal enters into negotiations which result in the purchase by him of the property: *Ibid*.

187. The question whether in such case the agent is entitled to his commission, depends upon whether the person who afterwards purchased does so as a result of the negotiations which the agent induced him to enter into. But such a question is one of fact for the jury: *Hanna v. Collins*, 69-51.

188. An agent does not become entitled to compensation under a contract for the sale of lands at a fixed price, and on specified terms, where he has not procured a purchaser, but has merely induced a purchaser to enter into negotiations with the principal, and such negotiations result in the sale of the property at a different price, and on different terms, and the principal did not know that he was dealing with a customer produced by the agent: *Blodgett v. Sioux City & St. P. R. Co.*, 63-606.

189. **Excess as commission:** Under an agreement that a real estate agent should have, as compensation for the sale of real property, whatever amount was realized for the property in excess of a certain sum, and

nothing was said as to incumbrances, *held*, that the owner of the property was bound to remove incumbrances: *Wisehart v. Dietz*, 67-121.

190. **Compensation for sales of machinery** cannot be recovered unless such sales are within the terms of the contract: *Williams Harvester Co. v. Pope*, 69-523.

191. Where the manufacturer of agricultural implements agreed to send such implements as ordered to his agent, but stipulated that he should not be held responsible to the agent for failure to furnish such implements, where the demand exceeded the supply, *held*, that a judgment against the manufacturer for failure to furnish implements, there being no averment nor proof that implements were ordered, nor that the manufacturer did not use his best efforts to furnish such implements, was erroneous: *Ibid*.

192. **Right of agent to reimburse himself:** An agent is not permitted to speculate with property intrusted to him. Even if he is entitled to reimburse himself for the sums actually expended for his principal, with the interest, he cannot acquire absolute title to property taken in trust for his principal, on account of a mere failure of the principal to reimburse him for his outlays, unless he has first made a full and clear statement of such outlays to his principal: *Continental L. Ins. Co. v. Perry*, 65-709.

As to compensation, etc., of ATTORNEYS, see that title.

c. Good faith from agent to principal.

193. **Adverse interest of agent:** While an agent cannot act so as to bind his principal, when he himself has an adverse interest, yet an assignment made by a firm to a creditor may be accepted by one of the members of the firm as agent for such creditor: *Randolph Bank v. Armstrong*, 11-515.

194. **Tax title adverse to principal:** Before an agent having charge of real property can acquire a tax title on such property adverse to his principal, there must be an unambiguous relinquishment of the agency. The mere fact that the principal has failed to furnish means to pay the taxes will not justify the agent in procuring and holding such a title: *Bowman v. Officer*, 53-640.

Good faith.

195. Adverse interest of agent: A land agent who has procured and put on file a mortgage to secure an anticipated loan, which is not, in fact, effected, cannot acquire valid title to such property from another source, while such mortgage remains as a cloud upon the title: *Smeltzer v. Lombard*, 57-294.

196. The rule that an agent will not be permitted, during his agency, to put himself in a position which is adverse to his principal, is for the protection of the principal, and the principal is the only party who can avoid a contract made in violation thereof. If he chooses to authorize his agent to transact his business in violation of this rule, or afterwards ratifies its violation, other parties will not be heard to question such acts of the agent. Therefore an agreement by which the agent is to receive a commission from a third person, for a purchase made in behalf of his principal, is binding on such third person, who knows the agent's relation to his principal: *Leekins v. Nordyke, etc., Co.*, 66-471.

197. Profit on purchases for principal: An agent whose contract is such that he is to receive a certain sum for land purchased for his principal, may make whatever profit for himself he can, provided there be no fraud in the transaction, and it is immaterial to his principal what price he pays for the land: *Anderson v. Weiser*, 24-428.

198. Purchase from principal: While an agent employed to sell the property of his principal is charged with the duty of obtaining the highest price he can fairly get, yet if he himself becomes the purchaser and the principal the seller, he is under no obligation to assist the principal in obtaining the highest price. His agency thereupon ceases. He is not bound to disclose to the owner the value of the property, and see to it that he obtains a full price: *Collar v. Ford*, 45-331.

199. Fraud: Where an agent for the sale of lands, by fraudulent concealment of the facts as to the value, demand for the lands, etc., procures a conveyance to him of the lands for less than their value, while he is negotiating a sale thereof at a much higher price, and which sale is consummated after the conveyance to him of the lands, he will yet be liable to his principal for the proceeds of

the sale, if it was for a fair price, less what he has paid over to the principal, with interest on the amount found due: *Stoner v. Weiser*, 24-434.

200. Where an agent for the sale of lands effected a sale for the full amount, and reported to his principal a much less amount, obtaining the conveyance to himself, under the representation that it would be more convenient, the principal is entitled to recover the excess over the amount recovered: *Wilt v. Graham*, 33-599.

201. Where the principal relies upon the agent as to the value of the property, and the agent purchases for himself from the principal at an inadequate price, the transaction is fraudulent, and the sale may be set aside: *Ingle v. Hartman*, 37-274.

202. Bank dealing with its president: Where a contract for the delivery of stock is made with the president of a bank, for the bank, and the stock to be delivered is in the possession of the president, the president would be regarded as holding for the bank, and the stock would be considered as the bank's property: *Markley v. Rhodes*, 59-57.

203. Member of firm negotiating purchase from firm: A member of a firm, vendors of personal property, may act as the agent of one who buys of the firm, and, as such, file a bill of sale for record, and manage the vendee's interest in the property for him: *Thomas v. Hillhouse*, 17-67.

204. Agent for two principals: Where an agent, by authority of the principal, collected money coming to the principal, and, by consent of such principal, paid it over to another, whose agent he also was, *held* that the money so collected and paid over should not be recovered from the agent by the principal in whose behalf it was paid, although the contract under which it was paid was void for mistake: *Montgomery County v. American Emigrant Co.*, 47-91.

205. Agent dealing with principal under an assumed name: Where an agent for the sale of land wrote a letter to his principal in the name of another person, making an offer for the purchase of the land, and the principal then advised with such agent as to the acceptance of the offer, and did accept in pursuance of the advice thus given, and the agent thus procured title at a price much less

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than the value of the land, *held*, that equity would set aside the sale as fraudulent: *Seymour v. Shea*, 62-708.

V. RATIFICATION.

206. Parol ratification under written contract: Although the authority of an agent may be in writing, yet, if he exceeds his authority, and the principal ratifies the act, the principal will be bound, whether the ratification be in writing or not. No particular form of words is necessary to constitute a ratification: *Mathews v. Gillis*, 1-242.

207. In general: If a party, on learning that a contract has been made in his name by a person acting as his agent, though without authority to make such contract, does not repudiate the same, but assents to it, it will constitute a ratification. If the assumed agent has no authority to bind, his alleged principal can only be bound by ratification or adoption of the act. Such ratification may be implied as well as expressed, but the principal is not bound to disaffirm in order to avoid liability. There may be such circumstances as that the silence of the principal may amount to an implied ratification, but the principal is then bound by a positive affirmation, or what amounts to such, and not by a mere failure to disaffirm: *Burlington Gas Light Co. v. Greene*, 22-508.

208. Accepting benefits: While perhaps there can be no ratification by the principal of an act not done avowedly for him, yet where one of two persons takes the title to property, and pays the taxes thereon, and the title is afterwards adjudged to be in the other, and the latter accepts the benefit of such payment of taxes, he is bound to repay the same to the person who made the payment in the first place: *Goodnow v. Stryker*, 61-261.

209. Accepting the benefits of a sale, or proposition for a sale, made by or through an agent, ratifies the transaction and charges the principal with its burdens: *Milligan v. Davis*, 49-126.

210. While the rule is that the principal who accepts and retains the beneficial result of a contract made by the agent is estopped from denying the authority of the agent to make it, the fact that property or money

received by the agent without authority remains in the agent's possession will not prevent the principal from refusing to be bound by unauthorized acts of the agent: *Hakes v. Myrick*, 69-189.

211. One may become bound by a contract, which another has without authority assumed to make in his name, by knowingly accepting its benefits or by failing to repudiate it within a reasonable time, after he has been informed of the act. He may also become bound by giving his assent to it, or by an express contract subsequently made to perform the contract. In the one case the law conclusively presumes a ratification from the circumstances. In the other the party is bound, because he gives his consent to the act: *Eikenberry v. Edwards*, 67-14.

212. Knowledge of unauthorized act: A principal cannot be held to have ratified an unauthorized act done in his behalf unless he has knowledge of the act: *Tod v. Benedict*, 15-591.

213. One who avails himself of the benefits of an unauthorized contract made in his behalf is bound by all the terms of such contract, whether known to him or not. Therefore, where an agent who had authority to warrant was superseded by another without such authority, and the former, after the expiration of his agency, made a sale with warranty, taking notes which were transferred to and accepted by the principal, *held*, that such principal was bound by the contract of warranty made in connection therewith: *Eadie v. Ashbaugh*, 44-519.

214. Delay of the principal in disaffirming acts of the agent, assumed to be done by his authority, will not constitute a ratification, where the principal has no knowledge of the unauthorized acts: *Hakes v. Myrick*, 69-189.

215. An unauthorized contract will not be binding upon a principal until it is shown that the principal knew that the agent had so contracted, and that the principal, after being so informed, permitted the property to remain under the control of the agent: *White v. Morgan*, 42-113.

216. Failure of the principal to object to acts done in pursuance of supposed consent of agent will not amount to a ratification of such consent, unless the fact of such consent

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was known to the principal: *Decorah Woolen Mill Co. v. Greer*, 49-490.

217. Where the agent of an insurance company only claimed to have power to receive applications to be forwarded, and it was not shown that the company knew of his acts outside of his powers, *held* that they would not be bound by failure to object to a permission given by such agent to the insured to use an explosive on the premises: *Bartholomew v. Merchants' Ins. Co.*, 25-507.

218. **Ratification must be complete:** One who wishes to avail himself of the unauthorized acts of another must adopt the whole of such acts or none. But where the agent is duly appointed, whatever he does beyond his authority may be ratified, or if not ratified, is void, without affecting the validity of the authorized acts: *Davenport Savings, etc., Ass'n v. North Am. F. Ins. Co.*, 16-74.

219. The principal cannot, of his own mere authority, without the consent of the other party, ratify a transaction by his agent in part and repudiate it as to the rest; he must either adopt the whole or none. A ratification of a part ratifies the whole of that particular transaction of the agent: *Krider v. Trustees*, 31-547.

220. Therefore, where the president of a board of trustees executed as agent for such trustees a note for money borrowed, and to secure the same executed a mortgage upon the property of the corporation, *held*, that the ratification of the execution of the note ratified the execution of the mortgage: *Ibid.*

221. **Partial ratification:** Where a person assumes without authority to act as the agent of another, the principal cannot be bound at all, unless he ratify the act. In such a case he cannot accept the act in part and repudiate it in part. But the principle does not apply when the agent is duly appointed and vested with special or limited powers. In such case the principal may accept the benefits of acts which the agent was authorized to do, without being bound by the unauthorized acts of the agent, of which he had no knowledge when he accepted the benefits of the transaction: *Roberts v. Rumley*, 58-301.

222. Where a contract wholly unauthorized is an entirety, and the principal takes the benefit of it, he must take an obligation

which is a part of it. If the principal accepts the benefit of a portion of the contract, in ignorance of other terms thereof, he must, on learning the full terms of the contract, promptly disaffirm by returning the benefit received or he will be bound by the whole: *Beidman v. Goodell*, 56-592.

223. **Sale subject to approval:** Under the facts of a particular case, *held*, that an agent for the sale of land was not given authority to sell except on approval of the contract by his principal. In such a case the fact that former sales have been approved as made, would not give rise to authority to make further sales without approval: *Burlington, C. R. & N. R. Co. v. Sherwood*, 62-809.

224. **Long silence implying ratification:** Where a person pledged the entire stock of goods of another to the creditor of his supposed principal, and such creditor, after retaining possession for two years, disposed of the goods, *held*, that it might be inferred from the silence of the principal and his failure to complain of, or disaffirm the act, that the agent had such power: *Farwell v. Howard*, 26-331.

225. **Unauthorized lease; accepting rent:** Where the agent without authority made a lease, and rent thereunder was afterwards accepted by the principal, *held*, that the lease was binding upon the principal: *Chamberlain v. Collinson*, 45-429.

226. **Sale of land:** Where the owner of real and personal property executed a power of sale which did not in terms authorize the sale of real property, but it appeared that such owner intended to give to the agent power of attorney to sell the land, and the land was sold accordingly and the consideration received and retained, *held*, that the sale was binding upon the owner: *Rook v. Jimeson*, 67-202.

227. In case of an unauthorized sale of land by an agent, *held*, that the principal had so ratified said contract as to make it binding upon him: *Chamberlin v. Robertson*, 31-408.

228. **Acceptance of note:** The act of a person in accepting a note made in his favor is sufficient ratification of the agency of the person taking the note in his name: *Crouce v. Capwell*, 47-426.

229. Where the principal accepts notes taken by an agent he cannot deny the power

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of such agent to act for him, and is bound by the contract of the agent in pursuance of which the note was given: *Farrar v. Peterson*, 53-420.

230. Further acts after ratification: The act of the principal in accepting a note executed and delivered to him by one having no authority will not constitute the person thus acting an agent of the principal in such sense as to authorize him to receive payment and bind the principal by an agreement to deliver up the note: *Draper v. Rice*, 56-114.

231. Particular cases: Under the facts of a particular case, *held*, that the principal had ratified the acts of the agent in transferring a certain certificate of purchase, and could not afterwards question the assignee's right thereunder: *Hannum v. Benton*, 54-396.

232. Under particular circumstances, *held*, that although an agent employed in selling agricultural implements had not the authority to purchase a team with which to prosecute his business, yet that the circumstances showed a ratification of such purchase sufficient to render the principal liable upon a promissory note given for the team: *Warder v. Pattee*, 57-515.

233. Ratification by agent having general powers: A principal will be bound by the acts of an agent having general powers in ratifying a previous transaction, and appropriating the proceeds thereof to the principal's use, although such prior transaction was with the knowledge of the party with whom it was entered into, in violation of express instructions of the principal: *Palmer v. Cheney*, 35-281.

234. Ratification discharging agent from liability to principal: Where an agent to whom a draft was sent for collection, presented it for acceptance only, when it should have been presented for payment, and the indorser thereby became discharged, *held* that a subsequent direction by the principal to the agent to protest the draft, and a payment of the protest fees by the principal, would not amount to a ratification, so as to release the agent from his liability: *First Nat. Bank v. Price*, 52-570.

235. Where the agent intrusted with the disbursing of money for his principal renders an account of such disbursement, he has a right to expect his account will receive atten-

tion, and that any disapproval of his acts by the principal shall be made within a reasonable time. If the principal has possession of the accounts, and neglects to make examination, he will not be heard to say that he was not informed as to the agent's acts, and should not therefore be held to have ratified them: *Minnesota Linseed Oil Co. v. Montague*, 65-87.

236. Reasonable time to disaffirm: Where an agent without authority makes payment out of the funds of his principal, the question as to what constitutes a reasonable time within which the principal is required to object to such payment must be submitted for the jury to determine from the evidence: *Minnesota Linseed Oil Co. v. Montague*, 59-448.

237. Effect of ratification: The ratification of an act by the principal has the same effect as a previous authority: *Berryhill v. Jones*, 35-335. *Herriott v. Kersey*, 69-111.

238. Where a public officer makes an unauthorized loan of public moneys, and takes a mortgage to secure it, the mortgagor cannot be heard to deny the validity of the mortgage, nor can his privy in estate claim an interest in the lands mortgaged. And when the state ratifies such loan, the ratification has the same effect as an original authority, and makes the transaction valid from the beginning: *State v. Shaw*, 28-67.

AGRICULTURAL COLLEGE.

1. Lease of lands of: The legislature can fix and enforce the terms and conditions of a lease or sale of lands of the agricultural college belonging to the state: *Smith v. Trustees*, 28-500.

2. Right of way over lands: Proceedings had for the condemnation of a right of way over agricultural college land, to which the trustees of the college are properly made parties, will be binding upon a subsequent purchaser of such property: *Chicago, M. & St. P. R. Co. v. Bean*, 69-257.

AGRICULTURAL SOCIETIES.

1. Horse racing at fairs: The offer of a premium to the winner at a horse-race under

 Right to own and hold property.

the control of the society, is not in excess of the authority of such society under Code, § 1109, nor illegal under Code, § 1114, prohibiting gambling or horse-racing at such fairs: *Delier v. Plymouth County Ag'l Soc'y*, 57-481.

 ALIENS.

1. **Right to own and hold property:** The provisions of Const., art. I, § 22, that foreigners who are or may hereafter become residents of the state, shall enjoy the same rights in respect to the possession, enjoyment, and descent of property, as native born citizens, does not change the common law rule as to non-resident aliens, and a resident alien, to take advantage of its provisions, must be such at the time of descent cast: *Stemple v. Herminghouser*, 8 G. Gr., 408.

2. But this provision does not restrict the power of the legislature to extend the same privileges to other foreigners than those named: *Purcell v. Smidt*, 21-540.

3. It confers upon resident aliens the right to transmit as well as to acquire real property by descent: *Ibid*.

4. At common law an alien could not acquire real estate by purchase so as to convey a good title to his vendee: *Ibid*.

5. The act of 1858 respecting aliens (Rev., §§ 2483-2493), so far as it relates to personal property, is probably only declarative of the common law, and in this state, as at common law, aliens are capable of acquiring, holding and transmitting movable property in like manner as citizens: *Ibid.*; *Greenheld v. Morrison*, 21-538.

6. **Taking by descent or devise:** Prior to the adoption of the state constitution of 1846, the common law rule was in force, and although it was then provided by statute that real property should descend in equal shares to the children, nevertheless, an alien child had no inheritable blood and could not take by descent; and the subsequent constitutional provision above referred to only changed the rule as to aliens who were aliens at the time of descent cast: *Stemple v. Herminghouser*, 8 G. Gr., 408; *Krogan v. Kinney*, 15-242.

7. Also, *held*, that the provisions of the Revision above referred to were intended to

apply only to residents in this state or the United States, except in the single instance of a devise by will to a non-resident alien who should afterwards become a resident: *Krogan v. Kinney*, 15-242; *Rheim v. Robbins*, 20-45.

8. Such provision giving aliens, wherever resident, the right to take or acquire property by bequest or devise, upon condition, in case of non-residents, that they shall become residents of this state, was retrospective as well as prospective: *Purcell v. Smidt*, 21-540.

9. The judges of the court were divided on the question as to the capacity of a non-resident alien to acquire real estate in this state by descent under the statutory provisions above referred to: *Greenheld v. Stanforth*, 21-595.

10. Such statutory provisions gave aliens resident in the United States who had declared their intention of becoming citizens, and all aliens resident in this state, the right to acquire real property by descent or purchase, the word purchase meaning acquisition by bargain and sale for a consideration; and this provision was prospective: *Purcell v. Smidt*, 21-540.

11. This statutory provision also gave every alien, wherever resident, the right to acquire real estate by bargain or sale from persons holding an absolute title, provided he in good faith sold the same within ten years to a person capable of holding an absolute title. And the heirs at law of the non-resident alien purchaser took a valid title subject to the same necessity of selling. This provision was retrospective: *Ibid*.

12. Subsequent to this decision the court united in adhering to the doctrine that under the statutory provision referred to a non-resident could not inherit: *Brown v. Pearson*, 41-481.

13. Under the statutory provisions just referred to, under which it was decided that an alien non-resident could not take lands in this state by inheritance, *held*, that the non-resident alien heirs of such owner could not inherit any share of such property, but that the whole would pass to heirs who were resident citizens of the state: *King v. Ware*, 53-97.

14. Under these provisions an alien resi-

Effect of.—With fraudulent intent.

dent could take nothing by will unless he, subsequent to the making of the bequest, became a resident: *Ware v. Wisner*, 4 McCrary, 66.

15. **Granting of lands to:** The disposal of the public land within the state being expressly reserved to the United States, a grant by the United States to an alien will confer upon him an inheritable estate: *King v. Ware*, 53-57.

16. **Dower:** The provisions of the Revision gave an alien married woman the same rights of dower as if a resident, provided her husband was capable, at the time of his decease, of holding an absolute title to lands in this state: *Purcell v. Smidt*, 21-540.

17. **Married woman:** The citizenship of the husband determines that of the wife: *Ware v. Wisner*, 4 McCrary, 66.

18. **Child born abroad:** By the common law allegiance is not a matter of individual choice. It attaches at the time and on account of birth, and under circumstances in which the family owes allegiance and is entitled to protection: *State v. Adams*, 45-99.

19. Where a person removing to Canada was and had been for several years a citizen of this country, *held*, that he remained such citizen notwithstanding his removal to and subsequent death in Canada, and that his son born in Canada became a citizen of the United States, and that the child of such son, when brought with him to this state, was a citizen of this state without naturalization of his father or himself: *Ibid*.

20. **Involuntary military service** on the part of a citizen of this country, resident in a foreign country, in behalf of such country in a war between the two countries, and the acceptance of bounty for such service, is not sufficient to deprive him of the rights of citizenship: *Ibid*.

21. **Residence at time of independence:** The doctrine of the American courts seems to be that all persons domiciled in this country on the 4th day of July, 1776, and who remained here after the treaty of peace in 1783, became citizens. The English courts have held that the right of citizenship did not attach until the treaty of peace in 1783, and that all persons domiciled here at that time became citizens: *Ibid*.

VOL. I—8

ALTERATION OF INSTRUMENTS.

I. EFFECT OF MATERIAL ALTERATION.

a. *With fraudulent intent.*b. *Innocent alteration.*

II. WHAT DEEMED MATERIAL.

III. EVIDENCE; BURDEN OF PROOF.

I. EFFECT OF MATERIAL ALTERATION.

a. *With fraudulent intent.*

1. **Defeats recovery:** A material alteration of the terms or conditions of commercial paper, made by the holder thereof with a fraudulent intent, will defeat recovery thereon: *Robinson v. Reed*, 46-219.

2. Where a certificate of deposit was issued with blank as to the rate of interest, and a holder thereof, on transferring it to a purchaser, represented that the rate was left blank by mistake and that ten per cent. had been agreed upon, which amount was thereupon inserted in the blank by a third person, the statement as to the agreement for ten per cent. interest being false, *held*, that such alteration was fraudulent and would defeat recovery by the transferee on the certificate, or on the claim for the amount deposited, without regard to the certificate: *Woodworth v. Anderson*, 68-508.

3. **As against bona fide purchaser:** A material alteration of a note may be shown, even as against an indorser for value before maturity: *Charlton v. Reed*, 61-166.

4. Where a promissory note was fraudulently altered by the payee by inserting the words "one hundred" in the blank preceding the amount, and the figure "one" after the dollar mark, so as to change it into a note for one hundred and ten dollars instead of ten dollars, and the blank for the place of payment was also filled, there being nothing on the face of the note to indicate these alterations, *held*, that the note was void even in the hands of an assignee in good faith and before maturity: *Knoxville Nat. Bank v. Clark*, 51-264.

5. **Restoration of the instrument:** After such fraudulent alteration the party guilty thereof cannot restore the instrument to its former condition and then recover thereon: *Robinson v. Reed*, 46-219.

6. **Innocent holder after restoration:** An instrument which has been fraudulently

Innocent alteration.—What deemed material.

altered, but afterwards restored to its original form before coming into the hands of an innocent purchaser for value, will be valid in his hands: *Shepard v. Whetstone*, 51-457.

7. **Forgery:** A material alteration may constitute forgery: *Snyder v. Reno*, 88-329.

b. *Innocent alteration.*

8. **Renders instrument void:** This court has adopted the rule that any material alteration of a promissory note by the holder thereof avoids the note, and no action can be maintained thereon, even though the alteration be made innocently and without fraudulent intent: *Eckert v. Pickel*, 59-545; *Murray v. Graham*, 29-520.

9. **Recovery on original consideration:** If the alteration has been innocently made without a fraudulent purpose, the payee may recover in an action brought upon the original consideration: *Sullivan v. Rudisill*, 63-158; *Krause v. Meyer*, 32-566; *Murray v. Graham*, 29-520.

10. And he may establish the original consideration by any evidence, written or oral, which is not vitiated by the alteration of the instrument: *Morrison v. Huggins*, 53-76.

11. The fact that an alteration is made as the result of a mistake, or false information imparted to the holder, will not prevent his recovery on the original consideration, even though the false information was conveyed to him by an agent, if such agent was a stranger to the note: *Krause v. Meyer*, 32-566.

12. Where the alteration is not fraudulent, the original debt is not destroyed, and the party may recover thereon and maintain an action to foreclose a mortgage given to secure the same: *Clough v. Seay*, 49-111.

13. Action of a party in changing the date of an instrument, to correspond to what was supposed to be the understanding of the parties, does not preclude parol evidence as to what the real date was: *Barlow v. Buckingham*, 68-169.

14. **Recovery on original instrument:** Where the alteration was made by one of the makers, acting, as he believed, under proper authority, with the payee's knowledge, and the change was made in good faith, *held*, that a recovery could be had upon the note as originally delivered: *Murray v. Graham*, 29-520.

15. **Restoration to original form:** Where an alteration, although material, is, as made, adopted through ignorance as a method of accomplishing an authorized result, it may properly be stricken out by the party making it before change in the possession of the instrument, and the instrument will remain valid in its original form: *Horst v. Wagner*, 48-378.

16. So *held*, where the payee of a note, intending to transfer it to a third person, erased his own name and wrote that of the intended transferee in the body of the instrument, but before delivery canceled such alteration and restored the note to its original form: *Ibid*.

17. **Alteration by consent:** If the alteration is made with the knowledge and consent of the maker at the time of such alteration, the instrument does not become void, and if, with knowledge of the alteration, he advises the purchase of the note by another, he cannot afterwards raise objection on account of such alteration as against such purchaser: *Grimstead v. Briggs*, 4-559.

18. **Ratification:** Where it appeared by the evidence of the party who would be affected by the alteration, that such alteration accorded with the contract which the parties had made, and that they performed it as altered, and acknowledged themselves bound by it, *held*, that no objection on the ground of the alteration could be raised by a person not a party to the instrument, as affecting its validity: *Andrews v. Burdick*, 62-714.

19. Where a mortgage was altered by insertion of additional property after its execution by one of the joint mortgagors, but prior to its execution by the other, *held*, that it was valid against both mortgagors as to property included therein before the alteration, and as to the property subsequently inserted, it was void against the one who had already executed it but binding as to the other: *Van Horn v. Bell*, 11-465.

20. The burden of showing ratification of a material alteration is upon the party seeking to recover upon the instrument as altered: *Bell v. Mahin*, 69-408.

II. WHAT DEEMED MATERIAL.

21. **Different legal effect:** An alteration which does not give the instrument a differ-

What deemed material.—Evidence; burden of proof.

ent legal effect will not avoid it; *Briscoe v. Reynolds*, 51-673.

22. What changes material: The insertion in a note of a provision making the interest payable annually is a material alteration: *Marsh v. Griffin*, 42-403.

23. Striking out the word "surety" after the name of one of the signers of a note is a material alteration: *Laub v. Paine*, 46-550.

24. Writing the word surety above the name of an indorser in blank who is not payee, indorsee, or assignee, is a material alteration: *Robinson v. Reed*, 46-219.

25. An alteration of a note, by changing the word "order" to "bearer," is material: *Needles v. Shaffer*, 60-65.

26. Where a note was executed "payable at the ——— National Bank ———," held, that an alteration thereof by erasing the word "national" and inserting the name of a bank not a national bank, doing business in a county not that of the maker's residence, rendered the note void: *Adair v. Egland*, 58-314.

27. So, where, in a similar note, the blanks were afterwards filled so as to designate the true place of payment, held, that the alteration was material and sufficient to defeat recovery on the note: *Charlton v. Reed*, 61-166.

28. The question of the materiality of an alteration is one for the court, and where one who held a contract of insurance had altered an indorsement on the back thereof, which was in fact a contract with another party, held, that plaintiff's contract would not be avoided by such alteration if material, and under the facts of this case, the court should have instructed that the alteration was immaterial. But if there was such alteration of the contract by plaintiff as to affect and enlarge his contract, such alteration would avoid it: *Robinson v. Phoenix Ins. Co.*, 25-430.

29. Additional signatures: The signing of a promissory note by one as surety, after the execution by the original maker, if done without the consent of such maker, is a material alteration which will defeat the instrument: *Sullivan v. Rudisill*, 63-158.

As to the effect of adding or striking off a name upon the liability of the surety, see SURETYSHIP, II, c.

30. The addition of the name of another maker to a bill or note after its delivery,

without the knowledge and consent of the other makers, is a material alteration such as will discharge the original makers, without inquiry as to whether the alteration is beneficial or injurious to them: *Dickerman v. Miner*, 43-508; *Hall's Adm'x v. McHenry*, 19-521.

31. But the law will presume that the additional signer knew the effect of his signature, and he will be held liable upon the note: *Dickerman v. Miner*, 43-508.

32. Alteration not deemed material; Where a note was conditioned upon the fulfillment of an agreement by the payee, an acknowledgment written upon such note by one of the makers, stating a performance of the condition by payee, signed by the maker, held, not to constitute an alteration of the instrument such as to avoid it as against a co-maker: *Jackson v. Boyles*, 64-428.

33. Bill of sale: The execution and delivery of a bill of sale creates a title and right to possession in the grantee, and where such possession has been assumed, it may be maintained, notwithstanding the alteration of such instrument subsequent to its execution: *Ransier v. Vanorsdol*, 50-130.

34. Evidence in particular cases: The materiality of an alteration in a mortgage in a particular case considered: *Williams v. Barrett*, 52-637.

35. Evidence held sufficient to show alteration of a receipt: *Wilson v. Fulliam*, 50-123.

As to what is a sufficient alteration to discharge a surety, see SURETYSHIP, II, c.

III. EVIDENCE; BURDEN OF PROOF.

36. The mere appearance of a note is not sufficient to establish an alteration such as will render it void: *Harlan v. Berry*, 4 G. Gr., 212.

37. Presumption: An alteration, particularly if made with a different colored ink from that of the instrument and the signature, will throw suspicion upon the note and cast the burden of proof upon the party offering it; but the mere fact that words in the body of the instrument, without erasure or interlineation, appearing to have been written when the remainder of the note was written, or in a space left to receive them, are written in a different handwriting and

Evidence; burden of proof. — Cattle running at large.

in a different ink from that of the body and signature, are not sufficient to raise the presumption of alteration: *Jones v. Ireland*, 4-63.

38. If any ground of suspicion is apparent on the face of the instrument, the law presumes nothing, but leaves the question of the time when it was made, as well as of the person by whom, and the intent with which it was made, as matters of fact to be ultimately found by the jury, upon proof to be adduced by the party offering the instrument in evidence: *Ibid*.

39. The mere fact that different parts of an instrument are written in different ink and a different handwriting does not afford sufficient evidence of alteration to require explanation: *Wilson v. Harris*, 85-507.

40. The alteration being shown, will be presumed to have been made by plaintiff, and with a fraudulent intent, unless such facts are disproved by him: *Robinson v. Reed*, 46-219.

41. **Burden of proof:** If the execution of an instrument is not denied, the burden of proving alteration therein is upon defendant: *Van Horn v. Bell*, 11-465.

42. The execution of a county warrant in suit not being denied, *held*, that the burden was upon defendant to show that the alteration therein was made without the knowledge and consent of the county: *Warren v. Chickasaw County*, 13-588.

43. The burden of proof is upon the party relying upon the alteration as a defense to prove it: *Odell v. Gallup*, 63-253.

44. An allegation by defendant that a written contract upon which plaintiff relies has been altered since its execution is an allegation of new matter of defense and does not cast upon plaintiff the obligation to explain such alteration until evidence with reference thereto has been introduced by defendant: *Wing v. Stewart*, 68-13.

AMENDMENTS.

See that title in index.

ANIMALS.

As to obligation to fence against stock and sufficiency of fences, see FENCES.

1. **Cattle running at large:** In this state cattle are free commoners, and may lawfully

be permitted to run at large; and the rule of the common law, that every man is bound to keep his cattle within his own inclosure or be responsible in damage for injuries arising from their being abroad, is not applicable to the condition and circumstances of the people, and is not in force: *Wagner v. Bissell*, 8-396; *Heath v. Coltenback*, 5-490; *Alger v. Mississippi & M. R. Co.*, 10-268; *Russell v. Hanley*, 20-219; *Smith v. Chicago, R. I. & P. R. Co.*, 34-506.

2. Therefore, the owner of land can only maintain an action for trespass by cattle, by showing that his fence was such as is required by statute: *Frazier v. Nortinus*, 34-82.

3. But if cattle, after breaking over a sufficient fence into one field, go thence into another of the same owner, through a fence which is not sufficient, the action for their trespass upon the second field will lie: *Herold v. Meyers*, 20-378.

4. **Damages:** The owner of the land may have his remedy by action against the owner of the stock, as provided in Code, § 1452, or by distraining the animals. If he pursue the former course the ordinary rules as to proof, etc., apply, and he need not have the damages ascertained by the township trustees, as provided in § 1454: *Quinton v. Van Tuyl*, 30-554.

5. A land owner in a county where stock is prohibited from running at large is not relieved of his obligation to maintain partition fences, and if stock rightfully in an adjoining inclosure escape upon his land by reason of his failure to maintain such fence, he cannot recover damages from the owner of the stock: *Duffees v. Judd*, 48-256.

6. If animals, though lawfully on adjoining land, escape therefrom and do damage, and their escape is not in consequence of the neglect of the person suffering the damage, their owner is liable therefor. It is not necessary that the fence surrounding the land of the person injured is throughout a lawful fence, if it is shown to have been such at the place where the cattle broke through. And this will be true where the owner of the adjoining land and the owner of the cattle are the same person and the fence broken through belongs to him: *Noble v. Chase*, 60-261.

7. **Trespass:** Cattle, when they of their own accord go upon the unfenced land of

Negligence.

another, do not render their owner liable to an action by the owner of the land, and the owner of the cattle may rightfully enter to remove them; and if they have crossed the unfenced land of one and gone on to that of another, they may be driven back across the land they crossed in entering: *Camp v. Flaherty*, 28-520.

8. Negligence: The statute (13 G. A., ch. 26) making the owner of stock running at large liable for damages done by it, did not make it unlawful for stock to run at large, and therefore did not debar the owner of such stock from the recovery of damages against a railroad company for injury to such stock through negligence: *Kuhn v. Chicago, R. I. & P. R. Co.*, 42-420.

9. Cattle being free commoners, the mere fact of permitting them to run at large is not a ground of imputing negligence to the owner: *Haughey v. Hart*, 62-96.

10. The right of the owner of cattle or other stock to pasture them upon the commons is a permissive and not an abstract right. And while the owner of an inclosure cannot maintain an action for trespass against the owner of cattle entering thereon from the commons, unless his fence is such as is required by statute, yet there is no obligation on his part to fence, and there can be no recovery for injuries to the cattle from feeding upon growing crops: *Herold v. Meyers*, 20-378.

11. Male animals: The owner of a thoroughbred cow, which is got with calf by an ill-bred and unpedigreed bull, unlawfully running at large, may recover damages from the owner of such bull, which are to be measured by the difference in the value of the cow, for the purpose of breeding of fine stock, before meeting such bull, and afterwards: *Crauford v. Williams*, 48-247.

12. The provision as to stallions is not applicable to colts until they are of such age as to be troublesome to mares or dangerous to be at large: *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30-459.

13. Upon improved land: The fact that an eighty-acre tract of land is surrounded by a single ploughed furrow, and includes a few acres under cultivation, will not render it all improved or cultivated land within the meaning of Code, § 1452; but in such cases the

owner of the land may recover damages from the owner of cattle who herds and confines them upon such land: *Otis v. Morgan*, 61-712.

14. Submission of question to vote: Provisions authorizing a submission of the question whether swine and sheep should be permitted to run at large were held to be merely an exercise of police power, and therefore not unconstitutional as not having a uniform operation, nor as depending for their validity upon a popular vote: *Dalby v. Wolf*, 14-228.

15. A similar provision in 12 G. A., ch. 144, and 13 G. A., ch. 26, making the question whether that act should be in force in any county depend upon a vote of the people of the county, was held unconstitutional, and the act was held to be in force in all the counties of the state without such adoption: *Weir v. Cram*, 37-649; *Little v. McGuire*, 38-560; *Hallock v. Hughes*, 42-516.

16. Stock; meaning of term: The statutory provision (Code, § 1450 as amended), that the word stock shall include cattle, horses, mules and asses, is only applicable in the connection in which it is used, and is not to be deemed a limitation upon the meaning of the word as found in other statutes. As generally used it includes swine as well as the animals referred to: *State v. Clark*, 65-336.

17. Distrain: It is only persons whose lands are inclosed by a lawful fence who are authorized to distrain domestic animals injuring their premises. If lands are not so inclosed there is no right to distrain, and possession acquired by such distrain is unlawful. The rightfulness of the distrain may therefore be inquired into in an action of replevin; it is not a matter for the exclusive determination of the fence viewers. But if the distrain is found to be legal, the property may be remanded to the distrainer and the damages may be assessed by the township trustees, subject to the right of appeal as provided for in §§ 1454 and 1455: *Syford v. Shriver*, 61-155.

18. The fence viewers are not given special authority to inquire into and determine the lawfulness of fences inclosing the premises trespassed upon by cattle, and that matter may be determined in an action of replevin to recover the animals from the person making distrain, when it is claimed that his premises are not surrounded by a lawful fence: *Ibid.*

Sale of distrained animals.

19. The servant of a land owner, who distrains stock as agent of such owner, may justify as such agent, in an action of replevin brought against him to recover the stock: *Bearinger v. O'Hare*, 26-259.

20. Sale of distrained animals: The statute (Code, § 1447) does not contemplate that the officer making a sale of distrained animals shall have a process in order to make the sale provided for: *Dalby v. Wolf*, 14-228.

21. Hearing before fence viewers: Upon the hearing before fence viewers to assess the damages caused by stock running at large, the question as to whether the stock was improperly at large, as well as the amount of damage done, is before the fence viewers, and such question may also be considered on appeal from their action: *Duffees v. Judd*, 48-256.

22. Estrays: An estray is an animal whose owner is unknown, and therefore a person cannot take up an animal as an estray when the owner of such animal is known to him. In such case the owner may replevin without tendering costs: *Walters v. Glats*, 29-437.

23. By Code, § 1464, relating to what animals may be taken up as estrays, a distinction is contemplated between a broken and an unbroken animal. The former may be taken up if running in the highway: *Knudson v. Gieson*, 88-234.

24. An animal stolen from its owner and afterwards abandoned by the thief may lawfully be treated as an estray, especially under the language of Code, § 1456: *Kinney v. Roe*, 70—.

25. The sole object of the notice to the officer provided by Code, § 1520, in case of estrays, is to advise the owner of the property, when examining the estray book, of the loss or accident, and when he has actual knowledge of the loss without such notice there is no necessity for it: *Howes v. Carver*, 3-257.

26. Dogs may be personal property and have value, and such value may be shown in an action for injury thereto: *Anson v. Dwight*, 18-241.

27. Aside from the statutory provision (Code, § 1485), a person who has in his charge a vicious dog, knowing his character, and fails to restrain him, is absolutely liable for an injury inflicted. It makes no difference

whether the person has charge of the animal as owner or only bailee: *Marsel v. Bowman*, 62-57.

28. A person who has a dog in his possession or harbors him on his premises, as owners usually do with their dogs, is to be considered the owner within the meaning of the statutory provision (Code, § 1486) declaring such owners liable for damages committed by dogs. In determining the question of ownership the jury must consider the party's former treatment of the animal, his declarations concerning him, and the habits of the dog as to staying at such person's place: *O'Harra v. Miller*, 64-462.

29. To justify the killing of a dog, caught in the act of worrying or killing sheep, etc., or attacking or attempting to bite any person, as provided in Code, § 1485, the dog must be not only trespassing, but actually engaged in one of the acts mentioned: *Marshall v. Blackshire*, 44-475.

APPEAL.

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As to appeals in criminal cases, see CRIMINAL LAW, III, 14.

As to appeals from justices' courts, see JUSTICES OF THE PEACE, V.

Appeals from various officers and boards are treated under the titles in which the proceedings themselves are discussed.

As to the jurisdiction and organization of the supreme court, see COURTS, I, a.

As to appeals from the state supreme court to the supreme court of the United States, see COURTS, §§ 68-72.

I. RIGHT OF APPEAL AND WAIVER THEREOF.

1. **Must affirmatively appear:** The supreme court can entertain an appeal only when a judgment has been rendered from which an appeal may be taken. The judg-

ment must be affirmatively shown, and the court will dismiss the case where it does not appear that such judgment has been rendered, even though the parties fail to present the objection; for, being jurisdictional in its nature, the parties cannot waive it by silence or consent: *Green v. Ronen*, 59-83; *Groves v. Richmond*, 58-54.

2. Where the record shows a verdict to have been rendered, but does not show that a judgment has been entered thereon, the appeal should be dismissed: *Heath v. Groce*, 10-591; *Pittman v. Pittman*, 56-769.

3. By what law determined: The right of appeal is governed by the law in force at the time judgment was rendered: *Rivers v. Cole*, 88-677; *Davenport v. Davenport & St. P. R. Co.*, 37-624.

4. Another remedy: The fact that there is another remedy for the error complained of does not take away the right of appeal from an erroneous judgment or decision in cases where an appeal is authorized: *Wilson v. Shorick*, 21-332.

5. Waiver by accepting benefits; estoppel: A party who accepts the benefits of an adjudication, so far as favorable to him, thereby waives his right to appeal therefrom: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 55-157; *Independent Dist. v. District T'p*, 44-201; *Mississippi & M. R. Co. v. Byington*, 14-572.

6. The acceptance of a portion of the judgment admitted to be due will not waive the right to appeal from a part of the judgment claimed to be erroneous: *Upton M'f'g Co. v. Huiske*, 69-557.

7. If the right of appeal has been waived the appeal will be dismissed on motion: *Independent Dist. v. District T'p*, 44-201.

8. Whether such question can be raised by motion after the appeal has been determined, *doubted*; but under the peculiar facts of a particular case, *held*, that there had been no such acceptance of benefits as to constitute a waiver: *Crane v. Guthrie*, 48-698.

9. Acceptance of fine: Under a statute allowing to the prosecution an appeal from the action of a justice of the peace in criminal cases, *held*, that the acceptance by the county treasurer of the fine imposed by the justice would not deprive the state of the right to appeal: *State v. Tail*, 22-140.

 Right of.—From what judgments, orders, etc.—Final judgments.

10. **Payment of judgment:** A party who has paid a judgment against him cannot afterward appeal from such judgment: *Borgalhouse v. Farmers', etc., Ins. Co.*, 36-250.

11. An appeal cannot be maintained after the judgment complained of has been satisfied, if such satisfaction is made solely for the purpose of relieving property from the lien of such judgment. Such a satisfaction must be considered voluntary: *Hipp v. Crenshaw*, 64-404.

12. **Involuntary payment; under protest:** Payment of the judgment, to prevent its satisfaction by sale of real property under execution which has already been levied thereon, will not constitute such voluntary payment as to defeat the right to appeal: *Grim v. Semple*, 39-570.

13. So *held*, also, as to payment made after the taking of appeal and under protest to prevent sale of property under special execution: *Burrows v. Stryker*, 45-700.

14. **Acceptance of tender:** Where the amount of a tender was paid into court and judgment was rendered for plaintiff for that amount, from which he appealed, claiming an additional sum as interest, and plaintiff, after the announcement of the judgment and signing of the bill of exceptions, had accepted the amount of the tender, *held*, that the right of appeal was not thereby waived: *Dudman v. Earl*, 49-37.

15. It will not amount to a waiver of an appeal that money paid in to the clerk by the opposite party is applied in part by the clerk in satisfaction of a claim for an attorney's lien, without the knowledge of appellant, where he, as soon as he becomes aware of the fact, repudiates the transaction, and pays back to the clerk the amount so paid in: *Jewell v. Reddington*, 57-92.

16. **Change of venue by consent:** Where, after perfecting his appeal from a judgment, the party consented to a transfer of the case to another court for trial, *held*, that the appeal was thereby waived: *Lillie v. Skinner*, 46-329.

17. **Issuance of execution:** The issuance of execution after perfecting the appeal and filing transcript and abstract in supreme court, on which execution nothing was realized, *held* not to be a waiver of the appeal,

on which the appeal would be dismissed on motion: *Hornish v. Peck*, 53-157.

18. **Filing transcript in another county:** The right to appeal is not waived by filing transcripts of the judgment in other counties so as to make it a lien on property in such counties: *Tama County v. Melendy*, 55-395.

19. **Action to enjoin judgment:** An action in equity to enjoin the collection of a judgment waives the right to appeal from such judgment: *Gordon v. Ellison*, 9-317.

20. **The bringing of a second action** waives any error in dismissing a former action brought for the same indebtedness: *Ibid.*; *Liebuck v. Stahle*, 66-749.

21. **Judgment procured by the party appealing:** A party will not be allowed to appeal from a judgment which he caused to be rendered on his own motion: *Hughes v. Feeter*, 23-547.

22. **Taking stay of execution** is, by statute (Code, § 3063), made a waiver of the right to appeal: *Seacrest v. Newman*, 19-323.

II. FROM WHAT JUDGMENTS, ORDERS, ETC., APPEALS ARE ALLOWED.

a. Final judgments or decisions.

23. **Forfeiture of bail bond:** An order declaring a bail bond forfeited, and taxing costs to defendant, is a final judgment in such sense that an appeal may be taken therefrom: *State v. Conneham*, 57-351.

24. **A decree in a partition proceeding**, settling the rights and interests of the parties, is final in its nature, and may be appealed from before the division of the property in accordance therewith is actually made: *Williams v. Wells*, 62-740.

25. **Decree for an accounting:** Where, in an equitable action, plaintiff sought to have a deed set aside and also asked to have an accounting, and a decree for a reconveyance was made with an order of reference for an accounting, *held*, that an appeal from the decree for reconveyance might be taken, and that therefore an appeal from the decree for accounting would not bring up the question as to the correctness of the decree for reconveyance: *McMurray v. Day*, 70—.

26. **Void judgment:** The fact that a judgment is entered wholly without authority,

Final orders.—Intermediate orders.

as, for instance, by a person not qualified as judge, before whom the trial is had by consent, will not prevent the correction of the error on appeal, although the judgment itself is absolutely void: *Petty v. Durall*, 4 G. Gr., 120.

27. Judgment by default: An appeal may be taken from a judgment by default: *Doolittle v. Shelton*, 1 G. Gr., 271; *Woodward v. Whitescarver*, 6-1.

28. An order denying to the district attorney the right to appear for the county, where the county is a party, is a decision from which an appeal may be taken: *Clark v. Lyon County*, 37-469.

29. Arrest of judgment: An order of court arresting judgment is not such a final judgment as that an appeal may be taken therefrom: *Wallis v. Sparks*, Mor., 20.

30. An order punishing for contempt cannot be reviewed by appeal. The method of revision is by *certiorari*. (See Code, § 3499): *Dunham v. State*, 6-245.

31. This special provision controls the general provision as to appeals, and extends to contempts by disobedience of injunction, as well as other process: *First Cong. Church v. Muscatine*, 2-69.

32. When cross-bill is pending: An appeal may be taken from a decree which determines the rights of the parties to property in controversy, even though a cross-bill be still pending: *Lucas v. Pickel*, 20-490.

33. Ministerial act: Under a statute allowing an appeal from "all decrees and decisions of the county court," held, that an appeal could not be taken from the mere ministerial act of the county judge: *Kennedy v. Cress*, 19-42.

b. Final orders in special proceedings.

34. Order vacating a judgment: A final order in a proceeding to vacate a judgment for fraud is a "final order in a special proceeding, affecting a substantial right therein," from which an appeal may be taken (Code, § 3164): *Dryden v. Wyllis*, 51-534.

35. Certiorari proceeding: An appeal will lie in a *certiorari* proceeding from a decision granting the writ and ordering a stay of proceedings in the court to which the writ issues: *Iake v. Newton*, 54-586.

36. Revocation of permit to sell liquor: An order of a district judge, made under Code, § 1535, revoking a permit to sell intoxicating liquors, is a final order in a special proceeding, affecting a substantial right, from which an appeal may be prosecuted: *State v. Schmidt*, 65-556.

c. Intermediate orders.

37. Must affect the merits: An appeal will not lie from an intermediate order or ruling, as upon questions of practice or the admission or exclusion of evidence, but only from such judgments or orders as determine the rights of the parties to the relief or remedy asked, or to a substantial right as to the course of proceedings, whereby the cause is determined or is tried in a manner not authorized by law. The decision appealed from must be one affecting the merits of the case. (Explaining *McCoy v. Julien*, 15-371): *Richards v. Burden*, 31-305.

38. Erroneous action of the lower court in allowing a party to introduce additional evidence, when an equity case is remanded to the lower court for a decree in harmony with the opinion of the supreme court, is not a ruling so materially affecting the final decision as to authorize an appeal therefrom before final decision is rendered. It cannot be said that there will necessarily be an adjudication against the party complaining by reason of such error: *Garmoe v. Sturgeon*, 67-700.

39. Continuance: An order of continuance is a mere intermediate order, not materially affecting the merits, and an appeal does not lie therefrom: *Jaffray v. Thompson*, 65-323.

40. A finding of facts, even though considered as an intermediate order, is not considered as so far prejudicial to the substantial rights of the party to whom it is adverse that an appeal can be taken therefrom before final judgment: *Boyce v. Wabash R. Co.*, 63-70.

41. Order as to prosecution in disbarment: The ruling of the court in a disbarment proceeding, in refusing to compel a member of the bar to prosecute the case, is not such as that an appeal can be taken therefrom: *Byington v. Moore*, 70—.

42. Setting aside order: The sustaining of a motion to set aside an order made in a case directing the payment of a sum of money

Intermediate orders.

from one party to the other, *held* to be a ruling from which an appeal might be taken: *Guthrie v. Guthrie*, 71—.

43. The ruling on a motion to suppress depositions cannot be reviewed on appeal before final judgment: *Baldwin v. Mayne*, 40-687.

44. Change of venue: Appeal cannot be taken from an order granting or refusing a change of venue: *Allerton v. Eldridge*, 56-709.

45. On such an appeal the supreme court acquires no jurisdiction, and will refuse to entertain the case, although no objection on that ground is made by either party: *Groves v. Richmond*, 58-54.

46. Where the court has jurisdiction of the subject-matter and of the parties, the fact that the action is brought in the wrong county will not render the overruling of a motion for a change of venue such ruling as may be reviewed upon appeal before final judgment: *Horak v. Horak*, 68-49.

47. But where the motion for change of venue was treated as raising the question whether the action on a bail bond was properly brought in the county where the suit was commenced, and by that county, for the use of the school fund, or whether it should not have been brought in and by another county, *held*, that the decision of that question would be treated in the same manner as though made upon a demurrer, and an appeal therefrom would be entertained: *Lucas County v. Wilson*, 59-354.

48. If, however, the ruling upon the motion for change of venue is properly excepted to, an appeal from the final judgment will bring up the ruling for review if it was adverse to the party appealing: *McCracken v. Webb*, 36-551; *Allerton v. Eldridge*, 56-709.

49. Intermediate order reviewed on appeal from final judgment: In general, error in intermediate orders upon questions of practice, the admission of evidence, etc., from which an appeal cannot be directly taken, may be urged upon appeal from the final judgment: *Richards v. Burden*, 31-305.

50. But in such cases, the error in the intermediate order will not be considered unless the record shows that a final judgment was rendered: *Shannon v. Scott*, 40-629; *Jordan v. Henderson*, 19-565.

51. An intermediate order may be reviewed on appeal from the final judgment taken within the proper time after the rendition of such judgment, although the time for appeal from such intermediate order separately has elapsed. The failure to appeal from an intermediate order, even when such appeal is allowable, will not waive the right to have such order reviewed on appeal from final judgment: *Jones v. Chicago & N. W. R. Co.*, 36-68.

52. An appeal from final judgment brings up for review all intermediate rulings to which exceptions are taken. So *held* as to a ruling setting aside a default: *Palmer v. Rogers*, 70—.

53. An order requiring security for costs cannot be appealed from, but appeal may be taken from an order dismissing an action for failure to give such security: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38-446.

54. Order not contemplated by law: Where an intermediate order was one which the law did not contemplate, *held*, that it would be presumed that such order would not affect the final decision, and an appeal therefrom would not lie: *Battell v. Lowery*, 46-49.

55. Ruling on demurrer: An appeal may be taken from the ruling on a demurrer if the party against whom the ruling is made excepts and elects to stand on his demurrer or pleading, as the case may be. It is not necessary that it appear that final judgment has been rendered: *Cowen v. Boone*, 48-350.

But if the party pleads over or amends, he thereby waives any error in the ruling. See PLEADING, XIV, e.

56. A plaintiff, to whose petition a demurrer has been sustained, has the right to appeal, unless it appears that such right has been in some manner waived: *Hampton v. Jones*, 58-317.

57. An appeal may be taken from the action of the court in overruling plaintiff's demurrer to defendant's answer and dismissing the action upon plaintiff's refusing further to plead, and giving a judgment for costs against plaintiff: *Arnold v. Kreutzer*, 67-214.

58. Motion to strike: A ruling striking matter from a petition on motion, thus preventing plaintiff from introducing evidence of matter thus alleged, may be reviewed by

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appeal before final judgment: *Stanley v. Davenport*, 54-463.

59. The fact that the cause is still pending below does not prevent the supreme court from determining an appeal from an intermediate order involving the merits: *Ibid.*

60. A refusal by the court to sustain a motion to strike out a part of a petition not designed to show a distinct cause of action is not a ruling from which direct appeal will lie: *Specht v. Spangenberg*, 70—.

61. The ruling on a motion to strike a petition of intervention from the files on the ground that the original action had been settled, *held*, to be an intermediate order from which an appeal would lie: *First Nat. Bank v. Gill*, 50-425.

62. *Ad quod damnum*: An appeal in an *ad quod damnum* proceeding from a decision of the court overruling a motion to set aside the verdict and quash the writ, *held* proper without final judgment being rendered: *Burnham v. Thompson*, 35-421.

63. Dissolution of attachment: An appeal lies from an order dissolving or sustaining an attachment: *Johnson v. Butler*, 1-459.

64. But such appeal does not bring up the main case for review, except so far as material to the understanding and disposition of the order from which the party appeals: *Berry v. Gravel*, 11-135.

65. Judgment against garnishee: An appeal may be taken from a judgment against a garnishee: *Bebb v. Preston*, 1-460.

66. Dissolution of injunction: An appeal will lie from the action of a court in dissolving an injunction granted by a judge in vacation (although at that time the action of the judge in granting it could not be reviewed): *Trustees v. Davenport*, 7-218.

67. The action of a judge allowing or refusing an injunction in vacation may be reviewed by appeal therefrom (an express statutory provision having changed the law under which *Monticello Bank v. Smith*, 25-248; *Jewett v. Squires*, 30-92; *In re Curley*, 34-184, and other cases, were decided): *Bennett v. Hetherington*, 41-142.

68. Appointment of receiver: An appeal may be taken from an order appointing or refusing to appoint a receiver: *Callanan v. Shaw*, 19-183.

69. Recommitment of cause to arbitrators: An order recommitting a cause to arbitrators is a decision from which an appeal lies: *Brown v. Harper*, 54-546.

70. Substitution of other defendants: An order of court substituting other defendants in a case and releasing the original defendants may be appealed from, and such appeal may be prosecuted even though after such substitution the new defendants have procured a transfer of the case to the circuit court of the United States: *Sunberg v. District Court*, 61-597.

71. Dismissal of appeal from justice's court: Where, in an appeal to the circuit court from the judgment of a justice of the peace, a motion was made to dismiss the appeal for want of jurisdiction on the ground that the amount in controversy was not sufficient, *held*, the action of the court in overruling such motion and taking jurisdiction was a determination affecting the final result, and that an appeal therefrom might be taken: *Curran v. Excelsior Coal Co.*, 63-94.

72. Dismissal of habeas corpus proceedings: Under a statute authorizing an appeal from a county court to the district court, upon the merits, of any matter affecting the rights and interests of individuals, *held*, that an order of the county court overruling a motion to dismiss proceedings under a writ of *habeas corpus*, was not a final judgment from which an appeal would lie: *Smith v. Bigelow*, 19-459.

III. AMOUNT IN CONTROVERSY NECESSARY TO AUTHORIZE APPEAL; CERTIFICATES; INTEREST IN REAL ESTATE.¹

a. Amount in controversy.

73. Determined by the pleadings: To justify an appeal it must appear from the pleadings that it was possible for the court, consistently therewith, to render judgment

¹Code, § 3173. . . . But no appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed one hundred dollars, unless the trial judge shall certify that such cause involves the determination of a question of law upon which it is desirable to have the opinion of the supreme court, but this limitation shall not affect the right of appeal in any cause in which is involved any interest in real property.

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against one of the parties to the action for more than one hundred dollars: *Madison v. Spitznogle*, 58-369.

74. When the amount in controversy appears by the pleadings to exceed one hundred dollars an appeal may be taken, and it is immaterial that, upon the trial, the evidence does not support the claim to that amount: *Ormsby v. Nolan*, 69-180.

75. The allegations and not the prayer of the pleading govern in determining the amount in controversy: *Cooper v. Dillon*, 56-367.

76. The amounts of the original claim and a counter-claim cannot be added together in determining the amount in controversy under this section: *Madison v. Spitznogle*, 58-369; *Fox v. Duncan*, 60-321.

77. Where defendant concedes a part of the claim, the amount in controversy is the part not admitted: *Thompson v. French*, 57-559.

78. Tender: Thus, if by tender defendant reduces the amount of plaintiff's claim which is contested to not exceeding one hundred dollars, there can be no appeal without a certificate: *Marlow v. Marlow*, 56-299.

79. If plaintiff's claim is admitted and a counter-claim interposed, the counter-claim determines the amount in controversy: *Alsip v. Hard*, 38-697.

80. Where defendant claims a credit of more than one hundred dollars on a claim for less than that amount, but does not interpose a counter-claim, the amount in controversy does not exceed the plaintiff's claim: *Kurtz v. Hoffman*, 65-260.

81. Part of claim abandoned: Where the plaintiff claims more than one hundred dollars, but no evidence is introduced in support of a part of it, so that such part may be deemed abandoned, such part will not be considered in determining the amount in controversy: *Ibid*.

82. Consolidation of actions: Where an appeal from a judgment in a justice's court was consolidated with another action pending in the circuit court, so that the aggregate amount in controversy exceeded one hundred dollars, held, that there might be an appeal: *Brock v. Barr*, 70—.

83. Interest on judgment included: Where an action to set aside a previous judg-

ment for one hundred dollars and costs was brought a year after the rendition of such judgment, held, that the interest accrued on the judgment would be included in determining the amount in controversy: *Dryden v. Wyllis*, 51-584.

84. Where writ of error was brought in the circuit court to review the judgment of a justice of the peace for one hundred dollars, held, that interest accrued on the judgment before suing out the writ of error would be included in determining the amount in controversy in the circuit court, and that the amount involved exceeded one hundred dollars: *Holmes v. Hull*, 48-177.

85. But in case of an appeal from a judgment of a justice of the peace for one hundred dollars, held that the amount in controversy in the circuit court was to be determined by the pleadings in the justice's court, and that interest on the justice's judgment could not be included: *Hays v. Chicago, B. & Q. R. Co.*, 64-593.

86. Costs taxed in the case and included in the judgment cannot be considered in determining the amount in controversy. That depends upon the pleadings: *Hakes v. Dott*, 54-17; *Bradenberger v. Rigler*, 68-300.

87. Costs in justice's court: In an appeal from the action of a circuit court on appeal from a judgment before a justice of the peace, the costs in the justice's court cannot be included in determining the amount in controversy in the circuit court: *Arderly v. Chicago, B. & Q. R. Co.*, 65-723.

88. In an action of replevin wherein defendant does not claim ownership of the property but only an interest therein, less than one hundred dollars in value, such interest and not the entire value of the property determines the amount in controversy: *Mohme v. Livingston*, 54-458; *Davis v. Upright*, 54-752.

89. Appeal dismissed: Where the amount in controversy does not exceed one hundred dollars, and there is no certificate of the judge, the appeal will be dismissed: *Harrington v. Pierce*, 38-260.

90. Amount must appear, to defeat jurisdiction: As the supreme court has appellate jurisdiction in every case not falling within the exception of the statutory provision as to amount in controversy, the fact as to

Certificate as to question involved.

the amount to bring a case within the exception and defeat the jurisdiction of the supreme court on appeal, must affirmatively appear: *Babcock v. Board of Equalization*, 65-110; *Henkle v. Keota*, 68-334.

b. Certificate as to question involved.

91. Must state the question: It is not sufficient that the certificate of the judge states that the case "involves the determination of a question of law," etc., but it must state the question of law upon which the decision of the supreme court is desired. (So held in pursuance of a rule of court requiring the question to be set out, overruling in this respect *Fell v. Burlington, C. R. & M. R. Co.*, 43-177, decided before the adoption of such rule.) If the question is not thus set out where a certificate is necessary, the appeal will be dismissed: *King v. Derby*, 51-11; *Wetz v. Austin*, 51-342; *Minnich v. Chicago, R. I. & P. R. Co.*, 51-363; *Throckmorton v. Horton*, 52-737; *Dawley v. Houck*, 53-783.

92. And such rule of the court is not void as limiting the jurisdiction of the court further than authorized by statute: *Wilson v. Iowa County*, 52-339.

93. The question must be one of law, as distinguished from one of fact, and the certificate must specifically point out the questions of law, which must not be mingled with questions of fact: *Gillooby v. Chicago, M. & St. P. R. Co.*, 61-53.

94. It is not sufficient that the certificate states that "a question" is involved; it must state that the case involves "a question of law:" *Kierulff v. Adams*, 40-31.

95. Questions presented in a particular case held not to be questions of law: *Landers v. Boyd*, 59-758.

96. Mere abstract questions: The statute does not contemplate that mere abstract questions of law shall be certified, but only such as are decisive of the case: *Eckert v. Pickel*, 59-545.

97. Certificate must intelligibly state the questions without the record: The certificate must point out the questions upon which it is desirable to have the opinion of the court in such a way as to be intelligible in and of themselves, without requiring the court to examine the whole case and deter-

mine what the questions are: *Hawkeye Ins. Co. v. Lewis*, 63-514.

98. The certificate must be sufficiently explicit and definite to explain itself without reference to the record or any part of it: *Meeker v. Chicago, M. & St. P. R. Co.*, 64-641; *White v. Beatty*, 64-331; *Bower v. Kavanaugh*, 62-757.

99. The questions certified should embrace statements of the specific facts which are to be taken into consideration by the court; it is not sufficient to refer generally to the facts as shown by the evidence: *Brown v. Petrie*, 56-209.

100. A certificate of the judge which fails to indicate the specific question or questions to be determined, but presents the whole case and every question involved therein, without showing what they are, or what one or more of them it is deemed desirable to present for determination, is not sufficient: *Dunn v. Zoller*, 61-227.

101. The certificate must contain the abstract question of law which it is desired the supreme court shall determine. It will not make an examination of the record in order to determine what ruling it is desired to review: *Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co.*, 62-494; *Long v. Chicago, M. & St. P. R. Co.*, 64-541.

102. A question of law should be plainly set out in the certificate: *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69-320.

103. The certificate should point out the question to be determined and recite the facts upon which the question of law arises, so that it may be determined without resorting to the evidence in the case. It is not sufficient to refer the court to the record and ask it to determine whether there was error in particular matters: *Ibid.*

104. The certificate must set out and define the question which it is thought desirable to have determined, and the question set out should be so explicit as to render an examination of the record unnecessary: *Ben-nett v. Parker*, 67-451.

105. It is not proper to certify a general question which cannot be fully determined without a search of the entire record and a determination of two or more questions: *Wheaton v. Foster*, 58-661.

106. Where the certificate stated that there

 Certificate as to question involved.

was a question of law involved in certain instructions which involved more than one question, and did not point out which one it was desired to have determined, *held*, that it was not sufficient: *Gregg v. White*, 55-744.

107. While it was not the intent that only a single question should be certified, the several questions must be so stated that the supreme court can readily ascertain the point to be determined, and that it is a question of law. Questions of law and fact cannot be mingled together under the guise of a question of law: *Centerville v. Drake*, 58-504.

108. The certificate in a particular case *held* sufficient: *Nichols v. Wood*, 66-225.

109. Examination of the record: The court will sometimes look at the record for the purpose of determining whether the question certified properly arises in the case, and will refuse to consider the question if it appears that it has not been properly raised: *Swails v. Cissna*, 61-698; *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69-320.

110. The court will not, upon a certificate, consider an instruction differing from that which appears by the record to have been given in the case: *Cunningham v. Chicago, B. & Q. R. Co.*, 67-514.

111. The court cannot answer questions certified, but which are not presented in the record: *Ibid.*; *Miller v. Buena Vista County*, 68-711.

112. And the court will not consider a certificate sufficiently specific which requires examination of the record to determine what the question certified is: *Votaw v. Corwin*, 62-39.

113. Certificates *held* defective: A certificate of a question as to whether judgment could be rendered for a party "upon the agreed statement of facts filed in the case," *held* not sufficient: *Dawley v. Houck*, 53-733.

114. *Held*, in a particular case, that the certificate did not sufficiently point out the question of law upon which the opinion of the supreme court was desired: *Fitch v. Flynn*, 58-159.

115. In cases which come before the supreme court only upon a question certified by the judge of the lower court, the supreme court has jurisdiction only to determine such questions of law as may be certified. If the

question certified is one of fact, it cannot be determined: *Hanna v. Collins*, 69-51.

116. Must set out question: A certificate which does not set out the question of law upon which it is desirable to have the opinion of the supreme court, is not sufficient: *Bradenberger v. Rigler*, 68-300.

117. A certificate is not sufficient which asks whether certain action was erroneous "in view of all the evidence in the case:" *Gillooby v. Chicago, M. & St. P. R. Co.*, 61-53.

118. Where the appellant's abstract failed to show that the judge's certificate stated that it was desirable to have the opinion of the supreme court on the question certified, *held*, that the supreme court did not acquire any jurisdiction by the appeal: *Milliken v. Daugherty*, 59-294.

119. Sufficiency of evidence: While the sufficiency of the evidence to support a verdict may, in a certain sense, be said to be a question of law, yet it is not such a question as can be certified: *Hudson v. Chicago & N. W. R. Co.*, 59-581.

120. Questions must be such as arise and are argued: It is not the province of the supreme court to decide questions certified but not argued, nor questions argued but not certified, nor questions certified and argued where it is shown that they do not arise in the case: *Spiesberger v. Thomas*, 59-606.

121. Questions not certified: Only such questions as are presented in the certificate will be considered: *Thorpe v. Dickey*, 51-676; *Miller v. Haley*, 66-260.

122. The supreme court has no jurisdiction in such cases to determine any questions except those certified: *Arderly v. Chicago, B. & Q. R. Co.*, 65-723.

123. Questions presumed to have arisen: Where the question is certified by the trial judge, it will be presumed that it arises in the case unless it is shown affirmatively otherwise: *Noble v. Chase*, 60-261.

124. It will be presumed that the facts are correctly found, whether any finding appears of the record or not, unless the contrary appears: *Thorpe v. Dickey*, 51-676.

125. The court will not go back of the record to determine whether an assumption of facts therein is warranted: *Miller v. Haley*, 66-260.

Certificate as to question involved.

126. Or whether the case involves the question of law stated in the certificate: *Curran v. Excelsior Coal Co.*, 63-94.

127. Presumption as facts; remanding: The presumption being that the court found the fact upon which the question of law is based, and that such fact appeared of record, upon a determination of the question of law the case may be remanded for final judgment, and the party will not be entitled to a further trial unless on account of newly-discovered evidence: *Andrews v. Burdick*, 64-692.

128. Provisions constitutional; cases in equity: The statutory provision requiring a certificate in cases involving less than the amount named applies to chancery cases as well as actions at law, and as thus applied is not unconstitutional, as depriving a party in such cases of a right of appeal and trial *de novo*. It amounts simply to a restriction or regulation of appeals in such cases: *Andrews v. Burdick*, 62-714; *Johns v. Pattee*, 61-898; *Teager v. Landsley*, 69-725.

129. Time of making certificate: The certificate of the judge must be made at the time of the trial and before the adjournment of the term of court at which the judgment is rendered: *Fallon v. District T^p*, 51-206; *Independence v. Purdy*, 48-875; *Rose v. Wheeler*, 49-52; *Lomax v. Fletcher*, 40-705; *Rivers v. Cole*, 38-677; *Hershfield v. First Nat. Bank*, 39-699; *Nicely v. Rogers*, 39-441.

130. The parties cannot by stipulation provide that the certificate may be made in vacation: *Fallon v. District T^p*, 51-206.

131. The certificate must be given at the time of the trial, unless delayed upon order or for cause: *Angus v. Shannon*, 60-311.

132. The certificate must be signed by the trial judge at the term at which the case is tried. A signature afterwards made *nunc pro tunc* will not give the supreme court jurisdiction, even though the failure to sign the certificate at the term was an oversight on the part of the judge: *Hinesley v. Mahaska County*, 69-511.

133. The certificate cannot be properly made until the case is finally disposed of, as by the ruling on a motion vacating a judgment and granting a new trial: *Hickok v. Buell*, 51-655.

134. The making and filing of a certificate

during the same term but subsequent to the rendition of judgment is not sufficient; it must be made by the time the final judgment is rendered: *Foye v. Walker*, 62-251.

135. Where the certificate was filed after judgment, but it did not appear when it was signed, *held*, that the appeal would be dismissed: *Hakes v. Dott*, 54-17.

136. Where the certificate was entitled of a proper term, but did not show when it was made, nor that it was made at the time of the trial, or even during the term of the trial, *held*, that it was not sufficient: *Babcock v. Chickasaw County*, 60-752.

137. Where it appears that the certificate was signed at the proper term, it will be presumed that it was also filed in proper time: *Long v. Chicago, M. & St. P. R. Co.*, 64-541.

138. Not a matter of right: The purpose of the law in requiring a certificate in such cases was to prevent appeals in such cases in which the amount is trifling, unless there is an important question of law involved which should be decided in order that the decision may serve as a precedent, and the trial judge should not give a certificate unless he deems such question to be involved: *Meeker v. Chicago, M. & St. P. R. Co.*, 64-641.

139. Cannot be stipulated for: The parties cannot stipulate that the judge shall give a certificate in such cases. It is not a right of the unsuccessful party to have the certificate, and it can only properly be made where the judge believes it to be desirable for the proper administration of justice, that some specified question in the case should be settled by the court of last resort: *Fallon v. District T^p*, 51-206.

140. Appellant cannot question the correctness of a certificate given by the trial judge, stating the questions on which the opinion of the supreme court is desired. The court is not bound to give any certificate at all, and if the appellant does not get the questions certified which were tried, he is not bound to appeal: *Hager v. Adams*, 70—.

141. The certificate is jurisdictional: The sufficiency of the certificate is a jurisdictional matter, and if it is not sufficient the court will take notice of it, although the objection is not made; *White v. Beatty*, 64-331.

 What questions considered.

c. Cases involving an interest in real estate.

142. Right of public highway: Where the case involves the right of the public to occupy and use real estate as a highway, an interest in real estate is involved within the meaning of the statutory provision above: *McBurney v. Graves*, 66-814.

143. Establishment of lien: The fact that it is sought to establish a lien, special or general, upon real estate, does not make the case one involving an interest in real property, authorizing an appeal without regard to the amount in controversy: *Colyar v. Pettit*, 63-97; *Johns v. Pattee*, 61-898.

144. Therefore, *held*, that an action to foreclose a mechanic's lien was not within the exception: *Andrews v. Burdick*, 62-714.

IV. WHAT QUESTIONS WILL AND WHAT WILL NOT BE CONSIDERED ON APPEAL.

1. Question not raised in the court below.

145. New objections not considered: An objection not made or question not raised in the court below cannot be considered on appeal: *Dean v. Hall*, 4 G. Gr., 425; *Hintermeister v. State*, 1-101; *Mumma v. McKee*, 10-107; *State v. Groome*, 10-308; *Berry v. Gravel*, 11-135; *Rockwell v. Kimball*, 11-524; *Elder v. Littler*, 15-65; *Starry v. Starry*, 21-254; *Kruck v. Prine*, 22-570; *McNaught v. Chicago & N. W. R. Co.*, 30-336; *Evans v. Hawley*, 35-88; *Stanberry v. Dickerson*, 35-493; *State v. Cuddy*, 40-419; *Price v. Burlington, C. R. & M. R. Co.*, 42-16; *Trayer v. Reeder*, 45-272; *Davis v. Nolan*, 49-683; *Argall v. Pugh*, 56-308; *Wetmore v. McMillan*, 57-344; *Wire v. Foster*, 62-114; *Babcock v. Board of Equalization*, 65-110; *Goodnow v. Plumb*, 67-661.

146. A party is not to be surprised in the supreme court by new objections and issues not made in the court below, based upon defects of which he was not advised by motion or otherwise in the lower court, and which it would have been in his power to remedy had objection been taken thereto in proper time and manner: *Patterson v. Stiles*, 6-54.

147. The supreme court has only appellate

jurisdiction, and can only review and decide questions which have been made in and decided by the lower court: *McGregor v. Gardner*, 16-588.

148. An objection cannot be considered on appeal which is different from that made in the court below: *Oliver v. Depew*, 14-490.

149. Where an affidavit is tendered, and the court refuses leave to file it on the ground that if filed it would be insufficient, such refusal cannot be supported on the ground that at the time the party offered the same it was not yet sworn to: *Adams County v. Burlington & M. R. R. Co.*, 44-335; *Swan v. Bournes*, 47-501.

150. It may be that failure to object to misconduct of the attorney in stating to the jury facts as to which there is no claim that they are shown in the evidence will not deprive the opposite party of his right to raise such objection on appeal: *Whitsett v. Chicago, R. I. & P. R. Co.*, 67-150.

151. No change of base: A party must, on appeal, stand in the posture in which he placed himself in the lower court. He cannot change his base after the appeal: *Garland v. Wholebau*, 20-271.

152. No new issues: An issue not raised in the court below cannot be urged for the first time in the supreme court: *Latterett v. Cook*, 1-1; *Brazelton v. Jenkins*, Mor., 15.

153. The objection to plaintiff's recovery that his claim is within the statute of frauds, not having been raised below by demurrer or answer, cannot be raised on appeal: *Lower v. Lower*, 46-525.

154. Ruling cannot be supported on ground not urged below: A ground not urged in the court below cannot, on appeal, be relied upon to sustain a ruling of that court, which is erroneous on the ground upon which it is based: *Knapp v. Sioux City & P. R. Co.*, 65-91.

155. Service of notice: Objections to the service of the notice will not be considered on appeal where the record facts fail to show any ruling thereon in the lower court: *Des Moines v. Layman*, 21-153.

156. An objection to jurisdiction not raised in the court below cannot be raised upon appeal unless the record shows the case to be *coram non judice*: *Bridgman v. Wilcut*, 4 G. Gr., 563.

Question not raised in the court below.

157. An objection which does not go to the jurisdiction of the court below, but merely to plaintiff's right to bring action, will not be considered on appeal unless made in the lower court: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633.

158. Although the objection that the court has no jurisdiction of the subject-matter or parties may be raised for the first time in the supreme court, yet if it appears that the lower court had jurisdiction of the parties, but only erred as to the kind of proceedings adopted, the objection cannot be first raised on appeal: *Gould v. Hurto*, 61-45.

That such objection is waived unless raised by motion, see ACTIONS, §§ 35-39.

159. Where it appears that there is a want of jurisdiction in the court below, or where the ruling made is in excess of the authority or power of the court, it is the duty of the supreme court to recognize such want of jurisdiction, even if no objection be made: *Groves v. Richmond*, 53-570; *St. Joseph Mfg. Co. v. Harrington*, 53-380.

160. An objection to a pleading not raised by motion or demurrer in the court below, and passed upon by it, cannot be considered on appeal: *Ruddick v. Patterson*, 9-103; *Williams v. Sill*, 12-511; *Clews v. Traer*, 57-459; *Davis v. Burt*, 7-56; *Gifford v. Ferguson*, 19-166; *McCoy v. Cornell*, 40-457.

161. So held as to a defect in verification not objected to in the lower court: *Moses v. Riadon*, 46-251.

162. Objection that the petition is not sufficiently specific cannot be urged for the first time on appeal: *Davis v. Walter*, 70—.

163. Objections to the form of the pleading cannot be taken for the first time on appeal. If not taken below they will be deemed waived: *Willson v. Harris*, 68-443.

164. An objection that the relief granted is not asked in the pleading cannot be raised for the first time on appeal. It should be raised in some manner in the court below, in order that the party may have opportunity to amend his pleading if defective: *Iowa Lumber Co. v. Foster*, 49-25; *Williams v. Wilcox*, 66-65.

165. Issues not raised: Where the parties have themselves tried a case on the theory

that the question presented on the trial is raised by the pleadings, the court may properly submit such question to the jury, and a party cannot complain on appeal that no such issue was raised by the pleadings: *Hoyt v. Hoyt*, 68-703.

166. Error in granting change of venue to an improper court will be reviewed on appeal, although the party did not, in applying for the change, designate the court to which a change was sought: *Sayles v. Deluhrey*, 64-109.

167. A defense not pleaded in the court below will be disregarded on appeal: *Thomson v. Lee County*, 22-206; *Barlow v. Brock*, 25-308.

168. A variance between the allegations and the proofs cannot be first raised on appeal: *Singer v. Given*, 61-93.

169. Swearing the jury: The supreme court will not disturb a judgment upon the ground that the jury in the cause was not sworn when such question was in no way raised in the court below: *State v. Schlagel*, 19-169.

170. Objections to evidence not raised in the court below cannot be first taken on appeal: *Johnson v. Miller*, 69-562.

171. If incompetent evidence is not objected to by the prisoner at the time it is produced, its admission cannot afterward be made ground for reversal: *State v. McLaughlin*, 44-82.

172. In the absence of objection at the time and a showing of prejudice, the fact that one who read testimony reduced to writing to the jury in a criminal action was not sworn to do so correctly, cannot be urged as an objection on appeal: *State v. Polson*, 29-133.

173. An objection to the competency of a witness not made in the lower court cannot be first urged on appeal: *Schmidt v. Littig*, 69-277.

174. Evidence which is competent as determining the rights of the parties, and which might have been made admissible by the amendment of the pleadings on the trial, if not objected to then, cannot afterwards be objected to in the supreme court on appeal as not admissible under the issues raised by the pleadings: *Council Bluffs Lodge v. Bilups*, 67-674.

Question not raised in the court below.

175. A party cannot, on appeal, object to evidence on a different ground from that interposed in the court below: *Luke v. Bruner*, 15-3; *Iowa Homestead Co. v. Duncombe*, 51-525.

176. The record must show that the introduction of evidence was objected to upon the same ground urged against it upon appeal: *Childs v. McChesney*, 20-481.

177. A party having alleged one objection to evidence on which it is improperly excluded, cannot, on appeal, allege other objections thereto in support of the action of the court below: *Lines v. Lines*, 54-600.

178. For instance, under the objection that evidence is incompetent, irrelevant and immaterial under the pleadings, he cannot urge that it was improperly admitted in rebuttal: *Davidson v. Dwyer*, 62-332.

179. When the admission in evidence by the defendant of a deed void upon its face is objected to on other grounds, which are overruled, the plaintiff may upon appeal offer such objection to its validity, when the record shows that the court found for the defendant solely upon the evidence of the deed, and that plaintiff excepted to this finding and made it a ground of a motion for a new trial: *Ferguson v. Heath*, 21-488.

180. Objections to instructions: If specific objections are taken to instructions, even though a general objection would have been sufficient, the party cannot raise other objections on appeal: *Price v. Burlington, C. R. & M. R. Co.*, 42-16.

181. The objection that more than two paragraphs of the instructions are written on the same page, contrary to a statutory direction, cannot be raised for the first time in the supreme court: *Davenport v. Cummings*, 15-219.

182. The form of the judgment cannot be objected to for the first time upon appeal: *Barlow v. Brock*, 25-308.

183. Where there is but a general exception to a judgment below, and the court is not asked by motion or otherwise to correct it, the appellant will not be heard to allege objections to the form of the judgment on appeal: *Robinson v. Keith*, 25-321.

184. A motion to vacate an injunction cannot be first made after appeal: *Bishop v. Carter*, 29-165.

185. Motion non obstante: A question which can only be raised by motion for judgment *non obstante veredicto* cannot be first raised on appeal: *Coonrod v. Benson*, 2 G. Gr., 179.

186. Objections deemed waived: Objections not made in the court below will be considered waived, and the judgment in an action at law will not be reversed on appeal upon a point not presented to, nor passed upon by, the court below: *Iowa Homestead Co. v. Duncombe*, 51-525.

187. By pointing out specific objections a party is deemed to have waived any objections not pointed out: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38-448.

188. New arguments or authorities may be presented on appeal, although no new question can be raised: *District T^p v. French*, 40-601.

189. New reasons: Failure of the party objecting to the action of the lower court, to urge a good reason in support of his point or objection, will not prevent the supreme court from considering such reason and basing its action thereon: *Bond v. Wabash, St. L. & P. R. Co.*, 67-712.

190. The fact that the appellate court reaches its conclusions upon grounds different from those upon which the court below bases its judgment will have no effect as to such judgment if the conclusion reached is the same: *Richman v. Board of Supervisors*, 70—.

191. All objections appearing of record may be urged: A party has the right to make, in the supreme court, all objections which legitimately arise on the record, whether made in the court below or not, except in cases where it is required that objections urged in the court below shall be stated in writing or made to appear of record: *McGovern v. Keokuk Lumber Co.*, 61-265.

192. Therefore held, that the question of the sufficiency of affidavits to support a motion for change of venue was properly before the supreme court on appeal, although no objection thereto appeared of record, the party appealing having duly excepted to the ruling on the motion: *Ibid*.

How questions are sufficiently raised.— Motion below to correct error.

2. *How questions are sufficiently raised.*

a. *Motion in the court below to correct the error.*¹

193. When necessary: Any objection to erroneous action of the court below which might have been corrected in that court if attention had been called thereto, will not be considered if first raised in the supreme court: *Garvin v. Cannon*, 53-716.

194. So held, as to an objection which might have been raised in the lower court by motion in arrest of judgment: *Smith v. Warren County*, 49-336.

195. So held, also, in regard to the objection that the judgment was excessive, no motion to correct such error having been made in the court below: *Black v. Boyd*, 52-719; *Dickey v. Harmon*, 26-501; *Finch v. Billings*, 22-228; *Keller v. Jackson*, 58-629.

196. So held, also, where the objection that the judgment below was improperly entered in vacation was not made in that court: *Carmichael v. Vandebur*, 50-651.

197. Motion to set aside default: A judgment by default will not be reviewed in the supreme court until a motion to set it aside has been made and overruled in the court below: *Hunt v. Stevens*, 25-261; *Savings Bank v. Horn*, 41-55.

198. Thus, objection to judgment by default, that the notice was not served in time to render defendant in default, cannot be raised on appeal if no motion to set aside default was made below: *Pigman v. Denney*, 12-396; *McKinley v. Betschel*, 12-561.

199. So held, also, as to objections to judgment by default, on the ground of defective manner of service, or defect in the notice itself: *Van Vark v. Van Dam*, 14-232; *Bethel v. Leay*, 14-592; *Downing v. Harmon*, 18-535; *Decatur County v. Clements*, 18-536; *Pratt v. Western Stage Co.*, 27-363.

200. But before the enactment of the statutory provision above referred to, held, that an error apparent on the face of the pleadings in rendering judgment on default for more than plaintiff was entitled to recover,

might be corrected on appeal, although there was no objection in the lower court or effort made to have the error corrected: *Gower v. Carter*, 3-244.

201. Errors in taxation of costs cannot be urged in the supreme court unless motion for retaxation has been made in the court below: *Hemphill v. Salladay*, 1 G. Gr., 301; *Yeager v. Circle*, 1 G. Gr., 438.

202. Motion for retrial by defendant served by publication: As the statute gives to a defendant served by publication only a right to retrial upon motion within a specified time, he cannot, on appeal, object to the sufficiency of the service, unless such motion for retrial has first been made and overruled in the lower court: *Berryhill v. Jacobs*, 19-346; *S. C.*, 20-246.

203. Reason of the provision: The statutory provision above referred to was designed to prevent the expense and delay of appeal where the error relied upon is a mere irregularity, mistake, or omission on the part of some ministerial officer, or the court itself, which could readily be corrected in the trial court on motion: *Pigman v. Denney*, 12-396.

204. Other cases, applying the statutory provision, are as follows: *Robison v. Saunders*, 14-539; *Barnes v. Hayick*, 15-602; *Carleton v. Byington*, 17-579; *Boyd v. Rutledge*, 25-271; *Coakley v. McCarty*, 34-105; *Grimes v. Hamilton County*, 37-290.

205. Mistakes of clerk cannot be urged as objections to the judgment on appeal unless a motion to correct such error has first been made in the lower court: *Daniels v. Clafin*, 15-152.

206. Applicable in appeals from justices' courts: The same provision is applicable in case of appeal from the judgment of a justice of the peace to the circuit court: *Smith v. Parker*, 28-359; *Leonard v. Hallem*, 17-564.

207. But not in case of writ of error from the judgment of a justice of the peace which is entered without jurisdiction: *Holmes v. Hull*, 48-177.

208. What deemed sufficient calling attention of court to error: Where a motion for change of venue is resisted on the ground

¹ Code, § 3167. A mistake of the clerk shall not be ground for an appeal until the same has been presented and acted upon by the court below.

§ 3168. A judgment or order shall not be reversed for an error which can be corrected on motion in an inferior court, until such motion has been made there and overruled.

Motion for new trial.—Finding of facts.

that the court to which it is proposed to send the case has no jurisdiction of such cases, and notwithstanding such objection the change is granted to such court, the error may be reviewed on appeal, although no motion to change the order and send the case to a court which would have had jurisdiction is made by the objecting party: *Sayles v. DeLuhrey*, 64-109.

209. Statute not applicable: Such provision applies only to such errors as without motion would not be called to the attention of the lower court: *Brown v. Rose*, 55-734.

Exceptions, when necessary and how taken, see that title.

b. *Motion for new trial.*

210. Not necessary: The statutory requirement above referred to as to the necessity of motion in lower court to correct error before urging it on appeal, applies only to such errors as, without such motion, would not be called to the attention of the lower court. Another statutory provision¹ renders a motion for new trial in the lower court unnecessary in order to authorize the appellate court to review any judgment or order of the court below: *Brown v. Rose*, 55-734; *Drefahl v. Tuttle*, 42-177.

211. Before the enactment of this statutory provision, *held*, that a judgment would not be reversed, on the ground that the verdict was contrary to the evidence, when a motion for a new trial upon that ground had not been made in the court below: *Brayton v. Boone*, 19-506.

212. But the question was unsettled whether a motion for a new trial was necessary to bring up for review errors of law occurring at the trial: *Presnall v. Herbert*, 34-539; *Rindskoff v. Lyman*, 16-260.

213. A motion for new trial was, however, held not necessary in order to enable the supreme court, on appeal, to review a decision upon the admissibility of evidence properly excepted to, when such decision virtually disposes of the whole case: *McCoy v. Julien*, 15-371.

214. This provision affects the remedy, and hence is not unconstitutional as applying

to actions arising before its passage: *Johnson v. Semple*, 31-49.

215. Nor is it in conflict with Const., art. 5, § 4, providing that in actions at law the supreme court shall be a court for the correction of errors. Previous to the enactment of this provision, that court would review, as matter of law, the ruling of the lower court upon a motion for a new trial on the ground that the verdict was contrary to the evidence, and this act simply authorizes the court to treat the case as if such motion for a new trial was made and entered, and may be regarded as a standing motion in all cases: *Coffin v. City Council*, 26-515.

216. Where exceptions are duly preserved in the course of the trial, they may be brought up on appeal, although the motion for new trial is stricken from the files because filed too late: *Beems v. Chicago, R. I. & P. R. Co.*, 58-150.

217. The necessity of a motion being made below to correct errors, etc., is not removed by the provision making motion for new trial unnecessary to secure the review of a cause in the supreme court: *Webster v. Cedar Rapids & St. P. R. Co.*, 27-315.

218. Under this provision, however, errors of law committed by the judge might be reviewed on appeal without any motion for new trial: *Delvee v. Boardman*, 20-446; *Presnall v. Herbert*, 34-539.

219. Nor does such provision dispense with the necessity of taking exceptions to rulings objected to: *Root v. Illinois Cent. R. Co.*, 29-102; *Eason v. Gester*, 31-475.

220. Where defendant moved in arrest of judgment, and thereupon, in order to cure the defect insisted upon, plaintiff amended his petition, and introduced certain evidence to which a demurrer was sustained, the judgment arrested, and defendant recovered costs, *held*, that no motion for a new trial was necessary in order to present the exceptions, duly taken, on appeal: *Coates v. Galena & C. U. R. Co.*, 18-277.

c. *Finding of facts.*

221. How reviewed: Before the enactment of a statutory provision on the sub-

¹ Code, § 8169. The supreme court may review and reverse, on appeal, any judgment or order of the district or circuit court, although no motion for a new trial was made in such courts.

Finding of facts.—What the record must show.

ject,¹ it was held that, in order to enable the supreme court, on appeal, to review the correctness of the findings of the court below upon the facts, exceptions must have been taken to such findings and a new trial asked for: *Kelso v. Ely*, 11-501; *Gillett v. Foreman*, 11-512.

222. Before the enactment of this statutory provision there was, in an action at law tried by the court without a jury, no way of securing the review on appeal of the conclusions of the court upon the evidence, unless there was a special finding of facts by the court, except by a motion for new trial based upon the ground that the judgment was against the evidence, and an exception to the ruling on such motion: *Warner v. Pace*, 10-391; *Corner v. Gaston*, 10-512; *Roberts v. Hoyt*, 12-345; *Allman v. Gilbert*, 14-538; *Robison v. Saunders*, 14-539; *Reynolds' Heirs v. Miller*, 14-97.

223. The certificate referred to in the statutory provision set out below cannot be made by the judge in vacation, unless by agreement of parties. The term "judge" means the same as if the word "court" had been used: *Luse v. Des Moines*, 22-590.

224. In the absence of the certificate, or an agreement of the parties, the supreme court cannot, on appeal, review the conclusion of the court upon the evidence: *Wormley v. District T'p*, 45-666.

225. It is only when the evidence is all before the supreme court, that it can review a finding of the court below as to a question of fact: *Van Riper v. Baker*, 44-450.

226. Assignment of errors: This section does not dispense with assignment of errors: *Sisters of Visitation v. Glass*, 45-154.

227. Trial de novo on appeal: The section is applicable only in actions at law, and therefore does not interfere with the provisions for securing a trial de novo in equity cases: *Ibid.*; *Vinsant v. Vinsant*, 47-594.

A finding of facts must be made by the court on request of either party, where the trial is to the court in a law action: See PRACTICE, II, c.

228. As the finding of the court upon a question of fact in an action at law has the force of a verdict of a jury, the admission of improper evidence in such a case will be a ground for reversal, as fully and to the same extent that it would be in an action tried by a jury, where it does not appear but that such improper evidence was considered by the court in its final determination of the case: *Jaffray v. Thompson*, 65-823.

3. What the record must show in order that a question may be reviewed.

229. Final action: Where the abstract does not show what the final action of the court was, nor that any appeal has been taken, the court cannot determine the appeal: *Pittman v. Pittman*, 56-769.

230. A party complaining of erroneous rulings must make it appear from the record that judgment was rendered against him: *Shannon v. Scott*, 40-629.

231. Must show prejudice: The supreme court will not reverse a cause for error committed below, unless it is affirmatively shown by the record that such error was actually prejudicial to appellant: *Blackburn v. Powers*, 40-681; *Fulmer v. Fulmer*, 22-231.

That a case will not be reversed for error without prejudice, see *infra*, §§ 332-336.

232. Matters not of record: Evidence, instructions, etc., not made part of the record will not be considered on appeal: *Daniels v. Langdon*, 52-741.

233. Where the supreme court cannot determine from the record what issues are before it, the case may be remanded, in order that the parties may replead: *Lyon v. Tevis*, 8-79.

Oral evidence, how preserved, see EXCEPTIONS, II.

Shorthand notes of evidence, how made part of record, see EXCEPTIONS, §§ 76-83.

234. How fully the evidence must be set out: In order that rulings on the admission of evidence may be reviewed upon appeal, it is not necessary that all the evidence be pre-

¹ Code, § 3170. Where a cause is tried by the court, it shall not be necessary, in order to secure a review of the same in the supreme court, that there should have been any finding of facts or conclusions of law stated in the record, but the supreme court shall hear and determine the same whenever it shall appear from a certificate of the judge, agreement of parties or their attorneys, or, in case the evidence consists wholly of written testimony, from the certificate of the clerk, that the transcript contains all the evidence introduced by the parties on the trial in the court below.

What the record must show.

sented in the record. It is only necessary that the record shall show the rulings admitting or excluding the evidence, the purport of the evidence so passed upon, and the ground of objection: *Smith v. Johnson*, 45-308.

235. The evidence in full is required in law actions only when, as an objection to the judgment, it is urged that the verdict is not supported by the testimony. Upon no other question would it be proper to take all the evidence to the supreme court on appeal. The supreme court will pass upon the correctness of instructions or rulings as to the admission or rejection of testimony when the bill of exceptions contains a statement that there was evidence tending to prove the facts to which the instructions are applicable, or states evidence, not necessarily in full, about which the question as to the admissibility of evidence arises: *Kelleher v. Keokuk*, 60-473.

236. A general statement in a bill of exceptions as to what the party sought to establish, without a statement of the exact evidence offered, will not be sufficiently definite to enable the court to pass upon an exception to a ruling on such evidence: *Cousins v. Westcott*, 15-253.

237. A statement in a bill of exceptions that it contains the substance of the evidence is not sufficient where it is necessary, in order to authorize the court to pass on the action of the court below, that it shall have before it all the evidence in the case: *Thompson v. Mumma*, 21-63; *Burlington Gas Light Co. v. Green*, 21-835; *Lea v. Roads*, 22-408; *McKenzie v. Kitler*, 27-254; *Jemmison v. Gray*, 29-587; *Davis v. Card*, 33-592; *Hubbard v. Epperson*, 40-408; *Walker v. Beaver*, 50-504.

238. Where the bill of exceptions, after setting out evidence, continued, "being all the evidence offered by the plaintiff to sustain the issue on his part," held, that it sufficiently appeared that the evidence was all in the record to enable the supreme court to review the ruling of the lower court on a motion for nonsuit: *Rowan v. Lamb*, 4 G. Gr., 468.

239. Where it is necessary that the record shall be shown to contain all the evidence, such fact must appear from the judge's certificate and not merely from his reference to such a

certificate made by the shorthand reporter: *Walker v. Beaver*, 50-504.

240. When insufficiency of evidence is relied upon as ground for new trial in the lower court, and the motion is overruled, the ruling cannot be reviewed unless the record contains all the evidence: *State v. Lyon*, 10-340; *State v. Hockenberry*, 11-269; *Parsons v. Chapman*, 11-294; *McCool v. Galena & C. U. R. Co.*, 17-461; *Garber v. Clayton County*, 19-29; *Beal v. Stone*, 22-447; *McKenzie v. Kitler*, 27-254; *Smith v. Cedar Falls & M. R. R. Co.*, 30-244; *Davis v. Card*, 33-592; *Everett v. Union Pacific R. Co.*, 59-243; *Crystal v. Des Moines*, 65-502.

241. The supreme court will not disturb a verdict, on appeal, for insufficiency of evidence to support it, if it has not all the evidence before it: *Barker v. Kuhn*, 38-392.

242. Where the evidence on which the court below acted is not before the supreme court, the action of the lower court cannot be inquired into so far as it purports to be based upon the evidence: *Skiff v. Mershon*, 7-79.

In equity cases, in order that there may be a trial *de novo* on appeal, the record must show that it contains all the evidence offered or introduced on the trial: *Infra*, §§ 1085-45.

In criminal cases, see CRIMINAL LAW, §§ 1674-1676.

243. Impeaching evidence: In order that the action of the lower court in rejecting evidence offered to impeach a witness may be reviewed, the record should show the evidence given by the witness and what it was proposed to prove for the purpose of impeachment: *Shephard v. Brenton*, 20-41.

244. Rulings upon evidence; prejudice must appear: Where the answers to questions objected to, or sought to be elicited by such questions, are not shown by the record, the supreme court cannot review the ruling of the lower court in sustaining or overruling such objections. It must affirmatively appear that the action of the court, even if erroneous, was prejudicial: *Mays v. Deaver*, 1-216; *Speers v. Fortner*, 6-553; *Hanan v. Hale*, 7-153; *Willey v. Hall*, 8-62; *Lucas v. Jones*, 44-298.

245. When evidence is admitted over objection thereto: In reviewing the action of the court in overruling an objection to a

What the record must show.

question, the material inquiry is not whether an improper question was asked, but whether improper testimony was received, and error cannot be made to appear until it is shown that the question objected to was answered, and what the answer was: *Thurston v. Cavenor*, 8-155; *Campbell v. Chamberlain*, 10-337; *State v. Keeler*, 28-551; *Manny v. Woods*, 33-265; *Mosier v. Vincent*, 84-478.

246. It must be made to appear what the witness testified to, and that such testimony was material and prejudicial: *Oliver v. Depeur*, 14-490; *Bradley v. Kavanagh*, 12-278.

247. Where a record is admitted over an objection thereto, but the record is not made to appear in the bill of exceptions, the ruling cannot be reviewed: *Oliver v. Depeur*, 14-490.

248. The record must disclose facts affirmatively showing that the admission of evidence over objection was error to the prejudice of the party objecting, to warrant reversal on that ground: *Green v. Cochran*, 43-544.

249. But where evidence is admitted over the objection of a party it will be presumed that the court considered it, and that, if it was erroneously admitted, prejudice resulted: *Leasman v. Nicholson*, 59-259.

250. Where the whole of the testimony of the witness is not given in the bill of exceptions, or in the record; nor the fact in any way negatived that the witness was a professional one, or for some reason entitled to give an opinion, an objection that a question called for an opinion of the witness will not be held to have been erroneously overruled, as it may have been groundless in fact: *Higley v. Newell*, 28-516.

251. When evidence is excluded: In order to determine whether prejudice has resulted to a party by the exclusion of evidence offered by him, the answers, or the facts proposed to be proved by the witness in response to the question asked, must be made to appear. Unless prejudice be thus shown, the error in sustaining objection to the question or the evidence offered will not be ground of reversal: *Jenks v. Knott's Mexican Silver Mining Co.*, 58-549; *Gronan v. Kukuck*, 59-18; *Bays v. Hunt*, 60-251; *Kelleher v. Keokuk*, 60-473; *Klaman v. Malrin*, 61-752; *Shellito v. Sampson*, 61-40; *State v. Montgomery*, 65-488.

252. The court must be advised by the record of the character of the proposed evidence and the facts which the party desiring to introduce it claimed would have been established by it: *Votaw v. Diehl*, 62-676.

253. When the purpose of a question is not disclosed by the record, the supreme court will not interfere with the ruling of the court below in excluding it: *State v. Ross*, 21-487.

254. Where the bill of exceptions is so indefinite and uncertain that it cannot be determined what the evidence excluded was, to which objection is made, the supreme court will not, on appeal, pass upon the correctness of the action of the lower court: *Hunt v. Daniels*, 15-146.

255. A ruling of the court in refusing to require the production of a written instrument cannot be reviewed on appeal unless it appears that the instrument would have tended to establish the issue on the part of the party calling for it: *Greenough v. Sheldon*, 9-503.

256. Error of the court in excluding evidence will be deemed without prejudice unless the record shows that such evidence was material to the issues: *Atkins v. Anderson*, 63-789.

257. But if the record states what the evidence rejected tended to prove, such statement will be presumed to be true, and will enable the appellate court to determine whether such rejection, if erroneous, was material: *Spaulding v. Adams*, 63-497; *Chase v. Scott*, 83-309.

258. If the materiality of the evidence sought to be introduced is apparent on the face of the question asked, it is not necessary that it appear that the party seeking to introduce it state what he expects to prove thereby; but if this is not apparent the party seeking to introduce the evidence must state what he expects to prove and thus make the materiality of the question appear: *Mitchell v. Harcourt*, 62-349; *Votaw v. Diehl*, 62-676.

259. What necessary to enable court to review instructions: So much of the evidence should be set out in the record as relates to the exceptions, that their applicability may appear, but it is not absolutely essential that all the evidence should be set out. Instructions which are erroneous and mislead-

What the record must show.

ing in any possible view will be reviewed, although the record does not present all the evidence: *Stevenson v. Greenlee*, 15-96; *Murphy v. Johnson*, 45-57.

260. Evidence to support instructions: As an instruction may not state all of an abstract proposition of law, and yet be correct as applicable to the facts of the case, the supreme court cannot pass upon the correctness of instructions without some statement of the facts which the evidence tended to establish being before it: *Mudge v. Agnew*, 56-297.

261. The supreme court cannot pass upon the correctness of the action of the lower court in giving or refusing instructions, unless the evidence upon which such instructions are based appears of record and is appropriately brought before such court: *Potter v. Wooster*, 10-384; *Wilcox v. McCune*, 21-294.

262. As instructions, abstractly correct, may be properly refused if not applicable under the evidence, a party complaining of the refusal to give an instruction must bring before the court on appeal the evidence showing such applicability: *Cutter v. Fanning*, 2-580; *Gover v. Dill*, 3-337; *Hanan v. Hale*, 7-153; *Frost v. Inman*, 10-587; *Wisner v. Brady*, 11-248; *Paden v. Griffith*, 12-272; *Wilcox v. McCune*, 21-294; *Chase v. Scott*, 33-309.

263. The refusal of instructions which might have been proper under a certain state of the proof will nevertheless not be held erroneous on appeal when the evidence is not all before the court: *Shephard v. Breyton*, 20-41.

264. The court cannot, upon appeal, pass upon the pertinency of instructions given, unless all the evidence is before it: *Nollen v. Wisner*, 11-190; *Preston v. Walker*, 26-205.

265. The presumption is that instructions were correctly given, and that there was evidence introduced on the trial to authorize them, unless the absence of such evidence is made to appear: *Bridgman v. Steamboat Emily*, 18-509; *State v. Rice*, 56-431; *Roby v. Appanoose County*, 63-113.

266. The court cannot say that an erroneous instruction was without prejudice, unless such fact affirmatively appears: *Carlin v.*

Chicago, R. I. & P. R. Co., 31-370; *Potter v. Chicago, R. I. & P. R. Co.*, 46-399; *Roby v. Appanoose County*, 63-113.

267. In order to secure the review of instructions properly excepted to, it is only necessary that the record present so much of the evidence as will show that facts to which instructions are applicable were before the court. And what is usually necessary is a statement in the bill of exceptions that there was evidence tending to prove such facts: *Kelleher v. Keokuk*, 60-473.

268. When all the instructions must appear: The supreme court cannot reverse a criminal case for failure of the court to properly instruct the jury, when it has not before it all the instructions and evidence: *State v. Hamilton*, 32-572.

269. To warrant a reversal on account of refusal of the lower court to give instructions asked, it must appear that those given are all before the appellate court: *State v. Johnson*, 19-230; *Bower v. Stewart*, 30-579; *Chase v. Scott*, 33-309; *State v. Nichols*, 38-110; *Moody v. St. Paul & S. C. R. Co.*, 41-284; *State v. Stanley*, 48-221; *State v. Williamson*, 68-351; *Huff v. Aultman*, 69-71.

270. If an instruction given is so far erroneous that any modification thereof properly presenting the law would have been in conflict with it, the error will be ground for reversal although all the instructions are not before the court; but it will be otherwise if there might have been, in another instruction, modifications or limitations such as, with the instruction complained of, would have correctly presented the law: *Bland v. Hixenbaugh*, 39-532.

271. Verdict against instructions: The granting of a new trial on the ground that the verdict is against the instructions will not be reviewed unless the instructions appear in the record: *Caffrey v. Groome*, 10-548; *Briggs v. Hartman*, 10-63; *Beal v. Stone*, 22-447; *Howell v. Snyder*, 39-610.

272. Affidavits for change of venue: Where the affidavits on which a change of venue is asked in a civil case are before the court, it will presume that it has before it all the evidence upon which the court acted. In such case the opposite party cannot file counter-affidavits, and in the absence of any showing it will not be presumed that affi-

What will warrant reversal.—Presumptions of regularity.

ants were produced in court and subjected to a cross-examination: *McGovern v. Keokuk Lumber Co.*, 61-265.

273. Findings of fact by the court below will be presumed correct and supported by the evidence, if the evidence is not all before the supreme court: *Napier v. Wiseman*, 8 G. Gr., 246; *Hamilton v. Walters*, 8 G. Gr., 556; *Rosseau v. Fine*, 1-98; *Snell v. Kimmell*, 8-281.

274. An order of the lower court will not be interfered with on appeal where the supreme court has not before it all the evidence upon which the lower court acted: *Krause v. Hampton*, 11-457; *Adams v. Peck*, 14-508.

275. The granting of a new trial on the ground of newly-discovered evidence will not be interfered with, on appeal, if it does not affirmatively appear that all the evidence on which it was granted is before the appellate court: *Souden v. Craig*, 20-477; *S. C.*, 21-380.

276. Statement of judge as to evidence: Where a judge, in overruling a motion for a new trial, certifies that the newly-discovered evidence on which a new trial is asked is cumulative, such statement will be regarded, on appeal, as true, when the evidence itself is not before the court: *Seymour v. Hoyt*, 23-19.

277. A judgment will not be interfered with, on appeal, because not warranted by the evidence, unless all the evidence is before the appellate court: *Green v. McFaddin*, 5-549.

Action of the lower court will, on appeal, be presumed to have been supported by evidence, if the evidence is not all before the appellate court: See *Infra*, §§ 286-296.

V. WHAT WILL AND WHAT WILL NOT WARRANT REVERSAL.

a. Presumptions of regularity.

278. In favor of action below: Every reasonable presumption is to be entertained in favor of the ruling of the court below and the correctness of its judgment: *Davis v. Moffitt*, 4 G. Gr. 92; *Hendrie v. Rippey*, 9-351; *David v. Lealie*, 14-84; *Morris v. Steele*, 62-228; *Hintrager v. Kiene*, 62-605.

279. This presumption in favor of the action of the court below will prevail unless overcome by something appearing of record:

Brobst v. Thompson, 4 G. Gr., 135; *Speers v. Fortner*, 6-553; *Scofield v. Ford*, 56-370.

280. The supreme court cannot presume facts upon which to base error. Every fair presumption should be in favor of the court below: *Lawson v. Campbell*, 4 G. Gr., 413.

281. It will be presumed that the action of the lower court was regular and authorized, unless the contrary appears: *Bower v. Webber*, 69-286.

282. The presumption is in favor of the action of the lower court, and it will be interfered with only where it affirmatively appears that some prejudicial error has been committed: *Hunt v. Higman*, 70—.

283. Therefore, where a motion was made to strike out a part of a deposition as immaterial, and was submitted with the case, it not appearing that any ruling was made thereon, held, that, although the evidence was erroneous, it would be presumed that the court did not consider it: *Ibid*.

284. An appellate court is always bound to exercise presumptions in favor of the judgment it reviews, unless it is shown that the law and justice have been violated by such judgment: *State v. Hopkins*, 67-285.

285. Where the record does not show what the issues in the case were, such issues will be presumed as would render the action of the court proper: *Holland v. Union County*, 68-56.

286. It will be presumed that there was sufficient testimony to support the judgment rendered unless the contrary appears: *Brady v. Malone*, 4-146; *Hefferman v. Burt*, 7-320; *Jennings v. Conn*, 11-542; *Willett v. Millman*, 61-123; *Phillips v. Phillips*, 46-708.

287. It will be presumed, in favor of the finding of the court, that lawful evidence authorizing such finding was introduced and considered. So where, in an action to foreclose a mortgage, judgment was rendered by default, and it did not appear that the mortgage and note were introduced in evidence, held, that such fact would be presumed: *Henry v. Evans*, 58-560.

288. The supreme court will not, for the purpose of reversing a cause, presume that the proof established a state of facts which would render the decision of the court below erroneous, if a state of facts can be sup-

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posed under which such decision would be correct: *Crane v. Ellis*, 31-510.

289. Where the record shows some evidence on which a ruling could be supported, it will be upheld, no evidence to the contrary appearing: *Blythe v. Blythe*, 25-266.

290. Where there is nothing in the bill of exceptions showing the existence of grounds on which a motion for new trial is based, it will be presumed in support of the action of the court in overruling such motion that such grounds were not shown to exist: *Keys v. Francis*, 28-321.

291. Where no finding of facts is made, the presumption is that the court found such facts as will justify the conclusion of law, and the conclusion will not be held erroneous unless there is a finding of facts from which error affirmatively appears, or error appears otherwise from the record: *Oskaloosa v. Pinkerton*, 51-697.

292. Where it does not appear upon what facts the decision of the lower court was based, such a finding of facts will be presumed as will support the decision: *Fouts v. Pierce*, 64-71.

293. Where the judgment below is based upon an authentication of a judgment from another state, which is insufficient, the presumption will be entertained that there was other evidence sufficiently showing such judgment, unless the contrary appears: *Clemmer v. Cooper*, 24-185.

294. Where it appears that attorneys' fees were taxed, after rendition of judgment in the case, as they might properly be, it will be presumed that such taxation was made upon proper evidence being introduced, although it does not appear that there was any such evidence: *Kelso v. Fitzgerald*, 67-266.

295. In the absence of a showing in the record to the contrary, the supreme court will presume that there was before the lower court sufficient evidence to justify the finding that defendant had been duly and legally served with process: *Kent v. Coquilard*, 67-500.

296. Where appellants were defaulted, and the record did not show what proof was introduced to sustain the bill, *held*, that it would be presumed there was enough evidence to support the averment upon which

judgment was rendered: *Semple v. Lee*, 18-304.

297. Where the decree recites that certain matters essential to the jurisdiction of the court were made to appear, it will be presumed on the appeal that they were made to appear in the proper manner and that the court rendering such decree performed its duty: *Jewett v. Miller*, 12-85.

298. The supreme court will presume in favor of the regularity of the proceedings below, even though such proceedings are not shown by the record: *Dixon v. State*, 3-416.

299. Where the record showed that the trial was not by jury, *held*, that it would be presumed that a jury was waived, although that fact did not appear: *Hawkins v. Rice*, 40-485.

300. Error must affirmatively appear: Error will not be presumed, and the party alleging the existence of error to his prejudice must make it affirmatively appear: *Hudson v. Matthews*, Mor., 94; *Isett v. Oglevie*, 9-813; *Way v. Lamb*, 15-79; *Messer v. Reginnitter*, 32-312; *Stewart v. Bishop*, 33-584; *State v. Foster*, 40-303; *Thompson v. Winnebago County*, 48-155; *Pottawattamie County v. Marshall County*, 56-410.

301. Where error was assigned on appeal in admitting in evidence a certain order, and the record certified "that the order cannot be found among the files," *held*, that as the supreme court could not know what the order was, it could not say that it was error to have admitted such order in evidence in the court below: *Carpenter v. Parker*, 23-450.

302. Where a motion to discharge defendant because of unlawful arrest was unsupported by any evidence at the time, *held*, that an order overruling such motion would not be reversed on appeal: *State v. Ross*, 21-467.

303. Must be clearly manifest: Wherever error is complained of, it should be made to appear not only affirmatively but with reasonable certainty: *Randolph Bank v. Armstrong*, 11-515; *Gantz v. Clark*, 31-254.

304. Presumption in favor of record: Where an abstract showed an interlineation with a pen, and it appeared that the finding of the court below would not have been justified unless the allegation of the petition

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was such as shown by the abstract as amended by the interlineation, *held*, that in the absence of any showing to the contrary, it would be presumed that the abstract as thus amended was correct: *Mahaska County v. Ruau*, 45-328.

305. Defect in the record: Error cannot be presumed from mere omission or defect in the transcript. It must appear affirmatively. Unless it does so appear, the presumption of law is that the proceedings of the court below were legal and proper: *Mackemer v. Benner*, 1 G. Gr., 157.

306. Where a demurrer to a portion of the counts of an answer was sustained, and no action as to other counts appeared of record, but they might properly have been stricken out, *held*, that it would be presumed they were stricken out and that the action of the court was proper: *District T'p v. Smith*, 30-9.

307. Presumption as to pleadings: Where there was a cross-petition, and the case was tried as though a reply thereto had been filed, *held*, that the court would presume there was such reply, although none appeared in the record: *Hervey v. Savery*, 48-313.

That the same presumption obtains on appeals from justices' courts, see JUSTICES OF THE PEACE, § 102.

308. Where ruling does not appear: If it appears that a motion or demurrer was filed in the lower court, but it does not appear that any ruling was made thereon, it will be presumed that such motion or demurrer was waived: *Sigler v. Woods*, 1-177; *Busick v. Bumm*, 8-63; *Boardman v. Beckwith*, 18-292; *State v. Ross*, 21-467; *First Nat. Bank v. Carpenter*, 41-518; *Moore v. Gilbert*, 46-506.

309. Incidental rulings: The presumption in favor of the correctness of the rulings of the court below is especially applicable to those questions which are ever recurring and depend for their solution upon the discretion of the court: *Clinton Nat. Bank v. Torry*, 30-85; *Thompson v. Burnham*, 35-411.

310. Acts done in court in the progress of the case are presumed to be in accordance with law unless the contrary is made to appear. A presumption as to the regularity of the proceedings of the lower court will always be exercised, and error in such pro-

ceedings must be affirmatively shown to warrant a reversal: *McCue v. Wapello County*, 56-698.

311. Facts presumed: The presumption to be entertained in support of the ruling of the lower court requires that, if it would be correct under any presumable state of facts not inconsistent with the pleadings and the record, it shall be upheld: *Ward's Heirs v. Cochran*, 38-432; *Johnson v. Mantz*, 69-710; *Stone v. Hawkeye Ins. Co.*, 69-787.

312. The supreme court will not presume a state of facts upon which to found error, but if the record is silent and a state of facts can be supposed upon which the action of the lower court would be correct, the supreme court will adopt that view of the case which is consistent with the correctness of the ruling made: *Freher v. Geeseka*, 5-472.

313. Where sufficient ground appears upon which the judgment of the court below can be upheld, it will be presumed that the judgment was rendered on such ground: *Frederick v. Mitchell*, 1-100; *State v. Gibbs*, 39-318; *Steel v. Miller*, 40-402.

314. One of several grounds: If there be several grounds upon which a ruling may have been based, it will be upheld if any of such grounds are sufficient to support it, and if, among several insufficient grounds, one would be sufficient under certain conditions that may have existed, the supreme court will presume that such conditions existed and that the ruling was based thereon: *Worthington v. Olden*, 31-419.

315. Where a case is submitted to the jury on two issues, and a verdict is returned in favor of one of the parties which is sustainable on one of the issues upon the evidence introduced but not by any evidence in support of the other, it will be presumed that the verdict was upon the issue upon which there was evidence supporting it, and any error of the court below in refusing to take the other issue from the jury will be deemed to have been error without prejudice: *Calder v. Smalley*, 66-219.

316. Where an instruction was correct as to one question of fact involved and incorrect as to another, and it appeared that, under the evidence, the second question could not have been found as assumed in the instruction without the verdict being contrary

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to the evidence, *held*, that it would be presumed the verdict was found upon facts in harmony with the first branch of the instruction, and the error as to the other branch was without prejudice: *State v. Sanders*, 30-582.

317. If no ground can be discovered nor is pointed out, upon which the action of the court can be upheld, the presumption of regularity will be overcome: *Baird v. Chicago, R. I. & P. R. Co.*, 61-359.

318. Where but one ground of objection is urged, it must be presumed the ruling was on that ground, though erroneous: *Emery v. Emery*, 54-106.

319. Admission of evidence: If evidence may have been admissible under some aspects which the case may have assumed, and all the evidence is not before the court, it will be presumed that there was a state of facts authorizing the admission of the evidence objected to: *Chase v. Scott*, 33-309.

320. Where it appears that evidence was excluded, but it does not appear upon what ground, it will be presumed that there was some ground therefor, where the evidence is not all before the court: *Cook v. Sioux City & P. R. Co.*, 37-426.

321. If objection to evidence is sustained, and the record does not show the ground of the objection, if the evidence is vulnerable to any objection, it will be presumed that was the one made and sustained: *Hoben v. Burlington & M. R. R. Co.*, 20-562.

322. Where no other evidence than that appearing in the record could legitimately have been presented in the court below, it will not be presumed that the action of the court was based on anything not appearing of record: *McGovern v. Keokuk Lumber Co.*, 61-265.

323. Giving of instructions: In passing upon the correctness of the action of the trial court in refusing instructions as not applicable to the facts of the case, the presumption will be in favor of the correctness of the ruling of the court in the absence of evidence showing it to be erroneous: *Stier v. Oskaloosa*, 41-358.

324. A case will not be reversed for refusal to give instructions asked where it does not appear what instructions were actually given: *Moody v. St. Paul & S. C. R. Co.*, 41-284.

325. Where it appears that instructions

were given which were not before the court, which might have modified or changed those given which are insisted upon as being erroneous, the court cannot presume that there were not other instructions correcting any error in the one relied upon as being erroneous: *State v. Stanley*, 48-221.

326. Where the evidence is not all before the court, the action of the court in dissolving an injunction will not be reversed, but it will be presumed that a sufficient showing was made to justify the action of the court below: *Gray v. Montgomery*, 17-66.

327. Where the evidence is not all before the court, it will be presumed that there was evidence sufficient to support the verdict: *State v. Pitman*, 38-252.

328. The same presumptions of regularity obtain in favor of the proceedings in a case in equity as in an action at law. Unless the contrary appears, it will be presumed that the decree was authorized by the evidence: *Garner v. Pomroy*, 11-149.

329. Where instructions are objected to as not applicable to the evidence, and the evidence is not all before the court, on appeal, it will be presumed that there was evidence to which the instructions were applicable, rather than the contrary: *Blackburn v. Powers*, 40-681; *Gantz v. Clark*, 81-254.

330. Where instructions would be correct under a possible state of facts, and the evidence is not all before the court, it will be presumed that the evidence was such as to justify the giving of the instructions: *Rice v. Des Moines*, 40-638; *State v. Hemrick*, 62-414; *Wallace v. Robb*, 87-192.

331. Where the evidence upon which the court below has acted is not all before the supreme court, it will be presumed that the action of the lower court was proper under the evidence: *State v. Postlewait*, 14-446; *McIntosh v. Kilbourne*, 87-420; *Laughlin v. Main*, 63-580.

b. Error without prejudice; what is and what is not; effect of.

See CRIMINAL LAW, §§ 1661-1665.

332. Ruling not reviewed unless prejudicial: An exception will not be regarded in the supreme court unless the ruling has been on a material point, and prejudicial to the

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rights of the party excepting: *Bremer County Bank v. Eastman*, 34-392.

333. A judgment will not be reversed for an error committed by the trial court, unless appellant has been prejudiced thereby: *Tuck v. Singer M'f'g Co.*, 67-576.

334. One of two co-parties cannot object on appeal that a judgment against them jointly is erroneous because a judgment against his co-party was not proper, such co-party not having appealed: *Hoadley v. Hammond*, 63-599.

335. A case will not be reversed where it appears that no right of the party appealing has been prejudiced, no matter what error may have been committed: *Smith v. Eaton*, 50-488.

336. A party cannot, on appeal, complain of rulings which are in his favor, or a judgment so far as it is in his favor: *Boyce v. Wabash R. Co.*, 63-70; *Hintrager v. Hennessy*, 46-600.

337. Rulings to which party consents: The exclusion of evidence, by the consent of a party, cannot be made ground for reversal: *Wilson v. McAdams*, 10-590.

338. Waiver of error: Where improper evidence is permitted to remain in a criminal case, without objection, the error in its admission is waived: *State v. Stickley*, 41-232.

339. The action of the court in requiring additional security on a replevin bond, held not to be ground for reversal, as such order could not affect the validity of the judgment when rendered on the merits, and the error, if any, was waived by the compliance therewith: *Prichard v. Hopkins*, 52-120.

340. Where defendant was by the court ordered to answer, and thereafter obtained an extension of time within which to answer, and, upon his failure to comply, default was entered against him, held, that any error in the first order requiring defendant to answer was error without prejudice: *Rock v. Wallace*, 15-379.

Amending or pleading over by the party against whom a ruling is made on motion or demurrer will constitute a waiver of any error in such ruling: See PLEADING, XIV, e.

341. Upon the overruling of a party's demurrer, he may either stand thereon and

have a review of the ruling of the court by appeal, or he may plead over, thereby waiving his right to appeal, or in case no further pleading on his part is necessary to raise the issue, he may waive the issue on the demurrer by proceeding to the trial of the cause. By insisting on judgment for want of pleading or for refusing to proceed with the trial of the cause, the adverse party may require the unsuccessful party to either stand upon his demurrer or waive it, and, if he elect to stand upon his demurrer, judgment may be entered against him, which may be final, in case the decision of the court is affirmed on appeal. But, if no such judgment is entered, the affirmance upon appeal will not debar the unsuccessful party from pleading over or proceeding with the trial, as the case may be: *Tyler v. Langworthy*, 87-555.

342. Application by a party for the reconsideration by the court of its ruling on a motion for a new trial will not waive error committed in such ruling and prevent the party from taking advantage thereof on appeal: *Anderson v. Cahill*, 65-252.

343. Error in former action: Where suit was brought against several defendants for damages arising from illegal sale of intoxicating liquors, and the owner of the property in which the business was conducted was made a joint defendant, and a judgment by default was rendered against one of the sellers, the owner asking to be allowed to defend for such party; and afterward, a change of venue being first had as to the owner, judgment was rendered against him making the first judgment a lien against his property, held, that he could not on appeal in the latter case raise any error committed in refusing him leave to defend in the former case: *Putney v. O'Brien*, 53-117.

344. Party cannot object to action secured by him: A party having objected to evidence, which was thereupon admitted only for a particular purpose, cannot afterwards complain on appeal that such evidence should have been admitted for other purposes: *Henderson v. Chicago, R. I. & P. R. Co.*, 48-216.

345. Where justice has been done: Where it appears that justice has been done, and that a new trial would result in the same verdict or the same judgment, the action of

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the court in refusing to grant a new trial on the ground of errors of law committed, will not be reversed on appeal: *Dawson v. Wisner*, 11-6.

346. If the court below has erred in the decision of a legal proposition, and the supreme court can see that with the necessary correction the verdict on the second trial must be the same as the first, then the granting of a new trial by the lower court might be reversed; but if it is not manifest that upon such correction of error the second trial would result as the first, the action of the lower court in granting a new trial will not be interfered with: *Braddy v. Lumery*, 11-29.

347. While a verdict will not be sustained that is clearly against erroneous instructions, yet, in a particular case, as the court below did not so regard it, and it appeared that substantial justice was done by the verdict, held, that it would not be reversed for that reason alone: *Allison v. King*, 25-56.

348. Judgment will not be reversed because of an alleged erroneous instruction by the court, when the judgment is more favorable to the appellant than a fair construction of the evidence justifies: *McNally v. Shobe*, 22-49.

349. Where the jury were not sufficiently instructed as to the measure of damages, but it appeared that their verdict was not beyond the just sum that plaintiff ought to recover as lawful damage, held, that the judgment should not be reversed: *Cooper v. Central R. of Iowa*, 44-134.

350. A judgment will be affirmed upon appeal if it is correct, although the reasons given for it by the court below may have been erroneous: *Jamison v. Perry*, 38-14; *Whiting v. Root*, 52-292.

351. A cause will not be reversed because of an inconsiderable error in the amount of the judgment rendered: *Callanan v. Shaw*, 24-441; *Keokuk County v. Howard*, 42-29.

352. Remission of excess: Where a judgment is rendered for an amount in excess of that due, but on appeal the successful party offers to remit the excess over the proper amount, the judgment will not be reversed: *Morrill v. Miller*, 8 G. Gr., 104.

And see *infra*, §§ 956-972.

353. Failure to give nominal damages not ground for reversal: Where substantial justice has been done, a new trial will not be granted for a failure of the jury to award nominal damages: *Watson v. Van Meter*, 48-76.

354. The supreme court will not reverse a judgment because nominal damages were not allowed, even though it appears that the appellant was entitled thereto: *Rowley v. Jewett*, 56-492; *Phenix Ins. Co. v. Findley*, 59-591; *Case Threshing-Machine Co. v. Haven*, 65-359; *Watson v. Moeller*, 63-161.

355. The supreme court will not reverse a judgment where the error alleged therein involves no more than nominal damages: *Wire v. Foster*, 62-114.

356. An omission to assess nominal damages, where there is a mere technical right of recovery, is not ground for reversal: *Norman v. Winch*, 65-263.

357. Although a case will not be reversed where the only right involved is that to nominal damages, yet if it does not appear that no more than nominal damages could be recovered, the refusal of the court to allow any recovery may be reversed: *Madison County v. Tullis*, 69-720.

358. That error is prejudicial must affirmatively appear: A party appealing from a ruling of the lower court must not only show affirmative error but also error prejudicial to his substantive rights: *Fulmer v. Fulmer*, 22-230; *Blackburn v. Powers*, 40-681; *Brewington v. Patton*, 1-121.

359. Where the evidence in an action triable *de novo* was not properly certified, and was on motion stricken from the abstract, held, that the court would not consider an alleged error of the court below in dismissing plaintiff's petition, for the reason that even if there was error in the ruling it could not be determined, in the absence of the evidence, whether plaintiff was entitled to recover: *Hoy v. Cowgill*, 52-711.

360. Where it is claimed that the jurors have taken improper considerations into account in determining their verdict, prejudice must be shown, or sufficient ground must appear for presuming prejudice, to warrant a reversal on account of refusal of the lower court to grant a new trial on that ground: *State v. Woodson*, 41-425.

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361. Error appearing, presumed prejudicial: Error in the admission of evidence will not be deemed to have been without prejudice if such evidence is material. The admission of incompetent evidence has been held to be error without prejudice in cases where it appears that the judgment or verdict could not have been different had the evidence been excluded, but no such ruling has been made where the evidence held to be unlawful constituted the whole of the proof of the party offering it, or added to the weight of the testimony in his behalf: *Smith v. Johnson*, 45-308.

362. When there has been error, a presumption of prejudice arises, and if the record fails to satisfy the supreme court that no prejudice has been caused, then such error cannot be disregarded: *Potter v. Chicago, R. I. & P. R. Co.*, 46-399; *Strobel v. Moser*, 70—.

363. Where a conflict in the instructions arises out of one instruction which should not have been given, but which, by mistake, was handed to the jury, and such instruction is inconsistent with others given, although it is not shown that such erroneous instruction was considered and had an effect upon their decision, it will be presumed that it was considered, and the verdict will be set aside: *Carlín v. Chicago, R. I. & P. R. Co.*, 31-370.

364. If the instruction contains an erroneous enunciation of law, and is merely defective in not stating enough, or not giving all the modifications to which it is subject, it may be presumed, in the absence of a showing that all the instructions are before the court, that its defects were cured by other instructions; but if it is such that any modification thereof properly presenting the law would have been in conflict with it, the error therein will be ground for reversal although all the instructions are not before the court: *Bland v. Hixenbaugh*, 39-532.

365. An erroneous instruction will not be deemed to be without prejudice unless the fact appears affirmatively: *Roby v. Appanoose County*, 63-118.

366. If the instruction is erroneous or misleading, it will be presumed that there was evidence to which it was applicable, and that it therefore was prejudicial: *Harrison v. Charlton*, 37-184.

367. If error in admitting evidence appears, it must be affirmatively shown to be without prejudice to warrant its being disregarded: *George v. Keokuk & D. M. R. Co.*, 53-503.

368. Prejudice will be presumed from an erroneous ruling upon a motion for change of place of trial: *Ferguson v. Davis County*, 51-220.

369. While a presumption of prejudice will arise from a legal error, yet such presumption may be overcome; and where it is made to appear affirmatively that no prejudice did or could have resulted from the error, the case should not be reversed therefor: *Dunne v. Deery*, 40-251.

370. Error without prejudice in general: A judgment will not be reversed in consequence of errors which do not operate injuriously upon the party seeking reversal: *Granger v. Buzick*, 3 G. Gr., 570.

371. A case will not be reversed on account of error in the action of the court below which has worked no prejudice to the appellant: *Union Ag'l, etc., Ass'n v. Neill*, 31-95; *Wile v. Wright*, 32-451; *Hamilton v. Floyd*, 20-598; *Crawford v. Paine*, 19-172; *Bell v. Byerson*, 11-233.

372. Errors subsequently cured: Where an action of the court is at the time erroneous (as for instance in admitting a written instrument without proper proof of the signature), yet if subsequent evidence is such as to render the action of the court proper thereunder, there is no ground for reversal: *Davenport v. Cummings*, 15-219.

373. Judgment in favor of the party beneficially interested will not be reversed on account of error of the referee in finding in favor of a party not entitled: *Williams v. Brown*, 28-247.

374. Errors which have ceased to be prejudicial: A judgment will not be reversed which, however erroneous when made, has, by reason of a change in circumstances, ceased to be prejudicial to the complaining party: *State ex rel. v. Waterloo Savings Bank*, 39-706.

375. The supreme court will not reverse a case in behalf of a party where the right which he seeks to protect, if it ever existed, has expired: *Cutcomp v. Utt*, 60-156.

376. The improper substitution of a new

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appeal bond on an appeal from a justice of the peace, *held* to be error without prejudice where judgment on such appeal was for the party appealing and giving the bond: *Ham-mitt v. Coffin*, 3 G. Gr., 205.

377. Where persons bound over to await the action of the grand jury bring a proceeding, by *habeas corpus*, to test the correctness of the action of the magistrate, and being remanded to custody thereupon appeal from such order, a subsequent indictment by the grand jury for the same offense will render the decision in the *habeas corpus* proceeding immaterial and the appeal will be dismissed: *Witmore v. Burgan*, 70—.

378. Refusal to strike out immaterial matter in a pleading, upon motion, cannot be reviewed upon appeal: *Abbott v. Striblen*, 6-191.

379. Rulings upon demurrer, when deemed without prejudice: The fact that a demurrer based on an insufficient ground is erroneously sustained, will not be ground for reversal, where there could have been no recovery upon the count of the petition to which the demurrer was directed: *Childs v. Dobbins*, 61-109.

380. Where the lower court, in ruling on a demurrer to a petition, erroneously sustains it as to some portions thereof, but the action is determined in favor of plaintiff, and he is given the relief demanded, the ruling on the demurrer will be considered as error without prejudice: *Scott v. Union County*, 63-583.

381. The fact that the court erroneously sustains a demurrer to a count of the answer is error without prejudice, where the issue raised by such count is elsewhere presented and passed upon by the jury: *McKeever v. Jenks*, 59-300.

382. Where a demurrer to a petition was overruled and plaintiff thereupon filed an amended petition setting out the cause of action fully, *held*, that any error of the court in overruling the demurrer was without prejudice to the defendant: *Gillis v. Matthews*, 4 G. Gr., 254.

383. Where a demurrer to a portion of an answer was overruled, but under the instructions the issue thereby presented was, by implication, excluded from the jury and not considered by them, *held*, that the error, if any, in the ruling on the demurrer was with-

out prejudice: *Flanagan v. McWilliams*, 52-148.

384. Where a demurrer is erroneously sustained upon one ground, and overruled upon another as to which it should have been sustained, the action of the court will be reversed on appeal in order that the appellant may be enabled to take such action as he might have taken in the lower court if the demurrer had been sustained on a proper ground: *District T^p v. Independent Dist.*, 63-188.

And see, as to affirmance on other grounds, *infra*, §§ 916-918.

385. Error in striking defendant's answer from the files, on motion, is cured by subsequently allowing defendant to prove the defense alleged, when the evidence fails to establish the same: *McNamara v. Estes*, 22-246.

386. Refusal to allow an amended answer to be filed will be deemed error without prejudice, where it appears that all the facts alleged in the amended answer might have been proven under the original answer: *Hough v. Housel*, 20-19.

387. Allowance of an amendment which works no prejudice to the party appealing cannot be made a ground for reversal: *Tabor v. Foy*, 56-539.

388. Incompetency of a juror: Where an objection to a juror based upon his having a previously formed opinion with reference to the facts relating to a certain issue in the case was overruled, *held*, that such ruling would be error without prejudice where it appeared that the facts as to that issue in the case were not in controversy: *Albia v. O'Harra*, 64-297.

389. Error without prejudice in the rulings upon evidence: Where, from the instructions or from other parts of the record, it is made to appear that error in the admission of testimony has worked no prejudice to the party objecting, the cause should not be reversed on that ground: *Woodward v. Horst*, 10-120.

390. A cause will not be reversed for the admission of evidence which cannot have been prejudicial to the party complaining, even though such evidence was inadmissible: *Quinton v. Van Tuyl*, 30-554; *Cooper v. Mills County*, 69-350.

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391. Where, under the issues and the evidence, plaintiff could not recover, even had defendant introduced no evidence whatever, any error in the admission or exclusion of evidence cannot be complained of by plaintiff: *George v. Eason*, 69-461.

392. Where it appears that answers to questions which were properly objected to were favorable rather than adverse to the party objecting, the overruling of the objection will be considered as error without prejudice: *Andrews v. Woodcock*, 14-397; *Drath v. Deitz*, 15-436.

393. A judgment will not be reversed for improper rejection of testimony when the court is satisfied that justice has been done and that there is no reason to believe that a different result would be reached upon a new trial: *Pelamourges v. Clark*, 9-1.

394. Where the jury have returned their verdict against a party seeking to recover, any error in the admission of evidence having a tendency merely to limit the extent of his recovery will be error without prejudice: *Chambers v. Grout*, 63-342.

395. The admission of unimportant and irrelevant evidence, if without prejudice, will not operate to reverse a case on appeal, though such admission may have been error: *McKenzie v. Kitler*, 27-254; *Curl v. Chicago, R. I. & P. R. Co.*, 63-417.

396. Where immaterial evidence was admitted, in the main without objection, held, that the judgment would not be reversed because an inconsiderable portion thereof was admitted over the party's objection: *Weitz v. Ewen*, 50-34.

397. The admission of immaterial evidence will not constitute reversible error where it does not appear that it did or could have affected prejudicially the rights of appellant: *Walsh v. Aetna L. Ins. Co.*, 30-133.

398. Admission of evidence in a particular case, held error without prejudice: *State v. Mecherter*, 46-88.

399. Error in admitting evidence held cured by a subsequent admission, by the party objecting, of the fact which the evidence tended to prove: *Murray v. Wells*, 57-26.

400. The supreme court will not reverse a case for the rejection of testimony which, if

admitted, could not have changed the verdict: *Robinson v. Keith*, 25-331.

401. The exclusion of a deposition will not be made a ground for reversal, where it appears that it does not tend to prove or disprove any fact in issue between the parties: *Kelly v. Ford*, 4-140.

402. Exclusion of testimony which could not possibly have tended to establish the defense will not be ground for reversal on behalf of defendant: *State v. Hallett*, 63-259.

403. Error in refusing to exclude evidence will not be sufficient ground for reversal where the result must have been the same if the evidence had been excluded: *Brayley v. Ross*, 33-505; *Courtwright v. Strickler*, 37-382; *Jaques v. Sax*, 39-367.

404. A cause will not be reversed for the admission of evidence which does not cast any greater burden upon the opposite party than he would have had without the admission of such evidence: *Barker v. Kuhn*, 38-392.

405. Admission of improper evidence as to a matter which is self-evident or of common observation known to all men, and in accord with such common observation, cannot be considered prejudicial: *State v. Smith*, 46-670; *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50-656.

406. The admission of evidence and giving instructions as to a certain matter, held to be error without prejudice, in view of the fact that the successful party was entitled to recover without regard to such evidence and instructions: *Langford v. Ottumwa Water Power Co.*, 59-283.

407. Where a record shows affirmatively that evidence which was improperly introduced did not influence the result or prejudice the party complaining, the judgment will not be disturbed on appeal: *Amsden v. Dubuque & S. C. R. Co.*, 13-132.

408. Where the supreme court are unable to see that evidence erroneously admitted could have had any effect on the jury prejudicial to the party complaining, the error will not be considered sufficient ground for reversal: *Holt v. Brown*, 63-319.

409. The exclusion of evidence will constitute error without prejudice where the witness is afterwards allowed to testify fully as to the matters called for by the question ob-

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jected to: *Keough v. Scott County*, 28-387; *State v. Geddis*, 42-264; *Allison v. Chicago & N. W. R. Co.*, 42-274; *Ham v. Wisconsin, I. & N. R. Co.*, 61-716; *Reed v. Chicago, R. I. & P. R. Co.*, 57-23.

410. Error in excluding evidence is cured by afterwards admitting it: *Abell v. Cross*, 17-171.

411. So if the witness testifies on cross-examination as to the matters with reference to which his testimony is erroneously excluded on direct examination, the error is cured: *State v. Nelson*, 58-208.

412. Error in allowing the introduction of a portion only of a deposition, held to be error without prejudice in view of the fact that the entire deposition was afterwards introduced: *Bixby v. Carskaddon*, 63-164.

413. The overruling of a motion to suppress a deposition is error without prejudice, where the witness testifies in person on the trial and such testimony is more favorable to the party complaining than that in the deposition: *Curry v. Allen*, 60-387.

414. Judgment will not be reversed for erroneous admission of evidence to establish a fact which is sufficiently established by other and competent evidence: *Ellwood v. Wilson*, 21-523; *McCrary v. Deming*, 88-527; *Le Grand Quarry Co. v. Reichard*, 40-161; *Wallace v. Wallace*, 62-651; *State v. Shelton*, 64-383; *Jackson v. Boyles*, 64-428.

415. Where a deposition was admitted over the objection of the opposite party, and without such deposition there was ample evidence to support the verdict and judgment of the court, held, that the admission of such deposition, if error at all, was error without prejudice: *Stone v. Ballingall*, 41-291.

416. Erroneous admission of evidence will not be ground for reversal where, in view of other evidence properly admitted, and the verdict of the jury, it is clear that the error did not affect the result: *Belair v. Chicago & N. W. R. Co.*, 43-662.

417. A judgment will not be reversed for error in admitting testimony to prove title when the title is subsequently established by competent evidence: *Des Moines v. Casady*, 21-570.

418. Error in rejecting evidence will be deemed to have been without prejudice

where the facts to be proven by such evidence are otherwise fully established: *Lowe v. Lowe*, 40-220; *State v. Woodson*, 41-425; *Hoadly v. Hammond*, 63-599.

419. The exclusion of cumulative evidence as to a fact otherwise fully established will be error without prejudice: *State v. Pratt*, 40-631.

420. Held, that defendant was not prejudiced by the rejection of testimony which had been once introduced and was again offered to the jury: *Smith v. Howard*, 23-51.

421. So where immaterial evidence was allowed as to the measure of damages, but it appeared from the nature of the verdict that no prejudice could have resulted from its admission, held, that the cause would not be reversed on account of such mere abstract error: *Hubbard v. Mason City*, 60-400.

422. Where the jury has failed to allow exemplary damages, any error in the admission of evidence as to malice will be error without prejudice: *Brown v. Hendrickson*, 69-749.

423. The admission of evidence upon a prosecution for murder, tending to show malice and deliberation, held error without prejudice in view of the fact that defendant was convicted only of manslaughter: *State v. Middleham*, 62-150.

424. Where a witness, in a prosecution for assault with intent to commit murder, gave evidence tending to show malice, and a cross-question to such witness by defendant's counsel was overruled, held, that as defendant was convicted only of assault and battery, the error, if any, was without prejudice: *State v. Graham*, 51-72.

425. A cause will not be reversed on appeal upon the ground that the evidence is not admitted in the proper order or for the reason that a fact which should be proved in the first instance by one party is established by the testimony of the other: *Cook Mfg Co. v. Randall*, 62-244.

426. Where the record does not show what evidence was admitted or excluded, the court cannot determine whether appellant was prejudiced by any ruling of the court in reference thereto: *Lucas v. Jones*, 44-298.

427. If, in answer to an improper question, matter is elicited not responsive thereto, the error of the court in overruling an ob-

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jection to the question will not justify a reversal on the ground of prejudice from the part of the answer not responsive to the question. In such case the court should be asked to strike out the irresponsive matter: *Hatfield v. Chicago, R. I. & P. R. Co.*, 61-434.

428. A verdict will not be set aside because in conflict with evidence which is irrelevant and immaterial, even though admitted without objection: *Scott v. Morse*, 54-732.

429. A cause will not be reversed on the ground that an objection to an improper question has been overruled, if the question itself was not followed by an improper answer: *State v. Groom*, 10-303.

Error in ruling upon objections to evidence will be deemed to be without prejudice, unless it appears that the questions were answered, and that such answers were prejudicial, or that if improperly excluded the evidence would have been material: See *supra*, §§ 244-258.

430. Error in the admission of improper evidence is error without prejudice if the court plainly directs the jury to disregard such evidence: *Cook v. Robinson*, 42-474. And see, further, INSTRUCTIONS, §§ 255-261.

431. Error without prejudice in giving instructions: A case will not be reversed for the giving of an erroneous instruction which could not have worked any prejudice to the complaining party: *McKay v. Leonard*, 17-366; *Clagett v. Conlee*, 16-487; *Ocheltree v. Carl*, 23-394; *Hunt v. Chicago & N. W. R. Co.*, 26-363; *Horr v. Reed*, 20-591; *Thompson v. Blanchard*, 2-44; *Blackburn v. Powers*, 40-681; *State v. Hart*, 67-142.

432. The giving of an irrelevant instruction will be considered error without prejudice where it could not have been detrimental to the party complaining: *Sullivan v. Finn*, 4 G. Gr., 544.

433. Where the result could not have been different if erroneous instructions which were given by the court had not been given, the giving of such instructions will be deemed error without prejudice: *Farwell v. Salpaugh*, 32-582.

434. The failure to give a correct instruction will not be reversible error, if, even had the instruction been given, the result must have been the same, and any other verdict

would properly have been set aside: *Cedar Falls & M. R. Co. v. Rich*, 33-113; *Olson v. Neal*, 63-214.

435. The refusal to give a correct instruction as to a matter properly before the jury will be error without prejudice if the jury specially find that the facts on which the instruction was founded did not exist: *Martin v. Algona*, 40-390; *Clinton Nat. Bank v. Graves*, 48-228.

436. While instructions should apply to the facts proved, yet, although they have no such application if they could have no effect upon the verdict, they will afford no ground for reversal, however erroneous; but if erroneous, and it appears that they could have had an influence prejudicial to the interests of the excepting party, the judgment will be reversed: *McGregor v. Armill*, 2-30.

437. The giving of an erroneous instruction which, under the testimony, could work no prejudice to the party complaining, will not be regarded as reversible error: *First Nat. Bank v. Brees*, 39-640.

438. Where it is clear from the verdict that the jury have not been misled by an erroneous instruction, the giving thereof will not be ground for reversal: *Gwinn v. Crawford*, 42-63; *Peake v. Conlan*, 43-297.

439. In a particular case, held, that while an instruction was improper for the reason that there was no evidence to support it, the giving of it was, under the circumstances, error without prejudice: *Parkhurst v. Masteller*, 57-474.

440. Error in giving an instruction will be error without prejudice where the verdict of the jury is in favor of the person complaining: *Dunham v. Dennis*, 9-543.

441. Where an erroneous instruction as to a particular matter is given, but from the verdict it is apparent that the jury have adopted a view of the case which renders such matter immaterial, the error will be considered as without prejudice: *Hall v. Stewart*, 58-681; *Hall v. Ballou*, 58-585.

442. Error in the giving of an instruction will be without prejudice where it appears that the jury have made such a finding upon the facts that such instruction can have had no influence upon the result: *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 61-175; *Lathrop v. Central Iowa R. Co.*, 69-105.

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443. Where an instruction in stating the liability of defendant fails to notice a limitation on that liability, but the evidence clearly shows the non-existence of such limitation, the error in failing to state the limitation will be deemed to be without prejudice: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

444. Where instructions were given as to the right of plaintiff to recover exemplary damages, which were claimed to be erroneous, *held*, that as, under the circumstances, plaintiff was not entitled to actual damages, the instruction was, if erroneous, error without prejudice: *Myers v. Wright*, 44-38.

445. Where the verdict necessarily implies the finding of every fact as established which under the law is required to establish right to recovery, there is no ground to set aside the verdict, even though under the instructions plaintiff was required to prove in addition, as a condition of his right to recover, another fact which was not essential: *Tuck v. Singer Mfg Co.*, 67-576.

446. Error in general instructions to the jury as to matters of law will be deemed error without prejudice where the verdict of the jury is special, having no connection or relation whatever with any principle of law: *Wilkinson v. Connecticut Mut. L. Ins. Co.*, 30-119.

447. Where the jury has, by special findings, determined every fact necessary to authorize judgment, error in giving or refusing instructions as to the legal conclusions to be drawn from such facts will constitute error without prejudice: *Boals v. George*, 30-601.

448. It is not error to refuse instructions asked which are substantially given in the charge of the court: *Wilhelm v. Fimple*, 31-131. And see INSTRUCTIONS, II.

449. A party cannot claim that he has been prejudiced by the failure to instruct at his request as to what his rights would have been under a condition of things which the verdict shows conclusively did not exist: *Wilhelm v. Fimple*, 31-131.

450. Judgment will not be reversed because of an erroneous instruction given by the court below when the controlling question in the case was fairly left to the jury,

and correctly decided by them: *Bondurant v. Crawford*, 22-40.

451. If a party complains of erroneous instructions he must not only show the error, but that it resulted to his prejudice, and for that purpose it must appear that judgment was rendered against him: *Shannon v. Scott*, 40-629.

452. Where it is evident that improper instructions could have reasonably misled the jury to appellant's prejudice, the court will reverse the case and order a new trial, but not so where the prejudice is not manifest: *Eyser v. Weissgerber*, 2-463.

453. The giving of an erroneous instruction *held* not to be error without prejudice in a particular case: *Kendig v. Overhulser*, 58-195.

As to what the record must contain in order to authorize the court to pass upon errors in instructions, see *supra*, §§ 259-270.

c. Action of lower court in granting or refusing new trial.

In general, as to granting or refusing new trials, see NEW TRIALS.

454. Discretion not interfered with: A motion for a new trial is addressed to the sound discretion of the court, and such discretion will not be interfered with, on appeal, unless it is manifest that it has been improperly exercised: *Freeman v. Rich*, 1-504; *Ruble v. McDonald*, 7-90; *Pickering v. Kirkpatrick*, 32-163.

455. The discretion of the lower court in granting or refusing a new trial will not be interfered with upon light grounds or for trivial causes: *Langworthy v. Meyers*, 4-18.

456. Such discretion should not be controlled except in a clear case of abuse: *New York Piano Forte Co. v. Mueller*, 38-552.

457. Although an erroneous decision of the lower court on an application for a new trial may be made a ground for review and correction on appeal, yet a strong case must be presented to authorize the interposition of the supreme court: *Brazelton v. Jenkins*, Mor., 15.

458. A wide latitude is given to the discretion of the lower court in granting or refusing new trials, and this discretion will not be interfered with except where palpable

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injustice has resulted to the party making the application, which injustice must be made manifest: *Hendricks v. Wallis*, 7-224.

459. The action of the court in sustaining a motion for a new trial rests largely in its own discretion, which cannot be interfered with unless an error plainly appears. The supreme court is inclined to support rulings granting a new trial rather than subject them to close and critical examination: *Donahue v. Lannan*, 70—.

460. The presumption is in favor of the ruling of the trial court on a motion for new trial: *Conklin v. Dubuque*, 54-571; *Johnson v. Chicago, R. I. & P. R. Co.*, 58-348; *Hill v. Densinger*, 61-240.

461. Where new trial is refused; sufficiency of evidence: The supreme court must be fully satisfied that the discretion of the court below has been improperly exercised in refusing a new trial, before it will disturb such ruling and pass upon the insufficiency of the testimony: *Freeman v. Rich*, 1-504.

462. The supreme court will not, on appeal from the action of the trial court in refusing a new trial, consider the weight of the testimony: *Lloyd v. McClure*, 2 G. Gr., 139.

As to sufficiency of evidence to support the verdict in criminal cases, see CRIMINAL LAW, §§ 1677-1683.

463. Conflict in evidence: The action of the lower court, in overruling a motion for a new trial based on the ground that the verdict is against the evidence, will not be interfered with, on appeal, if the conflict in the testimony is great, and its weight is not clearly against the verdict: *Ackley v. Berkey*, 22-226.

464. Where there is a conflict in the evidence, the action of the court below in overruling a motion for a new trial will not be disturbed, on appeal, unless a clear case of abuse of discretion is made to appear: *Hubbell v. Ream*, 31-289.

465. Where there is a conflict in the evidence, the supreme court will not interfere with the action of the lower court in refusing to set aside the verdict on the ground that it is not supported by the evidence: *Chambers v. Brown*, 69-218.

466. Where the evidence is conflicting, and the court below, which heard the evidence, with full opportunity for observing

the manner and appearance of the witnesses, has overruled a motion for a new trial on the ground that it is not supported by the evidence, the supreme court will not interfere: *Snyder v. Eldredge*, 31-129; *Mahaney v. Bell*, 42-883.

467. The discretion of the trial court in overruling a motion for a new trial on the ground that the verdict is contrary to the evidence will not be reversed where there is a conflict in the testimony: *Russ v. Steamboat War Eagle*, 14-363; *Brockman v. Berryhill*, 16-183; *Burlington Gas Light Co. v. Green*, 22-508; *Pierce v. Walker*, 23-424; *McCabe v. Knapp*, 23-308; *Callanan v. Shaw*, 24-441; *Schrimer v. Heilman*, 24-505; *Hull v. Alexander*, 26-569; *Sherman v. Western Stage Co.*, 24-515, 554; *Garland v. Wholeham*, 26-185; *Todd v. Branner*, 30-439; *Snyder v. Nelson*, 31-238; *Bergert v. Davenport City R. Co.*, 34-571.

468. Verdict against manifest justice: When the court conscientiously believes that a verdict is against the truth or the weight of the submitted evidence, a new trial should unhesitatingly be ordered; but to justify such inference the mind should be brought irresistibly to the conclusion that the verdict was not the result of a free, sound and unbiased exercise of judgment on the part of the jury, and that manifest injustice would result if the verdict is permitted to stand: *McKay v. Thorington*, 15-25.

469. Whenever a verdict is clearly, not doubtfully, against the manifest justice of the case, it is the duty of the trial judge unhesitatingly to set it aside; but where there is a conflict of evidence, and the jury, being clearly charged as to the law, have found a verdict which the trial court has refused to set aside, the supreme court will not interfere: *Smith v. Williams*, 23-28.

470. Manifest error: The error in overruling a motion for new trial must be clearly manifest to warrant a reversal: *Bellamy v. Doud*, 11-285.

471. Verdict against immaterial evidence: To justify the granting of a new trial on the ground that the verdict is against the weight of the evidence, such want of evidence must relate to a material issue legitimately raised by the pleadings. The refusal of the lower court to grant a new trial when the

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objection is that the verdict is contrary to immaterial evidence, though admitted without objection, will not be reversed or disturbed on appeal: *Parker v. Hendrie*, 8-263; *Scott v. Morse*, 54-732.

472. Verdict supported by evidence: It is not the province of the supreme court to overrule both the jury and the lower court in a conclusion reached by them as between conflicting evidence: *Sloan v. Central Iowa R. Co.*, 62-728.

473. Where the verdict finds support in the evidence the supreme court will not reverse the action of the court below in refusing to grant a new trial, although it believes that the preponderance of evidence is the other way: *Johnson v. Chicago, R. I. & P. R. Co.*, 58-348.

474. Excessive verdict: The court below, having a full opportunity of understanding whether the verdict is excessive, should fearlessly assume the responsibility of setting it aside on that ground, but the supreme court will be very reluctant to disturb verdicts in this respect: *Bower v. Burlington & S. W. R. Co.*, 42-546.

475. Where, in an action for personal injuries, the jury has rendered a verdict which the court below has refused to set aside as excessive, the supreme court will not, ordinarily, interfere: *Brown v. Jefferson County*, 16-339.

As to remitting amount deemed excessive, see *infra*, §§ 956-972.

476. What the record must show: The supreme court cannot undertake to say that the lower court has abused its discretion, either in granting or refusing a new trial, unless the whole case is presented to it by the record: *Barker v. Brown*, 15-70.

And see *supra*, IV, 3.

477. Action of lower court overruled: If the verdict is clearly in conflict with the evidence, and works manifest injustice, the refusal of the trial court to grant a new trial may be overruled on appeal: *Sadler v. Bean*, 38-684.

478. Where there is no doubt as to the incorrectness of the verdict, the supreme court will grant relief therefrom by overruling the action of the lower court in refusing a new trial: *Martin v. Orndorff*, 20-217.

479. Where material findings of fact in a special verdict are wholly unsupported by the evidence, and the court below has overruled a motion for new trial, the supreme court will reverse the judgment: *McCarty v. James*, 62-257.

480. Where it clearly appears that the verdict is in conflict with the evidence, the supreme court will, on appeal, reverse the decision of the trial court in overruling a motion for a new trial based on that ground: *Lester v. Sallack*, 31-477.

481. Passion or prejudice: But such decision will not be disturbed unless so barren of support as to warrant the finding that it was the result of passion or prejudice: *Schermer v. Gendt*, 52-742.

482. Verdict not the result of free and unbiased judgment: Where the mind is brought inevitably to the conclusion that the verdict was not the result of a free, honest, and unbiased exercise of judgment on the testimony submitted, and that manifest injustice will result if judgment is rendered thereon, the court below should grant a new trial; and where such a case is made clearly apparent to the supreme court, a new trial will be ordered, though refused by the court below: *Jourdan v. Reed*, 1-135; *Fawcett v. Woods*, 5-400; *Byington v. Woodward*, 9-360.

483. Discretion subject to review: The discretion of the court in granting or overruling a motion for new trial is a legal one, and must be exercised according to the rules of law: *Stewart v. Burlington & M. R. R. Co.*, 11-62; *Stockwell v. Chicago, C. & D. R. Co.*, 43-470.

484. An error of the court in granting or refusing a new trial on a legal proposition is reviewable on appeal with no more presumption in its favor than a ruling made in any other stage of the case: *Byington v. Woodward*, 9-360.

485. Where the court below, in granting or refusing a new trial, misstates a legal proposition, it is as much the subject of revision as any other question. In such cases the granting or refusing the motion is not a question of discretion, but is to be determined upon the law applicable to the case: *Stewart v. Ewbank*, 3-191; *Riley v. Monohan*, 26-507.

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486. While in most cases the question of the granting of a new trial is within the sound discretion of the trial court, and such discretion will not be interfered with, yet, if the grounds for a new trial appear of record and come within the well recognized rules of law, the action of the court in refusing a new trial may be reversed: *Jones v. Fennimore*, 1 G. Gr., 134; *Shaw v. Sweeney*, 2 G. Gr., 587; *Humphreys v. Hoyt*, 4 G. Gr., 245; *In re Will of Coffman*, 12-491.

487. Other grounds for new trial: Where the ground for new trial is accident or surprise, or that injustice has been done, the trial court is vested with a large discretion which will not be interfered with on appeal unless the error affirmatively appears: *Hill v. Denzlinger*, 61-240.

488. The action of a trial court in passing upon misconduct of counsel as a ground for new trial will be sustained on appeal unless it clearly appears to have been erroneous: *Sunberg v. Babcock*, 66-515.

489. Whether a new trial should be granted for misconduct of the jury is left largely to the sound discretion of the trial court, which is in a much better position to determine whether the rights of the parties have been affected by such misconduct than the supreme court can be, and if the lower court has determined that there should be another trial on that ground, its discretion will not be interfered with unless it is made to appear very clearly that there has been an abuse of discretion: *Perry v. Cottingham*, 68-41.

490. Where, upon the allegations of misconduct of the jury made as a ground for a new trial, there is a conflict in the evidence, the finding of the court in ruling upon such motion must have the same force as its finding upon any other question of fact arising in an action at law: *Watson v. Stotts*, 68-659.

491. The supreme court will not interfere with the action of the court below in refusing to grant a new trial on the ground of misconduct of the jury where there is a conflict in the evidence as to the nature of such misconduct: *Todd v. Branner*, 30-439.

492. A new trial will not be granted on appeal when a witness has given material evidence without being sworn, unless it be shown that the party complaining, or his

attorney, did not know of the fact until after the verdict: *Riley v. Monohan*, 26-507.

493. Where new trial is granted: An order granting a new trial may be reviewed: *Stewart v. Eubank*, 8-191; *Cook v. Sypher*, 8-484; *Newell v. Sanford*, 10-396.

494. But the supreme court will exercise a presumption in favor of the correctness of the ruling of the court below, and will not interfere with an order granting a new trial where it does not affirmatively appear that the action is erroneous: *Boardman v. Chicago & N. W. R. Co.*, 32-391.

495. It is a constant practice in the supreme court to refuse to disturb the action of the court below when a new trial is granted, although the ruling of the lower court would also have been upheld if the new trial had been refused: *Ibid.*; *McKay v. Thorington*, 15-25.

496. When the trial court determines that the verdict is contrary to the evidence, and ought to be set aside on that ground, the case must be a very clear one to warrant an appellate court in interfering with its action: *Moran v. Harris*, 68-390.

497. Where the trial judge has determined that the fair administration of the law demands that a new trial should be granted for any cause which the law recognizes as a ground for a new trial, his action will be interfered with on appeal only when it is shown that he has abused the discretion with which the law vests him: *Rogers v. Winch*, 65-168.

498. The action of the court in setting aside a verdict and granting a new trial will not be interfered with where it does not appear that the discretion reposed in the trial court has been abused or erroneously exercised: *Laverenz v. Chicago, R. I. & P. R. Co.*, 58-321.

499. Where it appears that the court below, with a full knowledge of all the circumstances transpiring at the trial, has ordered a new trial, the supreme court will not interfere therewith unless error in the action of the court is made affirmatively to appear: *Finley v. David*, 7-3.

500. The supreme court seldom interferes with a ruling of the court below in granting a new trial, and would not be justified in doing so except in a clear case: *Lytton v. Chicago, R. I. & P. R. Co.*, 69-338.

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501. A stronger case should be made to justify the interposition of the supreme court when a new trial has been granted, than where it has been refused: *Ruble v. McDonald*, 7-90; *Newell v. Sandford*, 10-396; *Shepherd v. Brenton*, 15-84; *Burlington Gas Light Co. v. Green*, 21-335; *Chapman v. Wilkinson*, 22-541; *White v. Poorman*, 24-108; *Roberts v. Jones*, 30-525; *Forney v. Ralls*, 30-559; *Pickering v. Kirkpatrick*, 32-163; *Boardman v. Chicago & N. W. R. Co.*, 32-391; *Tegeler v. Jones*, 33-234; *New York Pidno Forte Co. v. Mueller*, 38-552; *Howell v. Snyder*, 39-610; *Conklin v. Dubuque*, 54-571.

502. Where the trial court has set aside the verdict and granted a new trial, the supreme court will not be inclined to set aside the ruling on appeal: *Robinson v. Bacon*, 24-409.

503. Where a court grants a new trial on the ground that the jury were confused and misled by the instructions, the supreme court will not interfere: *Reeves v. Royal*, 2 G. Gr., 451.

504. An order granting a motion for a new trial will not be disturbed on appeal when the grounds alleged are fairly supported and there is nothing to show abuse of discretion: *Sanders v. Clark*, 22-275.

505. While it is true that a stronger showing should be made to justify an interposition of the supreme court when a new trial has been granted than when refused, yet, where the court in ordering a new trial misapplies a legal proposition, such ruling should be reviewed where made upon motion for new trial, the same as upon the ruling on any other legal question, and in so doing the discretion of the trial court as to granting new trials is not interfered with: *Mehan v. Chicago, R. I. & P. R. Co.*, 55-805.

506. No discretion is reposed in the court in determining whether or not evidence which is relied on to entitle the party to a new trial on the ground of newly-discovered evidence, is cumulative, and a ruling of the court in granting a new trial upon the showing as to such evidence will be reviewed as readily as though the court had refused to grant the new trial: *Manson v. Ware*, 63-345.

507. If the verdict is contrary to instructions, and the lower court has granted a new

trial on that ground, its action will not be disturbed on appeal, nor the instructions given be reviewed. It is the duty of the jury to regard the instructions as the law, and find a verdict accordingly, whether they be right or wrong: *Caffrey v. Groome*, 10-548; *Savery v. Busick*, 11-487; *Jewett v. Smart*, 11-505; *Taylor v. Cook*, 14-501; *Porter v. Thomson*, 22-391.

508. Where, under the evidence, it is apparent that the jury has disregarded an instruction of the court, the supreme court will reverse the action of the lower court in failing to set aside the verdict and grant a new trial on that ground: *Nichols v. Chicago, R. I. & P. R. Co.*, 69-154.

And further as to duty of jury to follow the instructions, see INSTRUCTIONS, III, e.

509. The action of the lower court in setting aside a verdict will not, in general, be interfered with on appeal on the ground that it is not sustained by the evidence: *Engs v. Priest*, 65-232.

510. Abuse of discretion must appear: Where a new trial is granted by the lower court on the ground that the verdict is not sufficiently supported by the evidence, the action of such court in determining such question will not be disturbed on appeal unless it appears that there has been an abuse of discretion in such ruling: *Hill v. Denslinger*, 61-240; *Stewart v. Dunlap*, 61-248; *Conklin v. Dubuque*, 54-571; *Pickering v. Kirkpatrick*, 32-163; *Able v. Frazier*, 43-175; *McNair v. McComber*, 15-368.

511. And where the verdict has been set aside by the court below as not supported by the evidence, and a new trial granted, it will require a stronger showing to warrant the interference of the appellate court than when a new trial asked on similar grounds has been refused: *Jenkins v. Chicago & N. W. R. Co.*, 32-97.

512. Action of the court in sustaining a motion for new trial on the ground of surprise will not be reversed unless the supreme court is well satisfied that such discretion has been abused: *Schumaker v. Gelpcke*, 11-84.

513. Conclusive preponderance of evidence: To authorize the reversal of the decision of the court below setting aside a verdict on account of insufficiency of evidence, there should appear such conclusive pre-

New trial.—Verdict of jury.

ponderance of evidence in its support as would show that injustice would be done: *Worthington v. Olden*, 81-419; *Burlington Gas Light Co. v. Green*, 21-335.

514. The case must be very clear to warrant the appellate court in interfering with the action of the trial court in setting aside a verdict as contrary to the evidence: *Moran v. Harris*, 63-390.

515. Error and abuse of discretion must be made to appear to justify a reversal of such action of the lower court: *Brett v. Bassett*, 63-340.

516. Excessive damages: The supreme court will hesitate long before interfering with the action of the trial court in setting aside a verdict on the ground that the damages found by the jury are excessive and appear to have been given under the influence of passion and prejudice: *White v. Beck*, 64-122.

517. Weight of evidence; manifest injustice: While there is no question as to the right of the supreme court to set aside a verdict and award a new trial when the verdict is against the weight of evidence or the truth of the case, yet, to justify such interference, the mind should be brought irresistibly to the conclusion that the verdict was not the result of a free, sound and unbiased exercise of judgment on the part of the jury, and that manifest injustice would result if the verdict should be permitted to stand: *McKay v. Thorington*, 15-25.

518. Mistake as to legal proposition: The discretion with which the court is clothed as to granting a new trial is a legal discretion, and its exercise must accord with the rules of law. If a new trial is granted upon insufficient cause, or for reasons in conflict with the law, such action will be regarded as an abuse of the discretion of the court, and will be reversed on appeal with the same freedom as if made at any other stage of the trial: *Ruble v. McDonald*, 7-90; *Shepherd v. Brenton*, 15-84; *Stockwell v. Chicago, C. & D. R. Co.*, 43-470.

519. Although it will require a stronger case to warrant the supreme court in reversing the action of the court below where a new trial has been granted than where it has been refused, yet, if the evidence is clearly and explicitly supported by the ver-

dict, the action of the lower court in granting a new trial may be reversed: *Cedar Falls & M. R. Co. v. Rich*, 83-113.

520. Concurring verdicts: Where several trials have resulted in the same verdict and the trial court has refused to set the last one aside as against the evidence, it would require a very strong case to justify an interference by the appellate court: *Burlington Gas Light Co. v. Greene*, 28-289; *Russ v. Steamboat War Eagle*, 14-363; *Terpenning v. Gallup*, 8-74; *Hollenbeck v. Marshalltown*, 62-21.

521. Where concurring verdicts have been rendered and the last one is allowed to stand by the trial court, this fact will authorize the presumption on the part of the supreme court that another trial would result in the same way: *Penn v. McLaughlin*, 36-538.

522. However, a second verdict concurring with the previous one which has been set aside as against the evidence, by no means concludes the court from again granting a new trial, and especially when the second application is based upon a different ground from that contained in the first: *Jourdan v. Reed*, 1-135.

523. Where a verdict was set aside because one juror had not concurred therein, and upon a subsequent trial the same verdict was rendered, *held*, that the fact that the result had been concurred in by twenty-three jurors would have much weight in sustaining the action of the court below in refusing to grant a new trial on the ground that the verdict was contrary to the evidence: *State v. Cross*, 12-66.

d. Verdict of jury.

524. Not interfered with if supported by evidence: The supreme court will not on appeal disturb the verdict of the jury as against the evidence on a question of fact, if there is any evidence to support it: *Harger v. Spofford*, 46-11; *Cole v. Coskery*, 63-526; *Witter v. Little*, 66-431.

525. To warrant a reversal on that ground the verdict must be clearly against the weight of evidence: *Booth v. Small*, 25-177; *Harper v. Madren*, 21-407; *Ayres v. Hartford Ins. Co.*, 21-193.

526. To justify the interference of the supreme court with the verdict of the jury on the ground that it is contrary to the evi-

Verdict of jury.

dence, it must appear that it is clearly and manifestly unsustained by the evidence: *Starker v. Luse*, 33-595.

527. The supreme court interferes very reluctantly with the verdict of a jury, and never unless it is clearly unsupported by the evidence or has been otherwise improperly reached: *Miller v. Mutual Benefit L. Ins. Co.*, 39-304.

528. In particular cases, *held*, that the verdict was not so lacking in support as to warrant a reversal: *Royal v. Smith*, 40-615; *Smith v. Wagaman*, 58-11; *Manning v. Meredith*, 69-480.

529. Where the court instructed the jury that to warrant a verdict on a particular issue in behalf of one of the parties, the evidence must be clear, satisfactory and conclusive in his favor, and a verdict was rendered for such party on such issue, *held*, that the supreme court would not on appeal set aside such verdict on the ground that the evidence was conflicting, if it appeared that the jury might, without bias or prejudice, have concluded that in their minds the evidence was of such a character: *Hoadley v. Hammond*, 63-599.

530. Where the evidence is conflicting the supreme court will not set aside the verdict on the ground that it is not supported by the evidence: *Hall v. Hunter*, 4 G. Gr., 539; *Pilmer v. Branch of State Bank*, 19-112; *Jones v. Jones*, 19-236; *Eason v. Webster*, 20-591; *Reeves v. Reeves*, 20-597; *Ellwood v. Wilson*, 21-523; *Law v. Illinois Cent. R. Co.*, 32-534; *Maxon v. Chicago, M. & St. P. R. Co.*, 67-226.

531. Where there is a conflict in the evidence and the verdict is not palpably against the weight of evidence, the appellate court will not interfere: *Crabtree v. Messersmith*, 19-179.

532. Where the determination of a question upon the evidence involves the credibility of contradictory witnesses, it is a matter peculiarly for the jury: *Peck v. Hendershott*, 14-40.

533. The rule that the supreme court will not on appeal interfere with the verdict of the jury when there is a clear conflict in the evidence, is applicable in criminal as well as civil cases: *State v. Falconer*, 70—.

534. **Honest and unbiased judgment of jury:** Where there is a conflict in the evi-

dence, the supreme court will not on appeal interfere with the verdict of a jury unless it is well satisfied of the insufficiency of the evidence to convince the reason, conscience and judgment of the triers: *Todd v. Braner*, 30-439.

535. Unless there is some foundation for the conclusion that the findings of the jury are not the result of honest, intelligent and unbiased judgment on their part, the supreme court will not disturb their verdict: *Martin v. Algona*, 40-390.

536. **Preponderance not controlling:** Where there is a mere conflict in the evidence, even though it strongly preponderates against the verdict, and there is a conviction in the minds of the supreme court that a different result would more nearly accord with justice, these facts are not sufficient to justify it in directing a new trial: *Garretty v. Brazell*, 34-100.

537. Where the evidence is conflicting the supreme court will not set aside the verdict of a jury, although they might have been better satisfied upon the evidence with a different result: *White v. Clark*, 39-333; *Starker v. Luse*, 33-595.

538. And this will be true even if the supreme court is clearly of the opinion that if it had been called to pass upon the evidence it would have reached a different conclusion from that reached by the jury: *Hyde v. Lookabill*, 66-453.

539. A strong preponderance of evidence against the verdict, and a conviction that a different result would more nearly accord with justice, are not sufficient to justify the supreme court in ordering a new trial, where they are not satisfied from the absence of evidence to support a verdict that it was not the result of a free, honest, unbiased and intelligent exercise of judgment and conscience on the part of the jury, and that justice will fail if the verdict is not set aside: *Garretty v. Brazell*, 34-100; *Parker v. Dubuque S. W. R. Co.*, 34-399; *Myers v. Dresden*, 40-660; *Allison v. Chicago & N. W. R. Co.*, 42-274.

540. **Question of negligence:** If the conclusion of negligence can be, by the jury, reasonably drawn from the circumstances, such conclusion will not be interfered with on appeal, although the opposite conclusion ap-

Verdict of jury.

pears to the court to be the more reasonable; but if the general result appears to be wrong, and the jury, as appears from their special findings, are unable to assign any certain or tangible ground for their conclusion, the court should interfere: *Ford v. Central Iowa R. Co.*, 69-627.

541. Question of fraud: It being the peculiar province of the jury to determine questions of fraud in fact, when alleged, the supreme court will not, on appeal, interfere with a judgment on the verdict in a case involving fraud, where it does not appear that the jurors could not, in the exercise of their unbiased and intelligent discretion, have properly found as they did: *Votaw v. Diehl*, 62-676.

542. Where the question is as to whether a transaction was fraudulent, the supreme court will not interfere with the verdict of the jury, who had the opportunity to see the witnesses and judge of their credibility, unless the evidence is so against the verdict as to raise a presumption of passion or prejudice on part of the jury: *Enneking v. Scholtz*, 69-473.

543. Passion or prejudice must appear: Where there is a conflict in the evidence the supreme court will not set aside a verdict unless it appears that it is the result of passion or prejudice: *Melhop v. Doan*, 36-630; *Moore v. Moore*, 39-461; *First Nat. Bank v. Charter Oak Ins. Co.*, 40-572; *Hall v. Ballou*, 58-585; *French v. Reel*, 70—; *Gibson v. Fischer*, 68-29.

544. To authorize a reversal on the ground that the verdict is against the evidence there must be such failure of proof as to raise the presumption that it was the result of passion or prejudice and not of an intelligent and honest exercise of discretion by the jury: *McCormicks v. Fuller*, 56-43.

545. Verdict set aside: It is with reluctance and caution that an appellate court interferes with the verdicts of juries. Where there is reasonable doubt, or a conflict of evidence, the verdict will be upheld; but if there is no such doubt or conflict, the duty to set aside the verdict is plain; and in the case under consideration the verdict was set aside: *McAunich v. Mississippi & M. R. Co.*, 20-388.

546. And in particular cases, held, that the verdict was so clearly contrary to the evi-

dence that the judgment upon such verdict should be reversed: *Martin v. Orndorff*, 20-217; *Lester v. Sallack*, 31-477; *Miller v. Mutual Benefit Ins. Co.*, 34-222.

547. Where there is an entire want of evidence to support or establish a fact essential to the verdict, a judgment based upon such verdict will be reversed on appeal: *Carlin v. Chicago, R. I. & P. R. Co.*, 37-816.

548. If the verdict is clearly unsupported by the evidence and appears to have been the result of passion or prejudice, the supreme court will not hesitate to reverse on that ground: *Woodward v. Squires*, 39-435.

549. The supreme court will reverse the case where, under the law as given the jury by the court, the verdict is contrary to the undisputed evidence: *Eckerd v. Chicago & N. W. R. Co.*, 70—.

550. Excessive verdict: A judgment will not be interfered with as excessive where it is within the province of the jury to determine under all the circumstances the amount that plaintiff is entitled to recover, as for instance where exemplary damages are allowable: *Dynes v. Robinson*, 11-187.

551. It is the province of the supreme court on appeal to set aside a verdict which is excessive and remand the case for trial by another jury. The court will, however, usually not make an absolute order remanding the case for another trial in such cases, but will allow plaintiff to elect whether he will take another trial or accept a certain amount which would not seem to the court to be open to the objection of being excessive: *Cooper v. Mills County*, 69-350.

And further as to remitting excess, see *infra*, §§ 956-972.

552. Verdict contrary to instructions: A verdict in conflict with the instructions will be set aside on appeal without regard to their correctness. The instructions are the law of the case for the jury: *Sullivan v. Otis*, 39-828; *Morss v. Johnson*, 38-430; *Cobb v. Illinois Cent. R. Co.*, 38-601; *Farley v. Budd*, 14-289; *Browne v. Hickie*, 68-330.

And see further, on this point, INSTRUCTIONS, III, e.

553. If instructions are conflicting the verdict will not be set aside if in harmony with the correct instructions: *Cobb v. Illinois Cent. R. Co.*, 38-601.

Finding of facts by court.

e. *Finding of facts by court.*

554. **Presumption in favor of:** The finding of facts by the lower court in a trial before it has the same presumption in its favor in the supreme court upon appeal as are entertained in favor of the verdict of a jury: *State v. Haskell*, 20-276; *Mallory v. Luscombe*, 81-269; *Hambell v. O'Neal*, 89-562; *Clark v. Reynolds*, 46-674.

555. Where an action by ordinary proceedings is tried by the court without a jury, the supreme court will not try the case anew on appeal, and will not interfere on account of the insufficiency of the evidence to sustain the findings of the lower court, except where the circumstances are such as would warrant the setting aside of the verdict of a jury: *Dove v. Independent School Dist.*, 41-689.

556. In all actions or special proceedings not triable *de novo* on appeal, the finding of the lower court upon questions of fact stands as the verdict of a jury and will not be disturbed on appeal unless clearly unsupported by the evidence: *Hamilton v. Iowa City Nat. Bank*, 40-307; *Sisters of Visitation v. Glass*, 45-154; *Knox v. Hanlon*, 48-252; *Smith v. Walker*, 49-289; *In re Will of Donnelly*, 68-126.

557. The findings of fact by the court must be clearly and manifestly unsustained by the evidence to justify the appellate court in granting a new trial on this ground: *Berryhill v. Jones*, 35-335; *Fouts v. Pierce*, 64-71.

558. To authorize a reversal in such case there must be such want of testimony in support of the findings of the lower court as to raise the presumption that the finding is not the unprejudiced and honest exercise of the discretion of the court: *Vogel v. Wadsworth*, 48-28; *Root v. Gay*, 64-399; *Woodman v. Dutton*, 57-442; *Ross v. McQuiston*, 45-145.

559. Practically there can be but two modes of trial in the supreme court. One is *de novo*, which obtains in equity cases, and the other is the one which has uniformly prevailed in actions at law, which is that, unless satisfied that the verdict or finding of the court is the result of passion or prejudice, the supreme court will not interfere: *Gibson v. Fischer*, 68-29.

560. In passing upon the question whether the finding of the court below is supported

by the evidence, the supreme court can only inquire whether there was evidence upon which the court below, in the honest and intelligent exercise of discretion, could have rendered such a finding. The finding of the lower court is in this respect regarded as the verdict of the jury: *Goldsmith v. Wilson*, 68-685.

561. **Conflicting evidence:** A finding of facts by the lower court will not be disturbed on account of insufficiency of the evidence to support it, where the evidence is conflicting: *Harris v. Heackman*, 62-411; *In re Railsback's Heirs*, 54-459; *Hallam v. Haywood*, 21-398; *McIntosh v. Livingston*, 41-219; *Watkins v. Swiggett*, 41-684; *Perry v. Cottingham*, 63-41.

562. Every presumption is in favor of the finding of the court below on the evidence, and such a finding will not be disturbed on appeal unless it clearly appears that it is not sustained by the testimony: *Brainard v. Van Kuran*, 22-261.

563. Unless it appears that a finding of facts by the court below is so manifestly against the evidence as to demand a reversal, the supreme court will not interfere with such finding, although if trying the case for itself it might have reached a different conclusion: *Williams v. Brown*, 45-102; *Starker v. Luse*, 38-595.

564. It is only when the finding of facts by the lower court is clearly and manifestly in conflict with the evidence that the appellate court is warranted in interfering therewith: *Ruble v. Atkins*, 39-694.

565. The supreme court will not, in a law case, reverse the judgment of the court below based upon a finding of facts, if there is any evidence upon which such finding can be sustained: *Leighton v. Orr*, 44-679.

566. It is only where the finding evinces passion or prejudice, and cannot be supported under any reasonable view which may be taken of the evidence, that it should be set aside on appeal: *Van Steenburg v. Milford Water Power Improvement Co.*, 64-711.

567. The question before the court on appeal, where there has been a finding of facts in a law action, is not whether the finding is sustained by the evidence, but whether there was evidence tending to support such finding: *Altman v. Farrington*, 45-620.

Findings by referee.—Judgment without finding of facts.

568. When the evidence submitted to the court below leaves a question of fact in doubt, the supreme court will not reverse the finding: *Weller v. Hawes*, 19-448.

569. When the finding of the court below is not sustained by the testimony a new trial will be awarded: *Keokuk County v. Alexander*, 21-377.

570. Finding not conclusive if judgment thereon reversed: Where final judgment is rendered in favor of a defendant, he cannot appeal from a finding of facts which is against him. But if defendant has properly objected to the correctness of such finding, it is not proper, in case of a reversal on plaintiff's appeal, to render judgment against defendant thereon without opportunity for a new trial: *Boyce v. Wabash R. Co.*, 68-70.

And see *infra*, §§ 917-920.

571. Conclusion of law: A finding by the lower court, which is merely a conclusion of law from the facts, there being no dispute or controversy as to the facts themselves, is reviewable on appeal, and is not conclusive in the same sense that a finding of fact is: *Northwestern Coal Co. v. Bowman*, 69-150.

The record: To warrant the review of findings of fact by the lower court, the entire evidence must be brought before the supreme court on appeal, otherwise the finding of the lower court will be conclusive: See *supra*, § 273.

f. Findings by referees.

572. Presumption in favor of: The finding of facts by a referee has the same force as the verdict of a jury, and will not be disturbed upon appeal unless clearly against the evidence: *Whicher v. Steamboat Ewing*, 21-240. And see REFERENCE, §§ 27-29.

573. Nor unless there is an absence of evidence to sustain it: *Brainard v. Simmons*, 67-646.

574. It will not be set aside on a conflict in the testimony: *Carson v. Cross*, 14-463.

575. It will not be held as unsupported by the testimony unless there is such absence of proof as to authorize the conclusion that it was not the result of honest, intelligent and unprejudiced judgment: *Taylor v. French Lumbering Co.*, 47-462.

576. Where it was impossible from the evi-

dence to determine whether a referee's report was correct or not, *held*, that it would be allowed to stand: *In re Heath's Estate*, 58-86. And see REFERENCE, §§ 80-83.

g. Judgment without finding of facts.

577. Not reviewable on the facts: The supreme court has no more power to review the judgment of a court below upon a trial by the court where there is no finding of facts, than it has to review the verdict of a jury: *Warner v. Pace*, 10-891. (But by statute a motion for new trial is no longer necessary in either case to secure a review.)

578. Where an equity cause is not triable *de novo* on appeal, the court will not interfere with the judgment unless there be such absence of testimony as to authorize the reversal of a judgment upon the verdict of a jury: *Mellinger v. Parsons*, 51-58.

579. Where the cause is tried to the court without a jury, a judgment of the court stands as a general verdict of the jury, and will not be interfered with unless palpably against the weight of evidence: *Woods v. Gevecke*, 28-561.

580. Where there is a conflict in the evidence, the court will not set aside a judgment because it is not supported by the testimony: *Boone County v. Wilson*, 41-69.

581. To authorize the supreme court to reverse a judgment on the ground of want of evidence for its support, there must be such absence of proof as to warrant the conclusion that the decision of the lower court was the result of passion or prejudice: *Murray v. Wells*, 57-26; *Melendy v. Rice*, 94 U. S., 796; *Patterson v. Seaton*, 70—.

582. In the absence of a special finding of facts by the court, it will be presumed that the judgment is based upon facts which in the proper exercise of judicial discretion the court below could have found under the evidence: *Bower v. Webber*, 69-286.

583. The supreme court may review the findings of the court below in like manner as it may re-examine the verdict of a jury, but for that purpose the entire evidence must be taken up. This takes the place of a motion to set aside the verdict of the jury for the reason that it is not supported by the evidence: *Snell v. Kimmell*, 8-281.

 Procedure.—Parties.—Time for appeal.

VI. PROCEDURE.

a. Parties.

584. **Must be party to the record:** One who has not had himself made a party to the record cannot appeal from the judgment, although having an interest therein: *Borgalt-hous v. Farmers', etc., Ins. Co.*, 36-250; *Ferguson v. Board of Supervisors*, 44-701.

585. If a person having an interest in the result desires to question the action of the court, he should apply to be made a party. Until he is thus made a party, he is in no way liable for costs, and therefore cannot be allowed to interfere with the rights of the original parties in the suit by appeal: *State ex rel. v. Jones*, 11-11.

586. If such a person should apply to be made a party and his application be refused, such refusal might be investigated upon appeal: *Phillips v. Shelton*, 8-545.

587. Where the complainant simply asks to redeem, a senior incumbrancer may appeal from an improper order in permitting the redemption, so that he does not get the full amount due on his mortgage, although he did not answer the bill: *White v. Hampton*, 13-259.

588. The parties for whose benefit suit is brought or defended under Code, § 2549, are not parties in such sense as to have the right of appeal: *Fleming v. Mershon*, 36-413.

589. In an action against the unknown owners of certain land, *held*, that there could be no appeal on behalf of the land, or the owners thereof, unless some one appeared in the action and made himself a party as the owner: *Fuller v. Unknown Owner, etc.*, 9-430.

590. A party who has not appealed cannot insist upon other or different relief from that awarded him in the court below: *Alexander v. Buffington*, 66-360; *Devoe v. Hall*, 60-749.

591. A party not appealing can have no relief: *Huff v. Olmstead*, 67-598; *Lamb v. Council Bluffs Ins. Co.*, 70—.

592. Parties who do not join in the appeal cannot present questions affecting their claims or interest not involved in the questions arising upon the appeal as taken by appellant. They can have no modification of the decree: *Butler v. Barkley*, 67-491.

593. **Co-parties:** It is essential in an appeal from the decree in a partition proceeding taken by one defendant, that notice of appeal be served upon his co-defendant, otherwise the supreme court cannot review a ruling which would necessarily affect the interest of such co-defendant, and the appeal will be dismissed: *State v. Baldwin*, 70—.

594. If co-parties, upon being served, elect to join in the appeal, they are entitled to all the benefits thereof, and may be allowed to file an assignment of errors, and be heard: *Barlow v. Scott's Adm'rs*, 12-63.

595. Where the *supersedeas* bond recited expressly that one of two defendants alone had appealed, and such defendant's name alone appeared in the heading of the notice of appeal, *held*, that he only could be considered as having appealed, although the body of the notice spoke of the appeal being by defendants: *Webster v. Cedar Rapids & St. P. R. Co.*, 27-315.

596. One defendant cannot upon appeal complain of any error which results in injury only to his co-defendant: *Eyre v. Cook*, 9-185.

597. Where a defendant appealing from a judgment notifies his co-defendant as well as the plaintiff of such appeal, and the co-defendant does not refuse to join, it is presumed (under Code, § 3176) that such co-defendant does join in the appeal, and appellant may thereupon urge any objection as to the judgment against his co-defendant which ultimately affects his own liability: *Engleken v. Webber*, 44-558.

598. A deceased party cannot appeal nor can the right of his estate be adjudicated if an appeal in form is taken: *Tracy v. Roberts*, 59-624.

b. Time for appeal.

599. In computing the six months within which an appeal may be taken, the day on which judgment was rendered will be excluded and the corresponding day at the end of the time included: *Carleton v. Byington*, 16-588.

600. Therefore, *held*, that an appeal taken September 30, from a judgment rendered March 30, was in time: *Parkhill v. Brighton*, 61-103.

601. The service of the notice within the time specified is sufficient. It is not neces-

Time for appeal.—Perfecting appeal.

say that it be filed with the clerk within that time: *Baldwin v. Tuttle*, 23-66.

602. Securing the clerk's fees for a transcript is not necessarily a part of the perfecting of the appeal which must be completed within six months: *Fairburn v. Goldsmith*, 56-347. But see *infra*, § 647.

603. An appeal from final judgment taken within the proper time will raise objections to previous proceedings in the case although more than the time prescribed for taking the appeal has elapsed since such previous proceedings: *Holladay v. Johnson*, 12-563.

604. Where judgment relates back: Where judgment is entered in vacation as of the preceding term, by agreement, the period for taking appeal will commence to run from the time the decision is, in fact, made, and not from the time to which by agreement it relates back: *Carter v. Sherman*, 63-689.

605. Where the judgment appealed from bore date more than the prescribed length of time before the taking of the appeal, but it appeared that the cause was held under advisement and decided in vacation and within the prescribed time, without any agreement that judgment should be entered as of the last day of the preceding term, *held*, that the appeal was not barred: *Kendall v. Lucas County*, 26-395.

606. Where a decree, in an action seeking to have set aside a deed of real property, and for a reconveyance thereof, and also for an accounting of rents and profits and improvements, was rendered for reconveyance upon payment by plaintiff of the sum paid, with interest, and also the value of the improvements, less rents and profits, etc., and the case was sent to a referee to take an account, *held*, that an appeal from the decree as to the reconveyance, etc., must be taken within six months from the time such decree was entered, and that the questions involved therein could not be raised on an appeal taken more than six months after that time, but within the six months after a final decree, based upon the referee's report, as to the accounting. Such decree is to be deemed final, although something further is required to be done afterwards: *McMurray v. Day*, 70—.

607. Ruling on motion for new trial: An appeal taken within six months from the decision of the court on a petition for a new trial, but more than six months from the rendition of the judgment upon the verdict, does not bring up for review the action of the court in rendering such judgment and its proceedings prior thereto, the appeal therefrom being barred: *Cohol v. Allen*, 37-449; *Carpenter v. Brown*, 50-451.

608. Where judgment is entered and afterward a motion for new trial is made and overruled, an appeal from the judgment must be taken within six months after the entry thereof, and an appeal from the overruling of the motion for a new trial will not raise any question not involved in the ruling upon such motion: *Patterson v. Jack*, 59-632.

609. An appeal in an equity case not taken until more than six months after the rendition of judgment, although within six months from the time of the overruling of a motion for a new trial, does not bring up for consideration in the supreme court any of the proceedings of the court prior to the filing of the motion, and therefore does not enable the court to try the case *de novo*: *Bosch v. Bosch*, 66-701.

c. *Perfecting the appeal; notice; supersedeas bond, etc.*

610. Service of notice: To give the supreme court jurisdiction, the service of notice upon appeal is as essential, where there is no voluntary appearance, as is the service of original notice in suits commenced in the lower court: *McClellan v. McClellan*, 2-312; *Lewis v. Miller*, 4 G. Gr., 95.

611. Service of notice of appeal upon the adverse party and upon the clerk is necessary to give the supreme court jurisdiction of the cause, and the fact of such service should be stated in the abstract: *Phillips v. Follett*, 69-39.

612. Appellant can have no relief on appeal as against a judgment in favor of a party not served with notice: *Hunt v. Clark*, 46-291.

613. Where the notice of appeal was directed to J. M. W. instead of to John M. W., and acceptance of service was made by the attorney of the proper person, *held*, that the

Perfecting appeal.

defect was immaterial: *Horst v. Wagner*, 43-373.

614. The statute providing for service of notice of appeal makes no provision for service by leaving a copy with a member of the party's family, as is authorized in case of service of an original notice, and such a service will not be valid: *Draper v. Taylor*, 47-407.

615. Service of notice of appeal upon the wife of attorney for appellee is not sufficient. Such notice of appeal can be served only in the manner prescribed by statute: *Webster v. Carson*, 69-243.

616. Service of notice of appeal may be made by taking a written acknowledgment of service by the person upon whom it is served: *Sanzey v. Iowa City Glass Co.*, 68-542.

617. Service of notice of appeal on the deputy clerk, shown by an acceptance of service signed by him with the name of the clerk by himself as deputy, is sufficient notice of appeal: *Ibid.*

618. Service of notice cannot be made by a party to the action: *Draper v. Taylor*, 47-407; *Marion County v. Stanfield*, 8-406.

619. Previous to the enactment of the provisions of Code, § 3214, there was no method authorized for service of notice of appeal by publication: *McClellan v. McClellan*, 2-312.

620. Filing with clerk: It is not necessary that the notice be filed in the office of the clerk within the time allowed for perfecting the appeal: *Baldwin v. Tuttle*, 23-66.

621. But, upon service of the notice, it should be filed or deposited with the clerk, and it thereupon becomes one of the original papers in the case and a part of the record. It is such a portion of the record as that it may be corrected by proper proceedings in the court in which it is filed, for instance, for the purpose of making it show the correct date of service upon the clerk: *Brier v. Chicago, B. & P. R. Co.*, 66-602.

622. New notice after delay in procuring appeal: Where four years had intervened between the taking of the appeal and the filing of the transcript, *held*, that the case would not be heard on motion of the appellant without additional notice to appellee, who had made no appearance: *Byington v. Robinson*, 16-591.

623. Substituted defendant: Where plaintiff appealed from an order substituting a third party in place of the sheriff against whom the action was brought, *held*, that the appeal might be prosecuted by plaintiff upon the sheriff without notice being served upon the substituted party, the substitution having been made on the joint application of the sheriff and such third party: *Sunberg v. Babcock*, 61-601.

624. A notice of appeal from a judgment brings up all the objections properly saved on the trial of the cause, including the motion for a new trial: *Gullihier v. Chicago, R. I. & P. R. Co.*, 59-416.

625. Appearance in the supreme court is a waiver of any irregularity in taking the appeal: *Romaine v. Commissioners, Mor.*, 357.

626. Such appearance is a waiver of notice: *Morrow v. Carpenter*, 1 G. Gr., 469.

627. Where there is no judgment rendered in the court below from which an appeal may be taken, consent of parties will not give the supreme court jurisdiction: *Long v. Long, Mor.*, 381.

And further to the effect that consent will not confer jurisdiction where the lower court had no jurisdiction, see JURISDICTION.

628. Appearance in the supreme court by filing additional abstract, etc., will not waive objection on account of want of notice, if such appearance is made prior to the expiration of the time during which notice might be served: *Brier v. Chicago, B. & P. R. Co.*, 66-602.

629. Supersedeas bond: An appeal is not perfected by the filing of a *supersedeas* bond alone, but service of notice of appeal is also necessary, and until such notice is served, at least on the clerk, such officer should not recall an execution or issue an order to stay proceedings thereunder: *Pratt v. Western Stage Co.*, 26-241.

630. An instrument is not a bond unless signed and sealed by the parties making it. In this respect a bond differs from a recognition: *Cuddelback v. Parks*, 2 G. Gr., 148. (By general statutory provisions, a private seal is no longer necessary to the validity of any instrument: Code, § 2112.)

631. Form: A bond, irregular in form, *held* sufficient as a statutory appeal bond: *Field v. Schricher*, 14-119.

Perfecting appeal.

632. In an appeal from the county court to the district court, *held*, that the bond, although not in strict conformity with the requisites of the statute, contained covenants sufficiently broad to charge the appellant and his sureties with all the costs to accrue from an unsuccessful prosecution of the appeal, and that it was therefore sufficient as a statutory bond: *Whitehead v. Thorp*, 22-425.

633. Under former statutes, *held*, that the supreme court had no authority to allow amendments to appeal bonds which were invalid because of a failure to obey the federal stamp law: *Hugus v. Strickler*, 19-412.

As to amendment of bonds, see BONDS.

634. In what cases bond may be given: An order of discharge in a *habeas corpus* proceeding cannot be suspended by *supersedeas* bond pending an appeal: *State v. Kirkpatrick*, 54-873.

635. Amount of bond: Where, in an action to foreclose a mechanic's lien, a personal judgment for the amount claimed is rendered against defendant, and the lien is declared established upon the property, and the property is ordered sold upon special execution to satisfy the judgment, and it is directed that a general execution issue for any sum remaining unpaid after exhausting said property, the penalty of the appeal bond should be twice the amount of the judgment rendered. The value of property on which the judgment is especially declared a lien cannot be taken into account in fixing the bond: *Flynn v. Des Moines & St. L. R. Co.*, 62-521.

636. Effect of bond: Where no *supersedeas* bond is filed, the appeal does not vacate or affect the judgment, and proceedings thereon are not stayed: *Phillips v. Germon*, 43-101.

637. A *supersedeas* bond is not essential in perfecting the appeal; it does not secure the clerk's fees for transcript, so as to render unnecessary the payment or securing of the same in order to perfect the appeal: *Loomis v. McKenzie*, 57-77.

638. The giving of a *supersedeas* bond does not supersede or render void a delivery bond previously given to secure the release of attached property: *Williams v. Robison*, 21-496; *State v. McGlothlin*, 61-312.

639. A *supersedeas* bond given in an action

by a party claiming a public office, and who has been adjudged entitled thereto, does not suspend his right to exercise such office in pursuance of the judgment, and to receive the salary incident thereto; and therefore in an action on such *supersedeas* bond the sureties are not liable for salary accruing pending the suit: *Jayne v. Drorbaugh*, 68-711.

640. When an order has been determined to have been correctly made, it is then too late for a party to claim relief because he was not allowed to supersede it: *Yetzer v. Martin*, 58-612.

641. Liability on the bond: Where, on appeal, judgment as to one party appealing was affirmed, but as to the co-party reversed, *held*, that the party as to whom it was affirmed and his sureties were liable on their appeal bond: *Knight v. Waters*, 15-420.

642. Sureties on a *supersedeas* bond are not discharged by an entry in the supreme court, by consent, of a judgment by the terms of which extension of time of payment and stay of execution are granted. Their relation to the action is not such as gives them control over it, and the party has a right to do whatever the law authorizes in such cases: *Drake v. Smythe*, 44-410.

643. Where the appeal is simply dismissed, allowing the judgment in the lower court to remain in full force, such dismissal has the effect of affirming the judgment of the court below, and the parties to the *supersedeas* bond become liable thereon: *Coon v. McCormack*, 69-589.

644. Where the defense to an action on an appeal bond was that the judgment appealed from was fraudulently obtained by depriving defendant of his day in court, *held*, that such fact, if true, was no defense to the judgment rendered in the supreme court upon trial *de novo*, to which defendant appeared and in which he was heard, it not being alleged that such fraud prevented a full and fair trial on appeal: *Knight v. Waters*, 18-345.

645. The statutory provision that property levied upon shall be released upon the filing of a *supersedeas* bond, it seems, refers only to personal property: *Swift v. Conboy*, 12-444.

646. The language of the statute (Code, § 8186) relating to rents and damages which are to be covered by the bond is a specification only as to the conditions of the bond; and if

Effect upon pending proceedings.—Record; transcript.

such condition is not contained in the bond, the party executing it cannot in an action thereon be held liable for rents or profits accruing during the appeal: *Gill v. Sullivan*, 62-529.

647. Fee for transcript: The appeal is not perfected until the fees for transcript are paid or secured, and giving a *supersedeas* bond cannot be regarded as "securing" such fees; and *held*, that after service of notice of appeal and filing of *supersedeas* bond, but before paying or securing costs of transcript, appellant had the right to abandon his appeal, and that the trial court had authority to entertain application by such party for a new trial, and grant it: *Loomis v. McKenzie*, 57-77.

648. The time within which the appeal is to be perfected by paying or securing the fees for transcript is not fixed. Filing an abstract and having the cause docketed is evidence of good faith, and the cause will not be dismissed for want of transcript. While one must be furnished, if insisted upon by appellee, time will be given to do so, unless appellant or his counsel have had notice that one would be required, and through negligence have failed to furnish it: *Fairburn v. Goldsmith*, 56-347.

d. *Effect of appeal upon pending proceedings.*

649. Divests lower court of jurisdiction: An appeal from a final decree in a chancery case deprives the trial court of all further jurisdiction in the case until it is remanded. It cannot make an order retaxing the costs, or amending the record: *Levi v. Karrick*, 15-444; *McGlaughlin v. O'Rourke*, 12-459.

650. And this rule applies also in actions at law, when the entire cause is brought to, and pending in the supreme court on appeal: *Turner v. First Nat. Bank*, 30-191; *Carmichael v. Vandebur*, 51-225.

651. Correction of record: The appeal does not so divest the jurisdiction of the lower court but that it may order a lost record substituted, or correct its record by supplying omissions, and do whatever else is proper to be done to enable the supreme court to review its alleged errors: *Steiner v. Steiner*, 49-70; *Becker v. Becker*, 50-139;

State v. Dillard, 52-749; *Mahaffy v. Mahaffy*, 68-55; *Mazon v. Chicago, M. & St. P. R. Co.* 67-226; *Buckwalter v. Craig*, 24-215.

652. The court below may settle and sign a bill of exceptions after appeal is taken, if done within the time allowed for that purpose: *Tiffany v. Henderson*, 57-490.

653. The lower court retains jurisdiction after the taking of the appeal to perfect the record by giving the certificate as to the evidence introduced in an equitable case: *Goff v. Hawkeye Pump, etc., Co.*, 62-691.

654. After the taking of appeal, a motion to amend the record cannot be entertained by the lower court without notice to the opposite party: *Eno v. Hunt*, 8-436.

Further as to correction of record, see *infra*, §§ 668-682.

As to proceedings in the lower court after determination of appeal, see *infra*, VII, f.

e. *Record; transcript.*

As to what papers, etc., are deemed part of the record by filing, and what must be made part thereof by bill of exceptions, see EXCEPTIONS, §§ 69-92.

655. Matters outside the record cannot be considered: The record of the proceedings in the lower court is the only basis for action in the supreme court. Extrinsic evidence cannot be considered: *Bell v. Pierson*, Mor., 21.

656. The supreme court has no original jurisdiction and cannot review or correct judgments of the lower court upon motion and affidavits outside of the lower court showing fraud in the procurement of the judgment: *Powell v. Spaulding*, 3 G. Gr., 417.

657. Even in an equity case, the supreme court cannot hear depositions taken after the trial of the case in the court below and never submitted to such court: *Perkins v. Testement*, 3 G. Gr., 207.

658. An amended return of service of notice cannot be filed originally in the supreme court: *Pilkey v. Gleason*, 1-85.

659. The record in the supreme court cannot be changed or explained by affidavits presented for that purpose, nor by the certificate of the clerk of the court below, except so far as such certificate is as to the matters appearing of record in his court: *Musgrave v. Brady*, Mor., 456.

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660. Certificate of clerk: A certificate of the clerk as to what evidence was presented in an action tried by ordinary proceedings will not be regarded; such evidence must be made matter of record by being embodied in the bill of exceptions signed by the judge: *Jordan v. Quick*, 11-9; *Garber v. Morrison*, 5-476.

661. A paper cannot be made a part of the record by mere certificate of the clerk: *State ex rel. v. Jones*, 11-11; *Harmon v. Chandler*, 3-150.

662. The bill of exceptions filed in the trial court, a transcript of which is sent to the supreme court, cannot be contradicted by the certificate of the clerk of the trial court. So *held* where the bill of exceptions showed a note sued on to be non-negotiable, while the note filed by plaintiff's attorney after the trial of the cause, and certified by the clerk by copy to the supreme court, showed that it was negotiable: *Daniels v. Gower*, 54-319.

663. The supreme court cannot notice matters certified by the clerk of the lower court which do not appear of record in such court: *Killion v. Killion*, 9-329.

664. It is not the duty of the clerk to certify or set out the evidence offered, and the supreme court cannot act upon his statements as to what the evidence was. It must be embodied in a bill of exceptions properly certified by the judge: *Potter v. Wooster*, 10-334.

665. The certificate of the clerk that certain instructions were given and were objected to by appellant, *held*, not sufficient to raise the question as to their insufficiency: *Knight v. Kelley*, 10-104.

666. The certificate of the clerk as to what appears of record in his court will not prevail against the recital of the record itself as transmitted by him: *Holmes v. Budd*, 11-186.

667. Certificate of judge is not competent to contradict the recitals in a bill of exceptions: *Pearson v. Maxfield*, 47-135; *Dedric v. Hopson*, 62-562; *Conner v. Long*, 63-295.

668. Correction of record: Upon suggestion of diminution of the record, a party may have the record in the lower court corrected or amended by proper proceedings therein, and present the record as thus amended to the supreme court by supplemental abstract: *Mahaffy v. Mahaffy*, 63-55.

669. Mistake in the record as to date of

service of notice of appeal on the clerk may be corrected upon motion in the court in which the notice is filed: *Brier v. Chicago, B. & P. R. Co.*, 66-602.

670. While evidence not offered or relied upon in the court below cannot be considered by the supreme court upon appeal, yet where the record as filed is incomplete, it is competent for the lower court, even after appeal, to order all the evidence submitted at the trial to be certified: *Campbell v. Long*, 20-882.

671. Where it was made to appear to the court by affidavit that the record was defective, *held*, that the court might, in the exercise of a sound discretion, remand the case for the purpose of ascertaining and embodying in a proper bill of exceptions the evidence upon which the former trial was had: *Tasker v. Marshall*, 4-544.

672. The record before the court must be taken as conclusive of the facts recited. If erroneous in any respect, the error should have been corrected by proper proceedings in the court below: *Stiles v. Botkin's Estate*, 30-60.

673. The record on which the case is to be tried on appeal must be made up in the court below. The supreme court will not, on motion, amend such record, as by inserting a finding of facts alleged to be lost: *Dobbins v. Lusch*, 53-304.

674. Lost records of the court below cannot be supplied by affidavit in the supreme court: *Morris v. Steele*, 62-228.

675. The substitution of a lost pleading in the court below is to be made in that court and not in the supreme court: *Tomlinson v. Funston*, 1 G. Gr., 544.

676. Correction of omissions or mistakes: Appeals are based upon the records of the cause remaining in the court below. The supreme court has no jurisdiction to correct mistakes or supply omissions in such records: *Bartle v. Des Moines*, 37-635.

677. A motion made in the supreme court, supported by affidavits, to strike out the bill of exceptions as not correctly embodying the evidence, cannot be considered: *Hughes v. Stanley*, 45-622.

678. Any correction of the record must be made in the court below. The transcript is the authoritative record in the supreme court, and, after being certified, it cannot be im-

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peached by a certificate of the clerk of the court below, or by any extrinsic evidence: *Gardner v. Burlington, C. R. & N. R. Co.*, 68-588.

679. Supplying lost records: The written evidence upon which an equity case is tried becomes a part of the record, and if it is lost, it is to be supplied by substitution. Such loss after judgment, and pending appeal, is not ground for a new trial: *Loomis v. McKenzie*, 48-416.

680. Where, after the taking of an appeal, the papers were lost without appellant's fault, *held*, that the court below should, on motion, have ordered substitution thereof: *Steiner v. Steiner*, 49-70.

681. Where a party, while his appeal was pending, filed in the court below a motion to supply his lost notice of appeal, which was done after the hearing of evidence with reference thereto, *held*, that as the evidence was conflicting, the order would not be disturbed: *State v. Dillard*, 52-749.

682. Where an additional transcript of a justice of the peace filed in the lower court in a proceeding by writ of error from the judgment of such justice of the peace was not sent to the supreme court with the transcript, but appeared to be lost, *held*, that the certificate of the judge and clerk were receivable to show that such amended transcript had been filed in the lower court: *Coffeen v. Hammond*, 3 G. Gr., 241.

Further as to correction or substitution of the record in lower court, see *supra*, §§ 651-654.

683. Partial record: If appellant presents a partial record which is, however, sufficient to clearly show the ruling appealed from, and it is manifest that the omitted parts could not aid the opposite party, the record will be sufficient to enable the court to pass upon the questions thereby raised: *Hall v. Smith*, 15-584.

684. A motion to strike evidence from the abstract because not preserved by a bill of exceptions, properly raises the question whether there was a bill of exceptions or not: *Morris v. Steele*, 62-228.

685. On such a motion the record must speak for itself and can neither be attacked nor supported by affidavits: *Ibid.*; *Moriarty v. Central Iowa R. Co.*, 64-696.

686. The fact that the evidence is not so certified as to be properly a part of the record may be raised by motion to strike it from the record, but will not be a ground for affirming the judgment, as the record, without the evidence, may show error entitling appellant to reversal: *Bracket v. Belknap*, 40-704.

687. The supreme court will not strike the evidence from the abstract upon motion, where it is in considerable doubt as to what ought to be done, or where the proper ruling would require a somewhat careful and extended investigation of the abstract; it will either overrule the motion or require it to be submitted with the cause; and where such a motion is overruled, the court does not consider itself precluded from determining upon the submission whether the record is such that the case can properly be considered upon its merits, especially where appellee insists in his argument that it cannot: *Alexander v. McGrew*, 57-287.

688. Defects in record: An objection that the record on appeal does not properly embody the evidence cannot be supported by affidavit. If the objection does not appear on the face of the record, it may be amended upon suggestion of diminution, or if the record in the court below requires change to make it correspond with the facts, proper steps should be taken to amend it there: *Hughes v. Stanley*, 45-622.

689. That the entire record is not before the supreme court is not sufficient either to warrant the dismissal of the appeal or to strike from the files what is there. The extent to which a loss of a portion of the record will prejudice the parties will be considered on the final determination of the cause: *Mayo v. Temple*, 16-585.

690. If it should appear in a law case that the evidence is not all before the supreme court, it would not dismiss the appeal if there were questions which might be determined without all the evidence being before it: *Balm v. Nunn*, 63-641.

691. If the record is in such condition that the supreme court cannot determine from the pleadings what the issues are, it may remand the cause in order that the parties may have an opportunity to replead: *Lyon v. Tevis*, 8-79.

692. Evidence must be of record below: A bill of exceptions cannot be considered in

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the supreme court unless it is embodied in the record certified from the court below: *Platner v. Mofford*, 1 G. Gr., 476.

693. But if no question is made the court presumes the evidence presented in filing the abstract was properly preserved. If that fact is called in question by a denial, the court will go to the transcript to determine it: *Wilson v. First Presbyterian Church*, 60-112.

694. Even if it appears that the transcript contains a paper not properly identified by the bill of exceptions, this fact will not warrant the striking the whole bill of exceptions from the record: *Hardy v. Moore*, 62-65.

695. Where no steps are taken to strike from the files a portion of the record claimed to have been erroneously certified, it cannot be disregarded on final hearing: *Edie v. Applegate*, 14-273.

696. Any paper not spread out in full in the bill of exceptions must be referred to thereunder by some unmistakable reference. Depositions, reporter's notes, etc., need not be copied therein in full but should be clearly identified. Where the only identification of the evidence contained in the bill of exceptions was as follows: "here, let the clerk insert all the evidence, rulings, exceptions and objections," held, that what purported to be the evidence in the case should be stricken from the abstract and transcript on motion: *Hill v. Holloway*, 52-678.

And see further, EXCEPTIONS, §§ 98-120.

697. Although the record purports to contain all the evidence heard before a referee, yet if it does not appear that the evidence was preserved by a bill of exceptions, or a certificate of the referee, or otherwise identified, the court cannot consider that it has the evidence before it: *Donovan v. Hayes*, 62-36.

698. Where it is made to appear that the bill of exceptions was not presented to the attorney of the opposite party, as required by rule of the lower court, such bill of exceptions should be stricken out on motion in the supreme court: *Christenson v. Central Iowa R. Co.*, 63-703.

699. To secure a review of a law action it is not essential that the evidence and instructions should be certified by the judge. It is sufficient that the evidence is properly made part of the record by bill of exceptions, and

the instructions are identified by the bill of exceptions or in other proper manner: *Wilson v. First Presbyterian Church*, 60-112.

700. Parties may, by stipulation, agree as to what the evidence was on which the case was tried in the court below, for the purpose of having a trial on appeal upon errors assigned, although the case is equitable: *Hutchinson v. Wells*, 67-430.

701. Insufficient record: Where the evidence and instructions referred to in the bill of exceptions, and by it made part of the record, are not actually included in the transcript, for the reason that they are not found on file by the clerk, the supreme court cannot pass upon errors in rulings upon the evidence or instructions to the jury, it not appearing that the abstract corrects such defect: *Bonney v. Cocke*, 61-303.

As to whether instructions, motions, etc., are properly parts of the record, without being embodied in the bill of exceptions, see EXCEPTIONS, §§ 69-92.

702. Transcript of the record: While a bill of exceptions in an action by ordinary proceedings should be brought to the supreme court by copy, and not in its original form, yet an error in this respect only works a continuance to obtain a corrected transcript: *Fernow v. Dubuque & S. W. R. Co.*, 22-528.

703. A bill of exceptions transmitted to the supreme court with the record but not embraced in it, nor certified to by the clerk as being a part of the record, cannot be considered: *State v. Leis*, 11-416.

704. It will not be a ground for striking the transcript from the files that it appears that it was delivered to the attorney of the party, where it is not shown that it was not afterward forwarded in the manner directed by the statute: *Dedric v. Hopson*, 62-562.

705. In equity cases: On appeal in a case tried by ordinary proceedings, a transcript should be sent up, but if tried by equitable proceedings upon written testimony, the depositions and papers are to be sent up in their original form: *Baldwin v. Tuttle*, 23-66.

706. If the original evidence is not certified up in such cases, the same presumption obtains in favor of the correctness of the ruling below as in an action at law: *State v. Orwig*, 27-528.

707. An objection that papers of record in

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the court below are certified to the supreme court by copy instead of in their original form should be raised in time to permit the other party to correct the error, if it be one, by filing the original papers. Such an objection not made before the final submission of the case will not be regarded: *McDonald v. Farrell*, 60-335.

708. Inspection of instruments: Where the objection made in the court below to the introduction of a contract in evidence was that its appearance indicated that it had been altered since its execution, and there was no evidence tending in any manner to explain such alteration, *held*, that the supreme court could not pass upon the sufficiency of such objection, where the appellant had not secured the transmission to the supreme court of the instrument to which the objection was made: *Wing v. Stewart*, 68-18.

709. Certificate of clerk: It is to be presumed that the papers certified by the clerk as a part of the record in the case were properly filed in such case, although the fact of their authenticity and connection with the transaction does not appear from the papers themselves: *Mays v. Deaver*, 1-216.

710. The certificate of the clerk to which he attaches loose and detached depositions in their original form, stating that the transcript contains the original depositions in the case, is not sufficient to enable the court to try the case anew: *Wetherell v. Goodrich*, 22-583.

711. Evidence presented in the record in an equity case, triable *de novo*, which is in no way certified or identified as that upon which the trial was had in the court below, will be stricken out on motion: *Bracket v. Belknap*, 41-592.

712. In an equitable action tried on written evidence, it is not necessary that such written evidence be embodied in and preserved by bill of exception, but the certificate of the clerk that it is all sent up is sufficient to enable the supreme court to act upon it: *Ticonic Bank v. Harvey*, 16-141.

713. A certificate of the clerk that the transcript contains all the evidence "appearing on file" will not be sufficient: *Davenport v. Ellis*, 22-296; *Grant v. Grant*, 46-478.

714. The certificate of the clerk that the record contains all the evidence offered in the court below, in a case tried wholly upon dep-

ositions and papers on file, is sufficient to enable the supreme court to consider the case on appeal; and the provisions of the amendment to Code, § 2742, requiring a certificate of the judge to be given at the trial term, has no application in such a case: *Cross v. Burlington & S. W. R. Co.*, 58-62.

715. Where the clerk certified as follows: "The depositions accompanying this transcript, marked A, B, C, D, and E, are all of the evidence in such case used on the trial thereof," and the depositions were found thus marked, *held*, that they were sufficiently identified, in the absence of a suggestion or showing of substitution: *Chambers v. Ingham*, 25-222.

716. Reporter's notes: In order to make the evidence as taken down by the shorthand reporter a part of the record, it must be transcribed by him, and filed in the court below: *Gaylord v. Taft*, 53-756; *Lowe v. Lowe*, 40-220.

717. The reporter's translation of his notes does not become a part of the record unless certified to by him as correct. A certificate of the judge, that the notes referred to in a bill of exceptions contain all the evidence, will not be sufficient: *Richards v. Lounesbury*, 65-587.

718. Where the judge certifies to a shorthand writer's transcript of the evidence, it is thereby sufficiently made part of the record, although the reporter was not appointed by the court, but acted at the request of one of the parties: *Lutz v. Aylesworth*, 66-629.

719. If there is a certificate of the judge to the reporter's notes, to the effect that they contain all the evidence introduced or offered in the case, it will be presumed that the statement is true, and that no evidence was afterwards introduced, although the judgment was not rendered until some time subsequent to the making of such certificate: *Royer v. Foster*, 62-321.

As to how reporter's notes are made part of the record, see EXCEPTIONS, §§ 77-85.

720. Failure to file transcript: The objection that appellant has not filed a transcript must be raised by motion and not after submission upon the argument: *Simplot v. Duluque*, 49-630.

The failure to file a transcript is a ground for affirmance on motion: See *infra*, VII, a.

The abstract.

721. An agreed abstract renders a transcript unnecessary: *Hampton v. Moorhead*, 62-91.

f. *The abstract.*

722. Form: The fact that what is filed and intended as an abstract is not so entitled or designated will not prevent the court from considering it if its nature is apparent: *Noble v. Des Moines & St. L. R. Co.*, 61-637.

723. Should contain what: It is not proper to set out in the abstract the entire testimony of witnesses, by question and answer, without excluding matter that is immaterial: *Vaughn v. Smith*, 58-553; *Tootle v. Taylor*, 64-629.

724. Nor should writs, services, and other writings not material to the case, be set out: *Tootle v. Taylor*, 64-629.

725. The abstract should show the fact of service of notice of appeal upon the opposite party and upon the clerk of the court, in order to show that the court has acquired jurisdiction of the case: *Phillips v. Follett*, 69-39.

726. Costs of improper abstract: Where the evidence as contained in the abstract was not abridged as required by the rules of the court, *held*, that appellant, although successful, should not be allowed the full cost of making the same: *Chandler v. Fremont County*, 42-58; *Macomber v. Peck*, 39-351; *Martin v. Cole*, 38-699; *York v. Clemens*, 41-95.

727. Where the party makes unnecessary costs in preparing the abstract by printing questions and answers in full, remarks of counsel, etc., and other matters not properly part of the record, such costs will not be taxed up in his favor: *Byerlee v. Mendel*, 39-383; *Dye v. Young*, 55-433; *Poole v. Hintrager*, 60-190; *Donahue v. McCosh*, 70—.

728. Costs of additional abstract: Where the court were satisfied that an abstract was not prepared in bad faith, or for the purpose of throwing the burden of preparing an additional abstract upon the opposite party, and that it fairly presented the questions to be determined, *held*, that the costs of an additional or amended abstract prepared by appellee should not be taxed to appellant: *Brown v. Byam*, 59-52.

729. Transcript may be unnecessary; reporter's notes: Where the abstract of appellant is satisfactory to the opposite party,

there is no necessity for the clerk's transcript, nor for the transcript of the reporter's notes which have been properly filed in the original form in the court below. The appellant may make out his abstract from whatever source he sees fit: *Hampton v. Moorhead*, 62-91.

730. If the abstract is not controverted by appellee, the court will not look into the transcript of the original evidence, nor will it refuse to try the case simply because such transcript is not filed: *Austin v. Bremer County*, 44-155.

731. An agreed abstract; amendment: If an agreed abstract is presented, the case will be heard on that, and no amendment presented by one of the parties will be considered: *Holmes v. Lucas County*, 53-211.

732. What waived by agreed abstract: The agreement of the parties that a cause may be heard upon the abstract will not operate to waive statutory requirements as to appeal: *Lewis v. Pearson*, 50-702.

733. Stipulations waiving the transcript and providing that the case should be tried on an amended abstract of the parties, *held* not to waive the objection that the abstract did not appear to contain all the evidence, and that the court could not, therefore, try the case anew: *Allen v. Hull*, 56-767.

734. Case determined upon abstract: The supreme court does not look beyond the abstract where a case has been argued and submitted with an apparent understanding that such abstract contains all that is material to its determination: *Montgomery County v. American Emigrant Co.*, 47-91.

735. Unless there is a disagreement in the abstracts, the supreme court does not examine the transcript, and the abstracts constitute the record. Where a certificate of the judge is necessary to entitle the party to appeal, it should be set out in the abstract: *Barnes v. Independent Dist.*, 51-700.

736. The supreme court will not, as a general rule, look into the transcript except for the purpose of determining the correctness of the abstract, where that is disputed in the manner required by the rules of court, and will not consider objections not appearing on the abstract. (But this rule was not adhered to in this case, it being a criminal case): *State v. Smouse*, 49-634.

The abstract.

737. How correctness of abstract questioned: The correctness of the statements of the abstract cannot be impeached by a mere statement in argument: *Van Winkle v. Iowa Iron, etc., Fence Co.*, 56-245; *Rankin v. Miller*, 43-11.

738. Where the abstract, although failing to show that a bill of exceptions was filed in the court below, contains matter which it could not properly contain unless made of record, the court will regard the appellant as claiming that it was made of record, and a direct statement to that effect will not be necessary. If the appellee desires to claim that no bill of exceptions was filed he must do so in an additional abstract: *Thompson v. Silvers*, 59-670.

739. Where the abstract filed by appellant purports to be an abstract of all the evidence, it will be assumed, in the absence of any showing to the contrary, that the evidence set out therein was properly made of record. If the opposite party wishes to claim that the evidence was not made of record, he should file an additional abstract so stating, and the statement of such additional abstract will be assumed to be true if not denied: *State v. Tucker*, 68-50.

740. Where appellant's abstract stated the taking of an exception, which was not denied in the amended abstract, *held*, that the court would consider that the exception properly appeared in the record: *Palmer v. Rogers*, 70—.

741. An abstract cannot be impeached or contradicted by a certificate of the clerk of the court below: *White v. Savery*, 49-197.

742. Nor can it be altered or changed by affidavit or certificate of the judge: *Pearson v. Maxfield*, 47-135.

743. A so-called amended abstract, setting out affidavits showing the judgment to be different from that contained in the abstract, will not be considered: *Holmes v. Lucas County*, 53-211.

744. Where an abstract purports to contain a copy of a paper which is part of the record, it is not necessary for it to state that what it sets out is the whole paper, but it will be presumed to be so unless the contrary is shown: *Baird v. Chicago, R. I. & P. R. Co.*, 61-359.

745. In the absence of a conflict of abstracts the court treats the abstract as the record in the case, and if it is not sufficiently intelligible to show the rulings made, the court acts upon the presumption that there is no error: *Eldredge v. Bell*, 64-125.

746. Motion to strike evidence from abstract: If the abstract sets forth evidence not made of record, the appellee may, on motion, have such evidence stricken therefrom: *Mudge v. Agnew*, 56-297.

747. If no question is made as to the filing of the bill of exceptions, the court presumes that the evidence has been properly preserved. If the appellee states in his abstract that no proper bill of exceptions has been filed, and moves to strike out the evidence on that ground, the court does not take the statement as true, but refers to the transcript for a determination: *Wilson v. First Presbyterian Church*, 60-112.

748. A statement in appellee's abstract that no exceptions were taken as set out in the appellant's abstract will be deemed true if not denied or avoided by appellant. *Armstrong v. Nillen*, 70—.

And see further, *supra*, §§ 684-687.

749. Court will not look beyond abstract: Where the evidence in a case was stricken from the abstract and the transcript as not being properly embodied therein, and leave was given to perfect the record, and a perfect transcript was filed, but no new abstract, *held*, that the court could only consider the original abstract with the evidence stricken therefrom: *Weider v. Overton*, 47-533.

750. Matter must be of record: The court cannot take the abstractor's statement of a fact where there is no claim that the fact appears from the record: *Dickerman v. Lubiens*, 70—; *Anderson v. Leaverich*, 70—.

751. Abstract of all the evidence: The court will not, against the objection of appellee, review a finding of facts made by a court, jury, or referee, unless the abstract purports to contain all the evidence introduced on the trial below: *Andrews v. Kerr*, 49-680; *Price v. Burlington, C. R. & M. R. Co.*, 42-16; *Rice v. Plymouth County*, 53-635; *Walker v. Plummer*, 41-697.

752. Where a review of the findings of a jury on the evidence is sought, the abstract should contain the statement that it contains

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all the evidence: *Kearney v. Ferguson*, 50-72; *Andreus v. Kerr*, 49-680.

753. It is not sufficient that it appear that all the evidence is in the bill of exceptions: *Rice v. Plymouth County*, 53-635.

754. The fact that the abstract purports to contain "the evidence" is not sufficient to enable the court to presume that it has all the evidence before it. Such expression is not equivalent to "all the evidence:" *Parsons v. Parsons*, 66-754.

755. Where an abstract fails to state that all the evidence is before the supreme court, that court will not review the findings of the court below on a question of fact: *Van Riper v. Baker*, 44-450; *Commercial Bank v. King*, 47-64.

756. A statement in the abstract that it contains all the evidence will not enable the court to determine whether the judgment is against the evidence, if it does not appear by agreement of parties or certificate of the judge that all the evidence is in the record: *Wormley v. District T'p*, 45-666.

757. Where the abstract does not purport to be an abstract of all the evidence, an objection that the damages are excessive cannot be considered: *Brant v. Lyons*, 60-172.

758. Where the abstract shows that it does not contain all the evidence, the case will not be reversed if there might have been evidence supporting the judgment: *Enix v. Miller*, 54-531.

759. In a particular case, *held*, that the abstract did not show error, nor show the evidence upon which the allegation of error in the decision of the court below was based, and therefore that the judgment must be affirmed: *Holwig v. Rowler*, 50-96.

In cases triable *de novo*: That the abstract must state that it contains all the evidence in order that an equity case may be triable *de novo*, see *infra*, §§ 1046-1052.

760. What sufficient to show that the abstract contains all the evidence: The statement in the abstract to show that all the evidence is comprehended therein is sufficient, if the opposite party and the court are fairly apprised that the appellant claims that he has presented an abstract of all the evidence, and in such cases the court will presume that he has, unless appellee sets out additional evidence: *Miller v. Wolf*, 63-233.

761. In regard to the statement that the abstract contains all the evidence it will not be examined quite as critically as the certificate of the judge to the effect that the evidence offered as well as that introduced was made of record: *Ibid*.

762. Where an abstract contains a statement that it is an abstract of all the evidence, it is assumed, not only that this statement is true, but that the evidence was made of record by due certification, unless it is made to appear to the contrary; but where the certificate relied upon is set out, and appears to be insufficient, that presumption will not be entertained: *Alexander v. McGrew*, 57-287.

763. Where the abstract stated that "the foregoing evidence is by the court duly certified to be all the evidence offered by either party on the trial of this cause," *held*, that it would be presumed that the evidence had properly been made of record by a bill of exceptions: *Macleod v. Geyer*, 53-615.

764. A recital in the abstract that it was an abstract of all the evidence, and that within a proper time a bill of exceptions was filed embracing in the record the testimony set out, *held* sufficient to show that the evidence was before the court on appeal: *Deere v. Needles*, 65-101.

765. Where the abstract purported to contain all the evidence, and recited that the evidence was taken down in writing by order of the court, and made a part of the record, *held*, that there was sufficient to entitle appellant to a trial *de novo*: *Stoddard v. Hardwick*, 46-160.

766. Where depositions were referred to in the certificate of the judge as being marked by certain letters, and the abstract did not identify the depositions and documents printed therein as being referred to in the certificate, but it was alleged in an amended abstract, filed by appellant, that all the evidence offered, introduced or used in the trial was set out in the original and amended abstracts, which allegation was not denied, *held*, that the court could presume that it had all the evidence before it: *Paine v. Means*, 65-547.

767. Where the abstract stated that a party filed a garnishee's answer "as follows; omitting formal parts," no issue appearing to have been joined thereon, and therefore no

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evidence having been admissible, *held*, that this statement was sufficient to show that all the evidence on which the court acted in ruling upon a motion for judgment on the garnishee's answer appeared to be presented: *Van Winkle v. Iowa Iron, etc., Fence Co.*, 56-245.

768. Where by the language of the abstract the opposite party and the court are fairly apprised that appellant claims that he has presented all the evidence, it will be assumed that he has done so unless the appellee sets out additional evidence in an amended abstract: *Miller v. Wolf*, 63-233.

769. Where a certificate of the judge that the record contains all the evidence is essential on appeal, if the abstract sets out the fact that the certificate was made on the date thereof, it is not necessary that such certificate be set out in the abstract: *Yant v. Harvey*, 55-421.

770. In a particular case, *held*, that appellant's abstract sufficiently purported to contain an abstract of all the evidence: *Higgins v. Mendenhall*, 51-135.

771. Must purport to contain all the evidence: An abstract which states that all the evidence in the case was reported and certified to by the reporter of the court, and duly certified by the court as being all the evidence offered in said trial, will not be sufficient to enable the court to try the case *de novo* if it fails to state that it (the abstract) contains all the evidence, that is, an abstract of all the evidence upon which the case was tried: *Cassady v. Spofford*, 57-237; *Ward v. Snook*, 61-610; *Hall v. Harris*, 61-500; *Phoenix Ins. Co. v. Findley*, 59-591; *Ohrt v. Ober*, 51-540; *Conwell v. House*, 57-754.

772. If a party wishes to make it appear that his abstract is an abstract of all the evidence, that fact should be specifically stated in the abstract. It is not sufficient to set out in the abstract the certificate of the judge, or clerk, or reporter, showing that the evidence is all made of record in the lower court: *Porter v. Stone*, 62-442; *Wisconsin I. & N. R. Co. v. Secor*, 70—; *Fulliam v. Muscatine*, 70—; *Woodrum v. Carraher*, 69-145; *Hasner v. Patterson*, 70—.

773. While the abstract should purport to contain all the evidence it is not usually necessary nor desirable that it should, in fact,

contain all the evidence: *Huff v. Farwell*, 67-298.

774. "Substantially," not sufficient: An abstract stating that "the testimony was taken on written deposition, and was essentially as follows," is not sufficient to show that the abstract contains all the evidence: *Britt v. Case*, 58-757.

775. The language of the record may be abbreviated in an abstract, but it is not proper for counsel to determine what are the facts established, or what is the effect of the evidence, or to substitute what they may consider as substantially the same: *Blohm v. Sweeney*, 66-604.

776. A statement in an abstract that it contains "all the evidence bearing upon or introduced to sustain the issues and findings as to which plaintiff appealed," *held*, not sufficient: *Roe v. Wilmot*, 51-689.

777. Setting out instructions: Where an abstract does not purport to set out the instructions, or any of them, in full, but simply sets forth parts of sentences of various instructions claimed to be erroneous, the court cannot pass upon their correctness: *State v. Nichols*, 38-110.

778. Where the abstract does not contain all the instructions given, alleged error in refusing an instruction cannot be considered: *State v. Williamson*, 68-351.

779. Abstract deemed true: The abstract filed by appellant, in the absence of an additional abstract, constitutes the record and is regarded as a verity. It takes the place of the transcript, and cannot be impeached or contradicted in any other manner or to any greater extent than the transcript could be: *White v. Savery*, 49-197.

780. If appellant's abstract is not denied by appellee, and shown to be untrue by an amended abstract, it will be assumed to be true: *Ibid.*; *Kearney v. Ferguson*, 50-72; *Hardy v. Moore*, 62-65.

781. If appellee files an amended abstract, which is not denied, it will be assumed to be true: *Kearney v. Ferguson*, 50-72.

782. If appellee's amended abstract is denied by another abstract filed by appellant, then the court will look into the transcript and determine its character: *White v. Savery*, 49-197.

783. In the absence of an amended ab-

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abstract denying the statements contained in appellant's abstract, the latter is deemed to be true, notwithstanding such a denial is made in the argument of counsel: *Farmer v. Sasseen*, 63-110; *Weaver v. Kintzley*, 58-191; *Kendrick v. Eggleston*, 56-128.

784. Where appellee discusses questions raised upon the instructions without objecting or suggesting that they are not truly set out in the abstract, his denial in the amended abstract, that the instructions given and refused are not properly set out, will not be considered: *Roberts v. Leon Loan, etc., Co.*, 63-76.

785. Where the abstract on its face appears to be full and complete, the statement that it contains all the evidence cannot be overcome by a mere denial by appellee, so as to require an examination of the abstract, but he must set forth the omitted evidence: *Andracs v. Kerr*, 49-680; *Allen v. Bryson*, 67-591; *Mielenz v. Quasdorf*, 68-726.

786. The statement in appellant's abstract, that it contains all the evidence, will be presumed true, unless appellee files an amended abstract supplying the deficiency: *Aller v. Pennell*, 51-537; *Huff v. Furvell*, 67-298.

787. The party filing an additional abstract purporting to supply defects and omissions in the original abstract, thereby admits that the two abstracts together contain all the evidence given on the trial: *Wells v. Burlington, C. R. & N. R. Co.*, 56-520; *Wilson v. Palo Alto County*, 65-18.

788. Thus, where appellant's abstract purported to contain all the evidence, and appellee filed an additional abstract denying that fact, and denying that the evidence was properly abstracted, held, that appellant's abstract would be deemed correct, notwithstanding the denial, the appellee's abstract not showing wherein appellant's abstract was insufficient or incorrect: *Cross v. Burlington & S. W. R. Co.*, 58-62.

789. If an abstract states that it contains all the evidence, but an amended abstract is filed by appellee giving additional evidence, without claiming that, as thus corrected, the abstract does not give all the evidence, it will be presumed that the abstracts together bring all the evidence before the court: *Cross v. Burlington & S. W. R. Co.*, 51-683.

790. Even if appellant's abstract contains

no averment that all the evidence is found therein, if appellee files an amended abstract setting out evidence alleged to have been omitted from the original, without any statement or claim that the two abstracts together do not contain all the evidence, appellee cannot afterwards urge that the evidence is not all before the court: *Van Sandt v. Cramer*, 60-424; *Starr v. Burlington*, 45-87; *Ferguson v. Davis County*, 51-220; *Cummings v. Browne*, 61-385; *Balm v. Nunn*, 63-641.

791. In such case, a claim by appellee that the evidence is not all before the court will not be considered, if not made until the argument: *O'Brien v. Harrison*, 59-686.

792. If appellant's abstract purports to contain all the evidence, the appellee must supply what he claims has been omitted: *McArthur v. Linderman*, 62-807.

793. Where the abstract of appellant does not purport to contain all the evidence, the appellee may set forth in his amended abstract other portions, coupled with the denial that with these additions the abstracts contain all the evidence, and will not be estopped from relying upon such statement in denial: *Cartwright v. Copest*, 60-195; *Hall v. Harris*, 61-500; *Howe v. Jones*, 66-156; *Hassett v. Hassett*, 66-304.

794. The appellee may, by an additional abstract, undertake to supply deficiencies in the appellee's abstract without thereby precluding himself from objecting that the evidence is not properly certified: *Alexander v. McGrew*, 57-287.

795. And if such objection is made it will be deemed true, unless appellant shows by an amended abstract that the evidence was properly certified: *Roby v. Hall*, 57-213.

796. Such statement, that the abstracts together do not present all the evidence, will be deemed true, unless denied by appellant: *Love v. Donaldson*, 63-631.

797. If an abstract is not denied by the appellee in an amended abstract, the record set out will be taken to be correct, as, for instance, it will be assumed that a bill of exceptions was filed. But if such facts are denied in an amended abstract, the denial will be taken to be true, in the absence of a transcript: *Brainard v. Simmons*, 58-464.

798. Unless an additional or amended abstract be denied it will be regarded as pre-

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sending the record correctly, and will prevail against the original abstract: *Hart v. Jackson*, 57-75; *Ham v. Wisconsin, I. & N. R. Co.*, 61-716; *Lucas v. Jones*, 44-298; *Daniels v. Langdon*, 52-741; *Cole v. Coskery*, 63-526; *Maxwell v. La Brune*, 68-689.

799. And this is true even though it seeks to eliminate something from appellant's abstract: *Richardson v. Hoyt*, 60-68; *Burkhart v. Ball*, 59-629; *Kearney v. Ferguson*, 50-72.

800. Service and filing of amended abstract: Where an amended abstract is served thirty days before the cause is submitted, it will not be stricken from the files because not served within the time required by the rules, where no prejudice could have resulted from the delay: *Green v. Ronen*, 62-89.

801. Where appellee's amended abstract was served twenty days before the case was submitted, and the motion to strike involved nothing but the cost of printing, *held*, that appellant sustained no prejudice from the delay in service and the abstract could not be stricken from the files: *Davidson v. Carter*, 55-117.

802. Where an additional abstract, filed after the filing of appellee's argument, was filed three months before the cause was submitted, and appellee had opportunity to examine it and correct any misstatements or error contained in it, and filed an additional argument based, in part, upon the record as made by the additional abstract, *held*, that such additional abstract might be considered: *Palo Alto County v. Harrison*, 68-81.

803. The fact that an amended abstract is filed without leave or notice is not ground for striking it from the files: *Frost v. Parker*, 65-178.

804. An amendment to appellant's abstract, rendered necessary by reason of a motion in the court below after the record was made up and the appeal taken, should not be stricken from the files because not served upon appellee: *Peterson v. Adamson*, 67-739.

805. It is not unusual to allow a party to file an amended abstract when he discovers his case is not fully presented in the original abstract. This should be done, however, before the case is submitted and at such a time as that the other party will not be

prejudiced thereby: *Wells v. Burlington, C. R. & N. R. Co.*, 56-520.

806. Where a motion was submitted with the case asking the court to strike from the files an amended abstract and argument of the opposite party because not filed within the time agreed upon between the parties, *held*, that while the motion would be overruled, no costs would be taxed to the unsuccessful party for printing such abstract and argument: *Keegan v. Malone's Estate*, 62-208.

807. Appellant cannot, after the appellee has argued his case, amend his abstract without leave of court and thus substantially change the record upon which the case is submitted. If leave to amend is asked, it may be granted upon such terms as seem proper under the circumstances, but an amendment filed without leave after the filing of appellee's argument will be stricken out on motion: *In re Caywood's Will*, 56-301.

808. Appellant cannot file an additional abstract with his argument in reply except to controvert the correctness of appellee's additional abstract: *Johnson v. Chicago, R. I. & P. R. Co.*, 51-25.

809. Under some circumstances, doubtless, a submission may be set aside and the case would then be open for proper changes in the record, but an amended abstract filed after the case is submitted, without the submission being set aside, will not be considered: *Fletcher v. Terrell*, 50-267; *Rogers v. Carman*, 54-715.

810. An application by appellant to amend his abstract after the case is submitted, which application is not accompanied by a motion to set aside the submission, cannot be allowed: *State v. Hamilton*, 57-596.

g. Assignment of errors.

811. Necessary in a law case: In a law action an assignment of errors is absolutely essential to the consideration of the case on appeal, and it is immaterial that but one point is relied upon, and that this is apparent from the record and argument: *Barnhart v. Farr*, 55-366.

812. The court cannot consider objections not made in the assignment of error: *Wood v. Whitton*, 66-295.

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813. An objection not made in the assignment, but first raised in the argument, will not be considered: *Roberts v. Cass*, 27-225.

814. Not necessary in equity: In an equitable action triable *de novo* on appeal, an assignment of errors is not necessary: *Hackworth v. Zollars*, 30-433; *Sherwood v. Sherwood*, 44-192.

815. Where judgment is entered below on the admissions and allegations of the pleadings in an equity case, the cause on appeal is triable *de novo* on such allegations and admissions, and an assignment of errors is not necessary: *Early v. Burt*, 68-716.

816. On appeal from ruling on motion or demurrer: When an appeal is taken in an equity case from a ruling upon motion or demurrer, error must be assigned: *Powers v. O'Brien County*, 54-501; *Patterson v. Jack*, 59-632.

817. Trial of equitable actions upon assignment of errors: Where an equity case is not in proper form for trial *de novo*, it may be heard like an action at law on assignment of errors properly preserved by exceptions: *Schmeltz v. Schmeltz*, 52-512; *Cross v. Burlington & S. W. R. Co.*, 51-683; *Jordan v. Wimer*, 45-65; *Lutz v. Kelly* 47-307; *Lynch v. Lynch*, 28-326; *Jones v. Clark*, 37-586; *Mallory v. Luscombe*, 31-269.

818. Record must show error assigned: Where the record does not show that the ruling complained of in the assignment of errors was in fact made, such question cannot be considered: *Borland v. McNally*, 48-440.

819. What the assignment should show: An assignment of errors should plainly state the error complained of and not merely refer to the parts of the record wherein the objection complained of is said to appear: *Wood v. Whitton*, 66-295.

820. Assignments held insufficient: An assignment "that the court erred in its action in regard to the jury," held too indefinite: *Hannon v. Chandler*, 3-150.

821. An assignment that there was error in allowing the introduction of evidence objected to by plaintiff, and that the court erred in finding for defendant, held too indefinite: *Garrett v. Wells*, 63-256.

822. An assignment that "the court erred in overruling the defendant's exceptions to the report of the referee and entering judg-

ment against defendant," held not sufficiently specific: *Hoefer v. Burlington*, 59-281.

823. An assignment that "the court erred in rendering judgment for appellee" is not sufficiently specific: *Tomblin v. Ball*, 46-190.

824. The assignment that a verdict is contrary to the law as given by the court is too general: *Wood v. Hallowell*, 68-377.

825. Assignments that "the court erred in admitting improper and rejecting proper testimony," and that "the court erred in admitting certain evidence of the defendant against plaintiff's objection," held not sufficiently specific: *Merchants' Union Barbed Wire Co. v. Rice*, 70—.

826. Assignments of error that the verdict is contrary to law, and that the court erred in admitting testimony on the trial, and that the court erred in excluding testimony on the trial, and that the court erred in overruling defendant's motion in arrest of judgment and for a new trial, are not sufficiently specific: *Armstrong v. Nillen*, 70—.

827. Assignments held not sufficiently specific in the following cases: *Haves v. Twogood*, 12-582; *Wilson v. Hillhouse*, 14-199; *Morris v. Chicago, B. & Q. R. Co.*, 45-29; *Oschner v. Schunk*, 46-293; *Bardwell v. Clare*, 47-297; *McCormick v. Chicago, R. I. & P. R. Co.*, 47-345; *Nockles v. Eggspieler*, 47-400; *Moffatt v. Fisher*, 47-473; *Benton v. Nichols*, 47-698; *Betts v. Glenwood*, 52-124; *Black v. Boyd*, 52-719; *Brown v. Rose*, 55-734; *Wilson v. Klokenteger*, 56-764; *Low v. Fox*, 56-221; *Vanderberg v. Camp*, 68-212.

828. Errors in instructions: Unless the particular points claimed to be erroneous in instructions are specifically designated, an assignment of error thereon will not be regarded: *Peck v. Hendershott*, 14-40; *Brewington v. Patton*, 1-121.

829. An assignment of error in giving certain instructions, in refusing certain others, and in modifying certain others, specifying them in each case, held sufficiently specific: *Sherwood v. Snow*, 46-481.

830. An assignment of errors in giving instructions, designating them by number, as "in instructing the jury that," stating in substance a brief proposition of law, held sufficient: *Kendig v. Overhulser*, 58-195.

831. An assignment of errors stating that "the court erred in giving on its own motion

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each of the instructions numbered," setting out the numbers of the instructions objected to, is sufficiently specific: *Clark v. Ralls*, 50-275.

832. The assignment that the court erred in refusing to give certain instructions mentioned by number, and each one thereof, and in giving others mentioned by number, and in giving each thereof, is sufficiently specific: *Wood v. Whitton*, 66-295; *Hammer v. Chicago, R. I. & P. R. Co.*, 70—.

833. Where several instructions present but a single proposition, the assignment that the court erred in refusing to give them and each of them specifically, points out the error objected to: *Hathaway v. State Ins. Co.*, 64-229.

834. An assignment based upon instructions generally, without pointing out specific portions claimed to be erroneous, is not sufficient: *Peck v. Hendershott*, 14-40.

835. Where the assignment indicates clearly the instructions asked and refused, and that the court erred in refusing them, such assignment is sufficient without pointing out the particular objection relied upon: *Schaefer v. Chicago, M. & St. P. R. Co.*, 62-624.

836. Error in ruling on motion: Where a motion is made upon a statutory ground, and the overruling of the motion is assigned as error, such assignment will be sufficiently specific although the motion has specified more than one thing as constituting the irregularity complained of in the motion: *Thomas v. Hoffman*, 62-125.

837. Assignment of error in the overruling of a motion to dismiss, which motion was based on a single ground, held sufficiently specific: *Nichols v. Wood*, 66-225.

838. Error in ruling on motion for a new trial: A general assignment of error in overruling a motion for a new trial will not bring before the court the question whether the verdict finds sufficient support in the evidence, where that is only one of several grounds relied upon in the motion: *Leekins v. Nordyke, etc., Co.*, 66-471.

839. A general assignment of error in overruling motion for new trial, when such motion was based on several different grounds, is not sufficiently specific: *Reilly v. Ringland*, 44-422; *Richardson v. McCormick*,

47-80; *Stevens v. Brown*, 60-403; *Marsel v. Bowman*, 62-57; *Terry v. Taylor*, 64-35; *McCormick v. Chicago, R. I. & P. R. Co.*, 47-345; *Oschner v. Schunk*, 46-293; *Foley v. Kirkland*, 66-227; *Hasner v. Patterson*, 70—.

840. An assignment of errors in overruling a motion for a new trial, where no specific grounds of error are pointed out, is not sufficient: *Morris v. Chicago, B. & Q. R. Co.*, 45-29.

841. Where the error assigned was that the court erred in overruling the first, second and third grounds of defendant's motion for a new trial, and it appeared that the grounds referred to, while stated in three different ways, amounted to the same thing and embraced a single proposition, held, that the assignment was sufficient: *Kitterman v. Chicago, M. & St. P. R. Co.*, 69-440.

842. Error in ruling on demurrers: An assignment of error in the ruling of the court sustaining the several demurrers of different defendants, is not sufficiently specific: *Bradley v. Johnson*, 67-614.

843. Error in judgment: An assignment that the court erred in rendering judgment against the party who appeals could be valid only where the court below had rendered its decision in writing, stating the facts found and the conclusions of law thereon, or where the case had been tried by the court and the evidence was all brought up by a bill of exceptions: *Dean v. White*, 5-266.

844. Service and filing of assignment of errors: If the assignment of errors is filed at the time required, it cannot be stricken from the files, although not served or filed until appellee's argument is filed: *Conner v. Long*, 63-295.

845. Appeal will be dismissed if assignment of errors is not served in time. It seems that, if properly served on the appellee, he could not complain of the mere non-filing of the same with the clerk: *Independent Dist. v. Independent Dist.*, 48-206.

846. An assignment of errors presented by appellant in connection with his reply to appellee's argument will not be considered: *Betts v. Glenwood*, 52-124.

847. An assignment of errors not filed within ten days before the first day of the term and not until appellant's argument is

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filed cannot be considered: *Russell v. Johnston*, 67-279.

848. Objection for want of assignment must be made prior to the final trial and submission or it will be deemed waived, although the court may, notwithstanding such waiver, require an assignment: *Andrews v. Burdick*, 62-714.

849. An amended assignment, filed more than ten days before the term at which the cause is submitted, and duly served, will be considered: *Kendig v. Overhulser*, 58-195.

850. An amended assignment of errors which is not in time for the term to which the case was appealed, but was in time for a subsequent term to which the case was continued and at which it was tried, held to be filed in sufficient time: *Brown v. Rose*, 55-734.

851. Assignment made at end of appellant's argument, and not objected to by appellee until after the filing of his argument and within two days of the submission of the case, held sufficient: *University of Des Moines v. Livingston*, 57-307.

852. Assignments not argued: Assignments of error which are not discussed or insisted upon in argument will not be considered: *Clise v. Freeborn*, 29-110; *Soward v. Chicago & N. W. R. Co.*, 30-551; *Snyder v. Eldridge*, 31-129; *Hows v. Fostenson*, 31-600; *Abbott v. Board of Supervisors*, 36-854; *Cook v. Sioux City & P. R. Co.*, 37-426; *Hale v. Gibbs*, 43-380; *Huiras v. Berkeley*, 51-701; *Betts v. Glenwood*, 52-124; *Hepmon v. Dubuque*, 52-713; *Rice v. Plymouth County*, 53-635; *Smith v. Hickenbottom*, 57-783; *Clark v. Epworth*, 61-750; *Beeson v. Chicago, R. I. & P. R. Co.*, 62-173; *Wood v. Whitton*, 66-295; *Wood v. Hollowell*, 68-377.

853. The supreme court will not consider assignments of error not argued by counsel, even though they are stated in his argument: *Manning v. Burlington, C. R. & N. R. Co.*, 64-240; *Patterson v. Seaton*, 70 —.

854. An objection which is merely referred to in such way as might be sufficient as an assignment of errors, but is not argued, will not be considered: *Goodnow v. Wells*, 67-654.

855. Where the only argument made in support of an error assigned is a mere re-statement of the assignment, it will not be considered. If counsel are unable or un-

willing to suggest cogent reasons in support of an alleged error, the court will not assume that duty: *Marker v. Dunn*, 68-720.

856. Where no reasons are given in support of an assignment, it will not be considered by the court: *Parsons v. Parsons*, 66-754.

857. Errors assigned but not referred to in the opening argument are deemed waived and cannot be referred to for the first time in appellant's reply: *Renwick v. Davenport & N. W. R. Co.*, 49-664.

858. Where the assignments are referred to, and the general theory of the case is argued as inconsistent with the instructions given, and calling for the instructions refused, which giving or refusing is assigned as error, the assignment will not be deemed waived, although the instructions are not specifically discussed: *Clark v. Ralls*, 50-275.

h. Arguments.

859. Failure of appellant to file argument or brief will be considered an abandonment of the appeal: *Mores v. Hanchett*, 54-747; *Dinning v. Bement*, 54-156; *Cline v. Phipps*, 62-759; *Lamp v. Sievers*, 66-85.

860. In such case the decision of the lower court will be affirmed: *Devore v. Adams*, 68-385.

861. Although in an equity case the opening and closing on appeal may fall upon appellee, yet the failure of appellee to file an opening argument will not warrant the appellant in failing to file any argument whatever. If he does so, his appeal will be regarded as abandoned: *Scott v. Neises*, 61-62.

As to opening and closing in equity cases triable *de novo*, see *infra*, §§ 1082, 1083.

862. The supreme court will never decide questions which are not argued upon both sides, except when there exists an absolute necessity for their decision: *McKern v. Albia*, 69-447.

863. And the court will stop the consideration of a case not argued by appellee, upon reaching the conclusion that it ought to be reversed on any one ground: *Deeds v. Chicago, R. I. & P. R. Co.*, 69-164; *Gilfeather v. Council Bluffs*, 69-310.

864. Erroneous reasoning assigned as the ground of objection to action of the lower

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court will not prevent the court from considering a valid objection properly made in the lower court: *Gilman v. Donovan*, 59-76.

865. Filing of argument: An argument will not be stricken out on motion because not filed in time: *Bartle v. Des Moines*, 87-685.

866. But if the court is asked to do so, it will tax the costs to the party filing the argument after the proper time, unless the failure to file within the time prescribed by the rules has been reasonably excused: *Renwick v. Bancroft*, 59-116; *Smith v. McFadden*, 56-482.

867. While not striking the argument from the files because not filed in time, the court will, in a proper case, inflict penalties, or continue the case when asked to do so: *Cox v. Forrest City & S. R. Co.*, 66-289.

868. Especially will the argument not be stricken from the files because not filed in time, where the party moving to strike does not desire to file any argument on his part: *Kellam v. McAlpine*, 63-251.

869. Arguments filed with the clerk after the case is submitted are, by order of the court, not sent to the justices: *Wells v. Burlington, C. R. & N. R. Co.*, 56-520.

870. An argument improperly filed, as where appellee has improperly filed the opening argument, may be stricken from the files, but will not entitle the opposite party to judgment for costs: *Devore v. Adams*, 68-385.

871. Service of argument: Where a cause is submitted in a regular manner it will not be remanded upon the mere statement of opposing counsel in a petition for rehearing, that the argument was not properly served: *Hall v. Harris*, 61-500.

872. Where cases are argued together in the supreme court, in an oral argument, the court will look at the printed arguments in the cases to determine what portion of the oral argument was intended to be applicable to each, and a point raised in the oral argument will not be considered in a case the brief of which does not raise such point: *Iowa Homestead Co. v. Des Moines Nav. & R. Co.*, 63-285.

873. Taxation of costs: Where an argument contained numerous misleading errors, evidently due to want of time or negligence in reading the proof, held, that the costs

thereof could not be taxed with the costs in the case: *Fair v. Brown*, 40-209.

874. References to abstract: It is improper in a printed argument to refer to matters contained in the abstract without giving the page of the abstract where such matters may be found: *Herriott v. Kersey*, 69-111.

875. Improper argument: It is improper for an attorney in argument to make a statement of facts outside of the record impeaching the judicial conduct of the judge before whom the case is tried: *Paine v. Frost*, 67-282.

876. Improper remarks by counsel in printed argument adverted to and criticised: *Sax v. Drake*, 69-760.

877. On motion of appellant, a portion of appellee's argument was stricken out on account of its abusive character: *Cassidy v. Palo Alto County*, 58-125.

VII. HEARING AND DETERMINING OF THE APPEAL.

a. *Dismissal or affirmance on motion.*

878. For failure to file transcript or abstract: In the absence of the certificate of the clerk below, excusing the failure to file a transcript on the ground that he has not had sufficient time to prepare it, the appellee may, by filing a certified transcript of the judgment, have the judgment affirmed on motion. The statutory provision to this effect is not merely directory, but must be complied with to entitle a party to be heard in the supreme court, unless waived by agreement or act of the appellee: *Turner v. Hine*, 37-500.

879. The provision of the rules of the court for affirmance on motion for failure of the appellant to file a printed abstract does not supersede the provision of the statute authorizing an affirmance on motion for failure to file the transcript with the clerk, but in the latter case appellee, to be entitled to an affirmance, must file a certified copy of the judgment as a basis of the court's action, which is not required where the failure is merely to file the printed abstract: *Hunger v. Patterson*, 37-501.

880. Appellee can only have the appeal dismissed or the judgment affirmed when

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notice of appeal has been served the proper length of time before the term; but a showing that the clerk was served in time will be sufficient to authorize an affirmance on motion for failure to file the transcript, without a showing that the party also was served: *Pratt v. Western Stage Co.*, 26-241.

881. By subsequent statutory provision to that above referred to, the appeal is not to be dismissed or the judgment affirmed on account of failure to docket or file transcript, if it appears that the appeal was taken in good faith and not for delay, and an affirmance, where bad faith does not appear, will beset aside: *Engleken v. Schultz*, 40-708.

882. If appellee, upon being served with the abstract, or within a reasonable time thereafter, does not indicate to appellant that he desires a transcript, but insists thereon at the term at which the cause is to be submitted by filing a motion to dismiss or affirm, time will be given to procure a transcript, and if necessary a continuance for that purpose will be granted: *White v. Savery*, 49-197.

883. The court will not dismiss the appeal on motion for failure to file a transcript, but order the transcript to be filed and continue the case until it can be done: *Manson v. Ware*, 63-345; *Aldrich v. Price*, 57-151.

884. Failure to file a transcript can only be taken advantage of by motion to dismiss the appeal or affirm the judgment, and cannot be urged on final hearing: *Holmes v. Hull*, 48-177.

885. Setting aside affirmance: A judgment of affirmance may be set aside upon a proper showing such as to authorize such action: *Scarf v. Patterson*, 87-503.

886. If the motion to dismiss the appeal is overruled by the court *pro forma*, in order that it may be left for determination on the final submission, such action will not prevent its full consideration on the final determination of the cause: *Green v. Ronen*, 82-89.

887. Dismissed upon other grounds; when proper: Where it did not appear that a general verdict had been found or that judgment had been rendered, *held*, that the appeal ought to be dismissed on motion: *Martin v. State F. Ins. Co.*, 58-609.

888. The existence of the judgment from

which the appeal is taken is a jurisdictional fact, and if the existence of such judgment does not appear from the abstract, the appeal will be dismissed: *Warder v. Schwartz*, 65-170.

889. Affirmance or dismissal on motion will not be granted on the ground that the case is not triable *de novo*, and there is no assignment of errors. Such an objection can only be raised on final hearing: *White v. Savery*, 49-197.

890. An objection that the record, on appeal, does not sustain the errors assigned, can only be determined upon final hearing and not on motion: *Balm v. Nunn*, 63-641.

891. Cause remanded for repleading: When the record is in such condition that the supreme court cannot determine from the pleadings what issues are before it, the cause may be remanded in order that the parties may have an opportunity to replead: *Lyon v. Tevis*, 8-79.

892. Dismissal of appeal by appellant: A state may, as appellant, dismiss its appeal from a ruling of the lower court when it does not appear that such dismissal will prejudice the rights of the appellee: *State v. Moriarty*, 20-595.

893. Where a suit for *mandamus* was brought against the individuals composing the board of canvassers of an election to relocate a county seat (who were the county supervisors), and upon trial the *mandamus* was awarded from which defendants appealed, *held*, that the appeal could not be dismissed in the supreme court upon motion of a subsequently elected board of supervisors, such board being merely the nominal party: *State v. Cavers*, 22-848.

894. Where appellant is not entitled to prosecute the appeal, as, for instance, after payment of the amount of the judgment and acceptance of the same by the appellant, the appeal will be dismissed on motion: *Independent Dist. v. District T^p*, 44-201.

895. It is possible that where an appeal is prosecuted from an intermediate order affecting the merits, and the action is, in the meantime, prosecuted to final judgment in the court below, such fact might be brought to the attention of the supreme court as a ground for dismissal of the appeal: *Stanley v. Davenport*, 54-463.

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896. Where appellant by motion and affidavit sought to show that pending the appeal appellee (the plaintiff) had accepted a sum of money in full settlement of the judgment recovered below, and appellant thereupon asked that the appellee should take nothing further in the cause and be barred from the further prosecution of the action, and that appellant be discharged from further liability, which motion was resisted on the ground that a part of the judgment had been assigned before settlement, and that there was fraud in obtaining the settlement, *held*, that the court could not grant the motion and appellant must either dismiss or prosecute his appeal: *Simonson v. Chicago, R. I. & P. R. Co.*, 48-19.

897. To justify a dismissal of the appeal upon a showing that appellant has no further right to prosecute it, that fact should clearly appear. Where there is no doubt as to the facts, the appeal will not be dismissed: *Lewis v. Tilton*, 62-100.

898. Where a party appealed from a decree restraining his use of property for a certain purpose, and on motion it was made to appear that he had lost his interest in the property, *held*, that the appeal would not be further entertained for the purpose of determining the question of costs: *Faucher v. Grass*, 60-505.

899. Where the party in whose name the action is prosecuted appears on appeal by his affidavit and otherwise not to be the real party in interest and not to have authorized the prosecution of the action, the appeal may be dismissed. Such showing by the party in whose name the appeal was prosecuted will constitute a virtual abandonment of the appeal: *Gresham v. Chantry*, 69-728.

900. Where a motion to dismiss an appeal, because appellant is not entitled to prosecute it, is based upon facts as to which the affidavits filed by the respective parties are in conflict, the appeal will not be dismissed: *Long v. Smith*, 67-22.

901. Abatement by death: Where, pending an appeal in a divorce case, one of the parties dies, the action abates, both as to the claim for divorce and as to alimony: *Barney v. Burney*, 14-189.

902. The fact that the death of a party to the appeal is suggested to the supreme

court and made a matter of record does not constitute a revival of the cause against the heirs or representatives of such party: *Ibid.*

903. Affirmance without prejudice: It is competent for the supreme court, in the decision of a motion addressed to its discretion, to order the affirmance of the judgment without prejudice to the rights of the appellant to a new trial in the court below: *White v. Poorman*, 24-108.

904. Where a decree had been affirmed by reason of the defective condition of the record preventing a trial *de novo*, and afterward it was sought to have a re-investigation of the case upon a perfected record, *held*, that the decree could not be reopened, but that in view of the peculiar circumstances of the case, the court would order that such decree should not conclude the rights of either party in a new action: *Van Orman v. Spafford*, 20-215.

905. Second motion: A motion to dismiss an appeal is no bar to a motion for the same purpose made upon a new and more perfect record: *Seacrest v. Newman*, 19-323.

b. Method of trial of appeal in special proceedings.

906. Correcting assessments: An appeal in an action by special proceedings is to be tried according to the method provided for ordinary or for equitable proceedings according to the nature of the action: *Davis v. Clinton*, 55-549.

907. Probate of will: A proceeding for the probate of a will being a special proceeding cannot be tried in the supreme court *de novo*, but must be reviewed on errors assigned in the record: *Ross v. McQuiston*, 45-145; *Sisters of Visitation v. Glass*, 45-154; *In re Will of Donnelly*, 88-126.

908. An action to test the validity of a will is not triable *de novo* on appeal: *Kelsey v. Kelsey*, 57-383.

909. Summary proceedings: A trial *de novo* can be had only in equitable proceedings. In summary proceedings, as for instance to cancel a judgment, the supreme court only has jurisdiction for the correction of errors at law: *Brett v. Myers*, 65-274.

910. A habeas corpus proceeding will be heard on appeal on errors assigned as in an ordinary proceeding: *Drumb v. Keen*, 47-435.

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911. A proceeding to restore lost corners, as provided by statute, being a special proceeding involving merely a legal right, will be reviewed on appeal as an ordinary and not as an equitable action: *In re Harrington*, 54-33.

c. Affirmance or reversal in general; remanding; final judgment.

912. Want of jurisdiction of the subject-matter in the court below may be raised for the first time on appeal to the supreme court: *Walters v. Steamboat Mollie Dozier*, 24-192.

913. And the want of jurisdiction of the lower court may be taken notice of by the supreme court, although not raised: *Groves v. Richmond*, 58-570.

914. Where a change of venue was granted to a court having no jurisdiction to try the case, *held*, that the want of jurisdiction in the trial court could be urged in the supreme court, although not raised below, and the judgment was reversed: *Cerro Gordo County v. Wright County*, 59-485.

915. Under such circumstances the supreme court will not review the questions arising on the trial in the court having no jurisdiction: *Bennett v. Carey*, 57-221; *Gilman v. Donovan*, 59-76.

That in such case the cause will be remanded to the court improperly granting the change of venue, see *infra*, §§ 978, 979.

916. Affirmance where result is correct: Where the judgment of the court below is found to be correct, it will be affirmed although the reasons given therefor are erroneous: *Whiting v. Root*, 52-292; *Jamison v. Perry*, 38-14.

917. Cannot be affirmed on another ground: Where a motion to set aside a verdict and grant a new trial is overruled upon all the grounds urged except one, and on appeal the action of the court on this ground is held to be erroneous, the case will be reversed without inquiry as to whether the motion should not have been sustained on other grounds, the opposite party not having appealed with reference to the ruling on such grounds: *Collins v. Brazill*, 63-432.

918. Where a demurrer is erroneously sustained upon one ground and overruled upon another as to which it should have been sus-

tained, the action of the court will be reversed on appeal in order that the appellant may be enabled to take such action as he might have taken in the lower court if the demurrer had been sustained on the proper ground: *District T'p v. Independent Dist.*, 63-188.

No relief to party not appealing: See *supra*, §§ 590-592.

919. Nor to party successful below: A party against whom no judgment has been rendered cannot question the correctness of the proceedings in the lower court, and if the judgment is reversed, so far as it is in his favor he should not be bound thereby, so far as the proceedings are adverse to him, but should be given an opportunity for a new trial: *Boyce v. Wabash R. Co.*, 63-70.

And see *supra*, § 336.

920. Where a judgment contains two adjudications, one in favor of a party and one against him, and he appeals from the entire judgment, it will be presumed that he appeals from that portion adverse to him; and especially is this true where the relief sought by the appeal, if granted, would render the judgment of the court below nugatory. On such appeal, the judgment will not be interfered with in behalf of the party not appealing: *Hintrager v. Hennessy*, 46-600.

921. Entire reversal for error as to one count: Where error is committed as to only one of two counts upon which plaintiff recovers, but it does not appear clearly as to the amount recovered on each count, the entire judgment will be reversed: *Sioux City & P. R. Co. v. Walker*, 49-273; *Bond v. Wabash, St. L. & P. R. Co.*, 67-712.

922. Where an ordinance provided for a fine for maintaining a nuisance, and a person was under such ordinance fined, and the abatement of the nuisance ordered, and the supreme court held that the ordinance, in so far as it provided for a fine, was in excess of authority and void, *held*, that it would not sustain so much of the judgment as provided for the abatement of the nuisance, but would reverse the whole judgment: *Nevada v. Hutchins*, 59-506.

923. Affirmance where several issues are involved: The affirmance of a general judgment is an affirmance thereof with respect to all the issues decided thereby, although

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the opinion be based upon but one of such issues: *Finch v. Hollinger*, 46-216.

924. Where a judgment is entire, it should be affirmed or reversed as to all the parties appealing: *Cavender v. Smith's Heirs*, 5-157, 195.

925. Case remanded as to cross-action: A cause may be remanded for new trial as to a cross-action, with an order that such trial shall extend to that alone, and that the judgment on plaintiff's original action remain undisturbed: *McAfferty v. Hale*, 24-355.

926. Opinion of court on points which become immaterial: When a case is reversed upon errors in instructions and sent back for a new trial, the court will not express its opinion as to errors claimed to have been made in the admission or rejection of evidence which may not occur on a new trial: *Gould v. Chicago, B. & Q. R. Co.*, 66-590.

927. The provision requiring the court to decide on each error assigned, construed: *Baker v. Kerr*, 13-884.

928. Effect of affirmance of ruling on demurrer: Where a demurrer was submitted without stipulation for either party to amend or plead over, and the action of the court in overruling the demurrer was excepted to, and judgment for the other party entered, held, that upon the affirmance of the ruling on the demurrer the judgment was final, and the unsuccessful party could not have the cause remanded for the purpose of pleading over: *Grimes v. Hamilton County*, 37-290.

929. In such a case the court will not, upon affirming the action of the court below, grant leave to the appellant to withdraw his demurrer and proceed to trial upon the merits: *Dunlap v. Cody*, 31-260.

930. The action of the supreme court in sustaining the decision of the court below overruling a demurrer will be final as against the unsuccessful party only where judgment has been entered against him in the court below for failure to plead or to proceed with the case: *Tyler v. Langworthy*, 37-555.

931. Effect of reversal; new trial: It is only where the facts are settled by agreement of the parties or by the finding of a court or referee, or by a special verdict of the jury, that upon reversal in the supreme court in an action triable by ordinary proceedings, the court may render final judgment for the

party unsuccessful in the lower court. In other cases a new trial must be awarded: *Artz v. Chicago, R. I. & P. R. Co.*, 88-298; *Gray v. Regan*, 87-688; *Harwood v. Case*, 87-692.

932. Where the facts are not thus determined, and the cause is reversed and remanded to the lower court, judgment should not there be rendered without a retrial: *Harwood v. Case*, 87-692.

933. Where a judgment rendered below upon a report of a referee was set aside, on appeal, as in conflict with the law and evidence, and the case was remanded, held, that the lower court should have proceeded in the same manner as though such report had been set aside upon motion there made: *Gray v. Regan*, 87-688.

934. When final judgment will be entered on reversal: The supreme court cannot render final judgment where it reverses a cause on the ground that a new trial should have been granted below. It can only enter up such judgment as the court below should have rendered: *Payne v. Chicago, R. I. & P. R. Co.*, 47-605.

935. So held, in a case where a judgment was reversed because not supported by the evidence, and it also appeared that the evidence was substantially the same on a former trial in which judgment had likewise been reversed on the same ground: *Ibid.*

936. Upon a determination in the supreme court that there was error in refusing to admit certain testimony offered in the court below, the supreme court cannot proceed to render judgment as though the testimony had been admitted. The offered evidence might not be sufficient proof of the fact which it tended to establish, or might have been overthrown by other evidence. The issue must be again passed upon by the lower court: *Mende'l v. Chicago & N. W. R. Co.*, 20-9.

937. Where defendant has not had an opportunity to defend in the court below, for example, in case of default upon service by publication, the supreme court will not, in case of reversal, enter final judgment, but remand the case for the purpose of allowing defense to be made: *Doolittle v. Shelton*, 1 G. Gr., 272.

938. Where defendant in the court below,

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upon his demurrer being overruled, stood thereon and appealed, and the ruling was reversed, *held*, that he was not entitled to judgment in the supreme court, but that the case must be remanded, and the plaintiff would have leave to amend: *Ware v. Thompson*, 29-85.

939. Where the court below made a finding of facts unfavorable to defendant, and to which he excepted, and rendered judgment for defendant upon another question, and upon appeal by plaintiff the judgment was reversed, *held*, that as the correctness of the finding of facts could not be inquired into, although defendant also appealed, for the reason that there was no judgment against him, the court would not enter up judgment upon the finding of facts, but remand the case to the district court to retry the issues of law and fact: *Boyce v. Wabash R. Co.*, 63-70.

940. The reversal on appeal of an order directing the issuance of a writ of possession on the ground that it is irregular merely, and not because the adverse party is entitled to possession, does not entitle such adverse party, on motion, to an order for a writ of restitution. If the writ of possession is yet undetermined, the right thereto cannot be decided upon a mere motion: *Lombard v. Atcaler*, 46-501.

941. Where the judgment upon a special verdict is reversed on an error below, the supreme court may render such judgment as should have been rendered below: *Gilmore v. Ferguson*, 28-422.

942. Where a case is reversed on the ground that upon a finding of facts made by the court, the judgment is erroneous as a matter of law, final judgment may be rendered on such finding: *Shaw v. Nachtwey*, 43-653.

943. In such a case the supreme court may remand the cause for final judgment in the lower court, and judgment below should be entered up without a retrial: *Roberts v. Corbin*, 28-355; *Drefahl v. Tuttle*, 42-177.

944. Where a party has sued under a statute authorizing the recovery of treble damages, and the judgment in his favor is held to be erroneous on appeal, the supreme court cannot give him judgment for actual damages on a different cause of action: *Bond v. Wabash, St. L. & P. R. Co.*, 67-712.

945. Effect of reversal for conflict between verdict and instructions: Where a judgment is reversed because the verdict is inconsistent with the instructions of the court and special findings thereunder, although the correctness of the instructions will not be considered, the supreme court will not render a final judgment on the special findings, and in accordance with the instructions, but will remand the cause so that the correctness of the instructions may be determined by an appeal from the judgment of the court on the special findings: *Baird v. Chicago, R. I. & P. R. Co.*, 55-121; *S. C.*, 61-359.

946. Affirmance of judgment as modified: Where special findings were inconsistent with the general verdict, in so far as the latter included an allowance on one count of the petition, *held*, that the court could modify the judgment by striking therefrom the amount allowed on that count and affirm it as to the balance: *Cobb v. Illinois Cent. R. Co.*, 38-601.

947. Where final judgment should be entered: Where the judgment will affect the title to real estate, it should be entered in the lower court, and the case will be remanded for that purpose: *Hait v. Ensign*, 61-724.

948. What is the final judgment: If final judgment is rendered in the supreme court on appeal, it is the judgment of that court which constitutes the final adjudication of the cause and not the judgment of the court below: *Griffin v. Seymour*, 15-80.

949. Final judgment at subsequent term: The supreme court having reversed a cause and remanded it for a new trial will not, at a subsequent term, on motion of appellant, render judgment in his favor. In analogy to the rule as to the lower courts, entries or orders made at a previous term will only be changed to correct an evident mistake: *Roberts v. Corbin*, 26-315, 329.

950. Cancellation or correction of judgments: The supreme court has power, aside from any statutory provision, to correct or cancel judgments improvidently entered through mistake or oversight: *Drake v. Smythe*, 44-410.

951. Effect of judgment in supreme court: If appellee take a new judgment

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against appellant and sureties on his appeal bond, the former judgment is merged therein, and its lien destroyed: *Swift v. Conboy*, 12-444.

952. Before a statutory provision to the contrary, *held*, that where appellee on motion secured a judgment in the supreme court against appellant instead of a simple affirmance of a judgment of the lower court, such new judgment was subject to stay of execution in the same manner that the judgment in the lower court would have been: *Peoria F. & M. Ins. Co. v. Dickerson*, 29-98.

953. Judgment in supreme court on appeal bond; damages: Where there is not a money judgment in the court below against appellant, the supreme court cannot render such judgment on the appeal bond. Although the appeal may be taken solely for delay, yet it is only where the collection of money and the judgment therefor has been superseded by bond that the statute allows damages to be awarded against the party taking the appeal: *Berryhill v. Keilmeyer*, 83-20.

954. It is only where a judgment or order for the payment of money is appealed from, or where the damages can be accurately known to the supreme court without an issue or trial, that the court is authorized to award to appellee damages against appellant for taking the appeal: *Branscomb v. Gillian*, 55-235.

955. It appearing that appellant had been at the expense of printing abstract and argument, presenting the question raised by the appeal, *held*, that it was not proper to award damages against appellant for having taken the appeal: *Ragan v. Day*, 46-239.

956. Remitting excess, and final judgment in supreme court for balance: On an appeal in an action in which usury was pleaded as a defense, *held*, that plaintiff might remit the usury and take judgment in the supreme court for the principal, and that judgment might also be entered there for the ten per cent. penalty for the use of the school fund: *Thompson v. Purnell*, 10-205.

957. Where plaintiff, in an action to recover damages for injury to stock on defendant's railroad track, recovered double damages in the lower court, but on appeal it was considered that the service of notice was not sufficient to entitle him to double damages,

held, that the case would be reversed unless plaintiff consented to a judgment for simple damages and submitted to pay the costs of appeal: *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 56-440.

958. Where the supreme court reversed a case for error in including certain items in the judgment therein, and, on a petition for rehearing, appellee offered to remit such portion of the judgment as was held erroneous and asked for judgment for the balance, *held*, that such offer would be accepted, even on rehearing, and a judgment for the balance was entered: *Hyde v. Minneapolis Lumber Co.*, 53-243.

959. Where the attention of the court is called, upon a petition for rehearing, to the fact that there is error in the allowance of interest, and the opposite party offers to remit the excess, the judgment will be reduced to the proper amount without granting a rehearing, and the costs of the appeal will be taxed to the appellee: *Gere v. Council Bluffs Ins. Co.*, 67-272.

960. Where the judgment is for too large an amount by reason of an erroneous assessment of interest, if the party recovering the judgment remits the amount of the excess, judgment may be affirmed with such correction, and it is not necessary that it be remanded: *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

961. Remitting in lower court: Where an offer to remit the excess in the judgment was made in the lower court, after service of notice of appeal, and the appeal was nevertheless prosecuted, *held*, that the successful party might, upon remitting the excess, have affirmance of the judgment in the court below with costs, but that if no such remission was entered, then the judgment would be reversed: *Waggoner v. Turner*, 69-127.

962. The successful party may, in the lower court, remit the amount of the excess or submit to a new trial: *Kitterman v. Chicago, M. & St. P. R. Co.*, 69-440.

963. Remittitur where verdict is excessive: Where the verdict is evidently excessive by reason of an error in assessing the amount of recovery, the supreme court may order the successful party to remit the amount of excess or submit to a new trial: *Howe v. Sutherland*, 89-484.

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964. In a particular case, *held*, that the amount of damages allowed in an action for personal injuries, although mental anguish was a proper element to be considered, was so excessive as to indicate passion or prejudice, and appellee was allowed the option of accepting a less amount or submitting to a reversal: *McKinley v. Chicago & N. W. R. Co.*, 44-314.

965. A verdict in an action against a railway company for personal injuries being deemed by the supreme court excessive under the evidence in the case, and the result of prejudice, they directed that appellee might take judgment for a certain amount, and that if he had not elected to do so, within the time set, judgment should be reversed: *Lombard v. Chicago, R. I. & P. R. Co.*, 47-494.

966. Where judgment was entered below for less than the amount of the verdict on the ground that it was excessive, *held*, that the cause should be reversed and remanded with direction to the lower court to allow plaintiff to accept such judgment or submit to a new trial: *Noel v. Dubuque, B. & M. R. Co.*, 44-293.

967. A verdict will not be reduced in the supreme court on the ground that it is excessive unless such relief has been asked in the court below: *Small v. Chicago, R. I. & P. R. Co.*, 55-582; *Dickey v. Harmon*, 26-501.

968. Election to remit: While, if the verdict is excessive, it may be set aside on appeal and remanded, yet the court will not usually make an absolute order of remand, but allow the successful party to elect to take a certain amount which the court consider not excessive, or submit to a new trial: *Cooper v. Mills County*, 69-350.

969. Costs in case of remittitur: Where a judgment was modified in the supreme court on account of excessive interest having been included therein, but it did not appear that attention had been called to the error in the court below, *held*, that costs of appeal should be taxed to appellant: *Bayliss v. Hennessey*, 54-11.

970. Where the mistake in the judgment is such that it would probably have been corrected, if a motion therefor had been made, the costs will be taxed to appellant: *Sanxey v. Iowa City Glass Co.*, 68-542.

971. Where the judgment is excessive in amount, and it does not appear that any offer was made to remit the excess in the court below, costs of the appeal will be taxed to the appellee, although he may make the remission in the supreme court and prevent the case from being remanded: *Payne v. Billingham*, 10-360.

972. Where, before costs were made on appeal, the successful party offered in writing to remit all the judgment above a certain amount, which offer was refused, and, upon final hearing, the other party was allowed to recover more than the amount offered, *held*, that the costs of appeal were to be taxed to him: *Montelius v. Wood*, 56-254.

973. Decision of the case binding on second appeal: A decision upon appeal in a case constitutes the law of the case, and will not on a subsequent appeal of the same case be overruled or re-examined, however well satisfied the court may be that it is erroneous: *Adams v. Burlington & M. R. R. Co.*, 55-94; *Barton v. Thompson*, 56-571; *Simplot v. Dubuque*, 56-639; *Star Wagon Co. v. Swezy*, 63-520; *Ellis v. State Ins. Co.*, 68-578; *District Tp v. Independent Dist.*, 69-88; *Raridan v. Central Iowa R. Co.*, 69-527; *Drake v. Chicago, R. I. & P. R. Co.*, 70—; *Davis v. Curtis*, 70—.

974. Where the court has once definitely passed upon the case on one appeal, it will not, on a second appeal, reconsider its ruling thereon, unless there has been such change of the issues or other circumstances of the case as to raise a new question, touching the applicability of the former decision to the case as thus made on the second appeal. The only method for procuring a reconsideration of the decision on the first appeal is by rehearing: *Minnesota Linseed Oil Co. v. Montague*, 65-67.

975. Appeal not considered after dismissal for defects: Where an appeal is dismissed on the ground of defects in the record, it is incompetent for appellant, without obtaining a rehearing, to bring the case again before the court upon the same appeal on a corrected record: *Green v. Ronen*, 62-89.

976. Where an appeal is dismissed for the reason that appellant has not moved in the lower court to have the error complained of

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corrected, before appealing, a dismissal of the appeal and affirmance of the judgment will not prevent him, if not too late, from making the motion in the court below and again appealing from the refusal of the court to sustain it: *Berryhill v. Jacobs*, 20-246.

977. Where a judgment procured by appellee for failure of appellant to file a transcript was set aside on the ground that appellant had previously dismissed the appeal, *held*, that appellant could not afterwards prosecute his appeal, the formal setting aside of the judgment being a determination that the court had no longer any jurisdiction of the case: *Dewey v. Pierce*, 69-81.

978. To what court remanded; change of venue: Where a change of venue is improperly granted and the judgment of the court to which the change is taken is reversed for that error, the cause should be remanded to that court from which the change of venue was taken: *Ferguson v. Davis County*, 51-220; *Bennett v. Carey*, 57-221; *Gilman v. Donovan*, 59-76; *Cerro Gordo County v. Wright County*, 59-485.

979. Such an order was made without discussion in *McCracken v. Webb*, 36-551.

980. A procedendo is not necessary to authorize the court below to redocket and proceed with the case in a proper manner. That may be done on proper notice to the adverse party, at any time after the time for rehearing has expired: *State v. Knouse*, 33-365; *Becker v. Becker*, 50-139.

981. Notice of further proceedings in lower court: The opposite party is entitled to some notice that the case is again upon the docket before judgment can be rendered, upon the case being remanded: *Messenger v. Marsh*, 6-491.

982. Proceedings in lower court after reversal and remand: After a cause is remanded with direction that a certain judgment be entered, no fact existing prior to the first hearing in the lower court can be interposed as a reason against the entry of such judgment: *Lord v. Ellis*, 11-170.

As to whether amended or additional pleadings may be filed in the court below after a cause is reversed and remanded, see PLEADINGS, §§ 323-329.

983. Where a decree was reversed on the ground that the court below had erred in

overruling a motion to strike certain depositions from the files, for the reason that they had been taken without authority, and the cause remanded, *held*, that the court below could not be required to dismiss the cause or enter decree for the opposite party, but must proceed to try the case anew: *Kershman v. Suehla*, 62-654.

984. Where a cause was reversed on one point and sent back for a new trial and further proceedings not inconsistent with the opinion in the supreme court, *held*, that plaintiff (appellee on the appeal) was not required to introduce evidence on an issue determined in his favor on the former trial and which was regarded as settled in his favor on the appeal, and as to which no inquiry was authorized by the opinion; and this even though defendant, in an amended answer after the cause was remanded, had denied the fact involved therein: *Croup v. Morton*, 53-599.

985. Where a motion for a new trial is overruled in the court below and that action of the court is reversed on appeal, nothing remains to the court below but to proceed with a new trial. It cannot receive other affidavits and pass again upon the motion for a new trial: *Pomroy v. Parmlee*, 10-154.

986. If judgment is reversed for error of law in entering judgment on a finding of facts and the case remanded for a proper judgment upon such finding, judgment should be entered without a retrial: *Roberts v. Corbin*, 28-355; *Drefahl v. Tuttle*, 42-177.

987. But this rule is not applicable where a motion for a verdict upon the evidence is overruled in the lower court, and on appeal it is held that such motion should have been sustained. The lower court might have, even after sustaining the motion, allowed the introduction of other evidence omitted by mistake or inadvertence, and the supreme court will not, by rendering final judgment upon the motion for verdict upon the evidence, cut off the opportunity which would have existed in the lower court to introduce such additional evidence: *Meadows v. Hawk-eye Ins. Co.*, 87-57.

988. Where it was held on appeal that a new trial had been improperly granted on account of insufficient evidence, and the cause was remanded, *held*, that defendant

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was not entitled to judgment in the court below, but that it was the duty of that court to proceed and determine the issues joined in the petition for new trial as if no appeal had been taken: *Dryden v. Wyllis*, 53-390.

989. Where plaintiff in an action on a tax title set up generally the payment of taxes without specifying times or amounts, and the title was held invalid and the cause remanded for determination of amount plaintiff was entitled to recover for taxes paid and judgment therefor, *held*, that defendant might appear in the lower court and contest plaintiff's claim for taxes paid: *Miller v. Corbin*, 48-525.

990. If, from the judgment of the supreme court, it appears that the cause of action no longer exists, or, in other words, there is nothing left upon which the court below can act, the case upon being remanded to the lower court should be dismissed, and refusal of the lower court to do so may be corrected by *certiorari*: *Edgar v. Greer*, 14-211.

991. The court below should, upon the filing of a *procedendo* directing it to enter judgment in accordance with the opinion of the supreme court, proceed to enter such judgment irrespective of any notice by the adverse party of his intention to file a petition for a rehearing: *Fenton v. Way*, 44-438.

992. Where an answer containing three distinct defenses was demurred to, the demurrer sustained, and upon appeal the action of the court reversed as to the first cause, the other two not being passed upon, *held*, that defendant had no standing in the court below except on the first cause, but on a subsequent appeal the defendant had the right to have the sufficiency of the other defenses passed upon: *Bates v. Kemp*, 13-223.

d. Trial of equity cases de novo.

Special proceedings are not triable *de novo*: See *supra*, VII, b.

993. Cases tried as equitable: Where a proceeding has been treated without objection in the lower court as equitable, it is to be so treated in the supreme court: *Hintrager v. Sumbargo*, 54-604; *Balch v. Ashton*, 54-123; *Manchester v. Hoag*, 66-649; *Fritzier v. Robinson*, 70—.

994. Where an equitable action and a counter-claim therein were both tried in the

court below as in equity, *held*, that on appeal all the issues would be triable *de novo*, although the counter-claim was legal in its nature: *Taylor v. Kier*, 54-645.

995. Where the issues are equitable, it will be presumed that the case was tried as an equitable action, unless the record shows the contrary: *Baldwin v. Davis*, 63-231.

996. Trial *de novo* is the proper method in equity: Equity cases tried by the method provided by statute must on appeal be heard *de novo*. The appellant cannot have the case tried in any other manner. It is the mode of trial and not the character of the case and the relief sought which determine the method of trial on appeal: *Blough v. Van Hoorebeke*, 48-40.

997. The only mode contemplated by the constitution for removing chancery cases to the supreme court is by appeal, and although no objection has been made to the hearing of such cases upon writ of error, the court does not obtain jurisdiction by such method, and may dismiss the case: *McPoland v. Fitzpatrick*, 1 G. Gr., 543.

But see, as to review of errors duly preserved and assigned, *infra*, §§ 1008-1012.

998. Where a case was on appeal properly triable *de novo*, *held*, that the court would not refuse to try it in that manner because the attorney, by reason of a mistaken belief as to the proper method of trial in such an appeal, had not embodied all the evidence in the abstract, or introduced evidence in the court below which he wished to have considered on such appeal: *Sherwood v. Sherwood*, 44-192.

999. An equity case will be tried *de novo* on appeal, notwithstanding the special finding of the jury on the trial below: *Chambers v. Ingham*, 25-222.

1000. Where an equitable action is triable *de novo* on appeal, the fact that the referee reports the facts and conclusions of law separately will not give to his findings the effect of a special verdict, and the supreme court may still try the case upon the facts: *Cooper v. Skeel*, 14-578.

1001. The constitution guaranties the right of trial *de novo* on appeal in an equitable action, and a former statutory provision for a review of divorce and foreclosure cases only upon errors assigned was held uncon-

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stitutional: *Sherwood v. Sherwood*, 44-192; *Howe Machine Co. v. Woolly*, 50-549.

1002. Where appellant insists upon a trial *de novo*, and appellee objects, there can be no ground of complaint of either party where the court tries the cause anew and affirms the judgment: *McClain v. McClain*, 57-167.

1003. Regulations as to method: Although the legislature cannot take away the right of trial *de novo* on appeal in equity cases, yet the manner of its exercise may be regulated: *Richards v. Hintrager*, 45-253.

1004. The right to a trial *de novo* in equity cases on appeal is granted by the constitution only where the mode and manner prescribed by statute have been followed in the court below and the necessary steps taken to obtain such a form of trial on appeal: *Sisters of Visitation v. Glass*, 45-154.

1005. Where a divorce case was not tried in open court, as required by statute, but was sent to a referee who reported the evidence, with his findings, to the court, and all the evidence was taken to the supreme court on appeal, *held*, that as the trial in the court below was not in the manner prescribed by law, the supreme court could not try the case *de novo*: *Hobart v. Hobart*, 45-501.

1006. The legislature is not prohibited from providing for the trial of chancery causes in the supreme court upon questions of law certified by the court below. The provision prohibiting appeals in cases where the amount in controversy does not exceed one hundred dollars, except upon questions of law duly certified, is not unconstitutional as prohibiting a trial *de novo*: *Andrews v. Burdick*, 62-714.

1007. The rule is to try all cases on oral evidence in the lower court, and in the supreme court on exceptions and errors duly assigned, and if trial *de novo* on appeal is desired, the proper steps to secure it must be taken: *Finch v. Hollinger*, 47-173.

1008. Trial of equity case on errors assigned: Where it did not appear that the steps required by statute, in order to obtain a trial *de novo* on appeal, had been taken, *held*, that the case could not be tried in that manner, but only as a law action upon errors assigned: *Lynch v. Lynch*, 28-326; *Mallory v. Luscombe*, 31-269; *Twogood v. Reily*, 48-546; *Howe Machine Co. v. Woolly*, 50-549.

1009. Where the necessary steps to secure a trial *de novo* have not been taken, errors of law properly assigned may be considered: *Jordan v. Wimer*, 45-65; *Lutz v. Kelley*, 47-307; *Kershman v. Swehla*, 62-654; *supra*, § 817.

1010. In such a case, it will be necessary that the same steps shall have been taken to preserve and present the errors relied upon as must be taken in an action at law to secure a hearing upon the errors: *Buckwalter v. Craig*, 24-215; *Krapfel v. Piffner*, 24-176; *Schmeltz v. Schmeltz*, 52-512.

1011. Parties have the right to prepare and have an equity case tried on appeal upon errors assigned, and may stipulate or agree upon evidence introduced and considered in the court below for that purpose: *Hutchinson v. Wells*, 67-430.

1012. On appeal in an equitable case, from a ruling upon a motion or demurrer, exceptions must be taken and errors assigned as in an action by ordinary proceedings, and the hearing will be only upon errors: *Powers v. O'Brien County*, 54-501; *Patterson v. Jack*, 59-632.

1013. Law case not triable *de novo*: Even though an action by ordinary proceedings is tried on written evidence, and on appeal to the supreme court all the evidence is taken up, the case will not be tried *de novo* but only upon errors: *Dove v. Independent School Dist.*, 41-689.

1014. Steps necessary to secure trial *de novo*; motion and order: Under statutory provisions not now in force (Code, § 2742 before its amendment), it was required that a motion and order be made in the lower court at the appearance term for trial upon written evidence in order to secure a trial *de novo* on appeal, and it was held that if such motion and order were not made, a trial *de novo* could not be had: *Moses v. Continental Ins. Co.*, 40-440; *Altman v. Farrington*, 45-620; *Woodbury County v. Lambert*, 51-698.

1015. It was also held that the motion should be in writing and filed, and that a *nunc pro tunc* order at a subsequent term would not make good the want of such motion: *Trescott v. Barnes*, 46-644.

1016. So it was held that an order at the appearance term for trial upon written evidence was necessary: *Walker v. Beaver*, 50-504.

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1017. It was also required that the order must be in writing and made before the trial: *Berryhill v. Smith*, 51-127.

1018. Where the certificate of the judge recited that the case was tried upon oral testimony taken down in writing on the trial, as by order of the court, *held*, that it did not sufficiently appear that there was an order for trial upon written evidence, or that there was such trial: *McShane v. McShane*, 49-210.

1019. An order that the evidence should be taken down in writing, made at the time the case was called for trial, instead of at the appearance term, was held not sufficient: *Clark v. Reynolds*, 46-674.

1020. And that such order must be in writing and made before the trial: *Berryhill v. Smith*, 51-127.

1021. And that where there was neither motion nor order, there could be no trial *de novo*: *Ibid.*; *Ashcraft v. De Armond*, 44-229; *Howe Machine Co. v. Woolly*, 50-549.

1022. The appearance term in this connection was held to be that term at which it should be first ascertained that an issue of fact was to be tried: *Vinsant v. Vinsant*, 47-594; *Woodbury County v. Lambert*, 51-698.

1023. Motion or order of record: Under these provisions it was held that the motion or order for trial on written evidence should appear of record, and that the certificate of the judge that there was such motion or order would not be sufficient: *Endersby v. Endersby*, 49-694.

1024. Also *held*, that the fact that the record showed all the evidence to be before the supreme court was not sufficient to warrant the presumption that the proper motion and order were made at the proper time: *Hunt v. Downs*, 50-696.

1025. Agreement of parties: It was held, however, that the motion itself was not essential, and that a proper order made by the court, by consent of parties, would be sufficient: *Robinson v. First Nat. Bank*, 48-354.

1026. Also, that an agreement of the parties at the appearance term, for trial upon written evidence, would supersede the necessity of a motion and order: *Van Bogart v. Van Bogart*, 46-359.

1027. But it was held that such agreement must be an express agreement, and that the parties were entitled to know, at the appear-

ance term, whether the case was to be tried *de novo* or not: *Saunders v. Halliday*, 48-81.

1028. In a particular case, *held*, that the party was estopped by an agreement as to the method of trial in the lower court from objecting to trial *de novo* on appeal: *Ingle v. Culbertson*, 48-265.

1029. Consent of parties that an order be made for trial upon written evidence, *held* not to amount to a consent to trial *de novo* in the supreme court: *Woodbury County v. Lambert*, 51-698.

1030. Where the motion of a party in the court below, for trial upon written evidence, was granted against the objection of the opposite party, *held*, that the party obtaining the order could not, on appeal, object to trial *de novo*: *Fortney v. Jacoby*, 51-95.

1031. Generally, as to steps necessary to be taken to secure a trial *de novo* under such previous statutory provisions, see, in addition to above cases, *Hammersham v. Fairall*, 44-462; *Altman v. Farrington*, 45-620; *Clark v. Reynolds*, 46-674.

1032. Substitute for foregoing statute not applicable to cases pending: The substitute provided by 17 G. A., chap. 145 (for § 2742 of the Code), which made all issues of fact in equitable actions triable either on written evidence or evidence taken down in writing, and rendered a motion or order at the appearance term to secure such a trial unnecessary, was held not applicable to proceedings on appeal from a judgment rendered before the act took effect, although the appeal was not taken until after that time: *Simondson v. Simondson*, 50-110; *Trebon v. Zuraff*, 50-180; *Joliet Iron, etc., Co. v. Chicago, C. & W. R. Co.*, 50-455.

1033. Also *held*, that as the substitute relates to the form of trial in equity cases, it would not apply in actions already commenced before its enactment, even though not yet tried: *Schmeltz v. Schmeltz*, 52-512.

1034. But *held*, that as to the certificate of the judge required to show that the evidence was all reduced to writing, the provisions were applicable to actions already commenced but not tried: *Cornell v. Cornell*, 54-366.

1035. What must appear of record to warrant trial *de novo*: An equity cause cannot be tried *de novo* in the supreme court

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unless the testimony is all embodied in the record: *Krapfel v. Pfiffner*, 24-176; *Maxwell v. Lundy*, 19-576.

1036. Where it does not appear from recitals in the decree or from a certificate of the judge or clerk that the evidence is all before the supreme court, the case will not be tried *de novo*: *Van Orman v. Spafford*, 16-186; *Anderson v. Easton*, 16-56; *Kellogg v. Kelsey*, 16-388; *Winslow v. Turner*, 20-294; *Pickett v. Hawes*, 20-335; *Wetherell v. Goodrich*, 22-583.

1037. If the evidence is not all in the record, the same presumption obtains as to the correctness of the judgment of the court below as in an ordinary action: *State v. Orwig*, 27-528; *Garner v. Pomroy*, 11-149.

1038. Where the record did not show the evidence upon which findings of fact by a referee were based, *held*, that the supreme court could not try the case *de novo*: *Lillie v. Skinner*, 48-329.

1039. The testimony and not simply the facts found by the court should be set out in the record: *Robb v. Dougherty*, 14-379.

1040. Where the record contained a stipulation as to certain facts, but no statement that the cause was tried upon such stipulation, *held*, that the cause could not be tried *de novo*: *Davenport v. Ellis*, 22-296.

1041. Where the bill of exceptions referred to exhibits which did not appear of record, so that it was apparent that the evidence was not all before the court, on appeal, *held*, that the decree below would not be disturbed: *Cook v. Woodbury County*, 13-21.

1042. The court cannot try a case *de novo* where it has before it the oral evidence taken down in writing, but not the documentary evidence: *Howe v. Jones*, 66-156.

1043. Where the record showed that certain facts were proved without setting forth the evidence by which such proof was made, *held*, that the supreme court would not refuse to try the case *de novo* because of the omission of such evidence when no objection appeared to have been made to its sufficiency at the trial, but that if it affirmatively appeared that the record did not contain all the facts proved or all the evidence submitted to the lower court, its action would not be reviewed: *Pickett v. Hawes*, 20-335.

1044. If it should appear from an inspection of the record that some item of the evidence irrelevant to some issue in the case, or entirely immaterial, was omitted from it, the court would not on account of such omission refuse to try the case anew. But to warrant the court, however, in so trying the cause, the irrelevancy or immateriality of the omitted testimony must be clearly made to appear from the evidence: *Palo Alto County v. Harrison*, 68-81.

1045. Appellee cannot object to a trial *de novo* on the ground that the record does not contain evidence admitted against his objection but not contained in the abstract; it must be presumed that as to him the admission would strengthen rather than weaken appellant's cause: *Clinton Lumber Co. v. Mitchell*, 61-182.

1046. What the abstract must show: To entitle the party appealing to a trial *de novo* in an equitable action, it should appear from the statements of his abstract, which will be deemed true if not controverted, that the evidence is all before the court: *Britton v. Central R. Co.*, 39-390.

1047. The court cannot consider a case triable *de novo* where the abstract does not purport to contain all the evidence: *Britt v. Case*, 58-757.

1048. It must appear from the abstract not only that all the evidence was made of record on the trial below, but that all the evidence is substantially embodied in the abstract: *Greer v. Dickey*, 53-755.

1049. The abstract must purport to contain all the evidence: *Goodykoonts v. Ringland*, 52-732.

1050. If the action is triable on appeal *de novo*, and the abstract does not purport to be an abstract of all the evidence, the court will not try the case, but will simply affirm the decree: *Overholt v. Esmay*, 54-748; *Wilson v. Blair*, 55-745.

1051. Or the appeal may in such case be dismissed on motion: *Green v. Ronen*, 59-88.

1052. Where the case was equitable in nature, and the abstract purported to contain all the evidence, and recited that such evidence was by order of the court taken down in writing and filed with the clerk, and made part of the record, *held*, that there appeared a sufficient compliance with statute

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to entitle appellant to trial *de novo* on appeal: *Stoddard v. Hardwick*, 46-160.

1053. Method of making evidence appear of record: There are but three modes by which the supreme court can know that all the evidence introduced below is in the record: 1st. By bill of exceptions stating that fact. 2d. By certificate of the judge as contemplated in Code, § 2742; and, 3d, by certificate of the judge, agreement of parties, or certificate of the clerk, as provided in § 3170: *Flesher v. Groves*, 48-700.

1054. Judge's certificate; when to be given: Under the provisions of 17 G. A., ch. 145, that the evidence taken down in writing on the trial of equitable actions should be certified by the judge in term or vacation, *held*, that a certificate made at the second term after the trial term by the successor of the judge who tried the case was not sufficient: *Cornell v. Cornell*, 54-366.

1055. Under the present substitute for Code, § 2742 (19 G. A., ch. 35), the certificate of the evidence by the judge must be made during the time allowed for appeal (six months): *Mitchell v. Laub*, 59-36; *Page County v. American Emigrant Co.*, 61-246; *Marshalltown v. Forney*, 61-578; *Preston v. Hale*, 65-409; *Hartnett v. Sioux City*, 66-253.

1056. Where it does not appear at what time the certificate of the evidence is made by the judge the cause cannot be heard *de novo*. It should be made to appear affirmatively that the certificate was signed within the time fixed by statute and it cannot be presumed that it was so signed: *Russell v. Johnston*, 67-279; *Mitchell v. Laub*, 59-36.

1057. Objection to the giving of a certificate after the time for appeal has expired is not waived by a stipulation entered into by the parties before the expiration of the time for perfecting appeal, that the case shall be heard at a particular term of the supreme court: *Hartnett v. Sioux City*, 66-253.

1058. Evidence certified at such time as is provided for under 19 G. A., ch. 35, although before the passage of this act, may be considered in an appeal submitted after the taking effect of the act: *Starr v. Case*, 59-491.

1059. The judge may certify to the record within the proper time, even though it be

after the appeal is taken: *Goff v. Hawkeye Pump, etc., Co.*, 62-691.

1060. Where the certificate of the clerk as to the evidence is sufficient to enable the court to try the case *de novo* (see *infra*, §§ 1079-1081), the provisions as to the time the judge's certificate shall be made are not applicable: *Cross v. Burlington & S. W. R. Co.*, 58-62.

1061. Certifying evidence taken by reporter: The taking down of the evidence in shorthand, *held*, under 17 G. A., ch. 145, not sufficient compliance with the requirement that the evidence be taken down in writing in open court to comply with the statute: *Godfrey v. McKean*, 54-127.

1062. But under present statutory provisions (substitute for Code, § 2742, 19 G. A., ch. 35), if the court orders the evidence taken down in shorthand, and the evidence is so taken and properly certified at the time, and it is afterwards transcribed, this is a sufficient taking down in writing. It is not necessary that the translation or transcript be made at the time of the trial: *Ross v. Loomis*, 64-432; *Howe v. Jones*, 66-156.

1063. A case cannot be tried *de novo* on appeal unless the evidence be certified by the judge. It is not sufficient that the evidence be taken in shorthand and the notes preserved: *Carskaddon v. Bartlett*, 63-180.

1064. But if the evidence is taken down in shorthand by order of the court, and the notes are afterwards transcribed by the reporter and certified by him and filed, such transcript will be deemed written evidence; but this transcript must be filed within the six months allowed for making the judge's certificate. If the judge's certificate has been made in proper form in connection with the original notes as filed, it may be regarded as so connected with the transcript when made as to constitute, with the reporter's certificate, a sufficient certificate of the evidence; but the certificate is not to be deemed complete until the transcript is made and certified by the reporter. This rule would, perhaps, have no application in a case tried by ordinary proceedings: *Merrill v. Boue*, 69-653.

1065. It is no objection to the trial of a case *de novo* that the evidence was not taken down and certified by the official reporter

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where it is tried upon written evidence: *Gately v. Kniss*, 64-537.

1066. Sufficiency of judge's certificate: A certificate not attached to any evidence, but merely showing the names of the witnesses, and the side upon which they were introduced, respectively, without referring to any testimony as taken in writing, *held*, insufficient: *Alexander v. McGrew*, 57-287.

1067. In a particular case, *held*, that the certificate, although not attached to the evidence, identified the different instruments of evidence with as much certainty as was possible under the circumstances, and was sufficient in that respect: *Palo Alto County v. Harrison*, 68-81.

1068. Where, upon a trial of an issue as to one defendant, he introduced the same evidence that was introduced on the hearing of the case as to another defendant, *held*, that it was sufficient that the certificate of the judge appeared as to the evidence introduced on the first issue, and it need not be certified again as evidence introduced on the second trial: *Ætna L. Ins. Co. v. Bishop*, 69-645.

1069. Certificate by the judge trying the case: Where the trial is had before the judge of another district or circuit holding court by exchange, the judge trying the case can give the certificate within the time provided by statute, although he has left the district or circuit where the trial was held: *Howe v. Jones*, 66-156.

1070. What certificate must show: To secure a trial *de novo* in the supreme court in an equitable action, it is necessary that the certificate of the judge show that all the evidence *offered* upon the trial is before the court. The certificate that the evidence preserved is all the evidence which was *introduced* is not sufficient: *Taylor v. Kier*, 54-645; *Groneweg v. Barnum*, 70—.

1071. So *held* as to a certificate showing that the record contained all the evidence *used* on the trial: *Hart v. Jackson*, 57-75.

1072. So *held*, also, as to a certificate that the record contained all the evidence “*adduced*,” it further appearing from the record itself that in several instances evidence was offered and excluded which was not made part of the record: *Tuttle v. Story County*, 56-316.

1073. A certificate that the evidence cer-

tified was all that was “*offered*, *adduced* and *introduced*,” *held* sufficient: *Marshalltown v. Forney*, 61-578.

1074. So *held*, also, as to a certificate that the evidence certified “*is all the evidence offered in said trial, as well as the evidence introduced and admitted and used in the trial:*” *Wood v. Wood*, 61-256.

1075. A certificate that the evidence certified was “*all the evidence submitted in said cause,*” *held* sufficient: *Miller v. Wolf*, 63-233.

1076. Certificate of referee: Where a judgment is rendered upon a referee's report it is not sufficient that the evidence is certified by the referee, but it must be certified by the judge: *Porter v. Everett*, 66-278.

1077. Agreement of the parties as to what the evidence was on the trial in the court below, was, under Code, § 2742, before amendment, the only thing which could render unnecessary the certificate of the trial judge that the record contains all the evidence: *Vinsant v. Vinsant*, 47-594.

1078. Under the present substitute for that section, if by the agreement of the parties the facts are reduced to a statement in writing, such statement takes the place of depositions or of oral testimony reduced to writing and becomes the evidence in the case, and upon such evidence the case may be tried *de novo* on appeal: *Williams v. Wells*, 62-740.

1079. The certificate of the clerk that the transcript contains all the evidence on file does not sufficiently show that the evidence thus certified was all that was used in the court below: *Grant v. Grant*, 46-478; *Davenport v. Ells*, 22-296.

1080. It appearing that in an equitable action a trial by written evidence was ordered by the court at the proper time (under the statute then in force requiring such order), *held*, that it would be presumed that the trial was in that manner, and a certificate of the clerk that all the evidence was before the supreme court would be sufficient, although he should certify that the case was tried upon depositions, record evidence and oral evidence, the certificate as to the manner in which the cause was tried being without authority: *Ryan v. Mullinix*, 45-631.

1081. Where it appears that the evidence on the trial of an equitable action consists

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wholly of depositions and papers on file, the certificate of the clerk to such evidence is sufficient to authorize the supreme court to entertain the appeal. The rule requiring the certificate of the judge to be made during the term has no application to such certificate of the clerk: *Cross v. Burlington & S. W. R. Co.*, 58-62.

1082. Opening and closing argument: In a trial *de novo* in the supreme court, the party having the burden of proof in the case is entitled to the opening and closing of the argument: *Steel v. Fife*, 48-99; *Alexander v. McGraw*, 57-287; *Devore v. Adams*, 68-885.

1083. And where the burden of proof was upon appellee, *held*, that a reply filed by appellant to appellee's closing argument might be stricken out on motion: *Steel v. Fife*, 48-99.

1084. The hearing and determination: On an appeal in an equitable action the court will examine into the merits of the case for the purpose of administering justice, guided only by the universal principles of equity jurisprudence, not being confined to errors apparent on the record: *Austin v. Carpenter*, 2 G. Gr., 131.

1085. On such an appeal the facts, as well as the law of the case, are again reviewed and adjudicated: *Pierce v. Wilson*, 2-20.

1086. The court, however, can only act upon the testimony upon which the decree below was rendered: *Walker v. Ayres*, 1-449.

1087. It cannot, although the case be triable *de novo*, consider testimony not presented and considered by the court below: *McGregor v. Gardner*, 16-538.

1088. Upon trial *de novo* the court cannot determine a question as to which no issue is raised on the trial below: *Wheeler & Wilson Mfg Co. v. Hasbrouck*, 68-554.

1089. The difference between a court having appellate jurisdiction proper and a court for the correction of errors at law is, substantially, that the former tries cases *de novo* and renders such judgment as should be rendered upon the facts and the law, while the latter simply inquires into alleged errors of law committed by the lower court. Under our constitution the supreme court has jurisdiction to try *de novo* on appeal only chancery cases: *Sherwood v. Sherwood*, 44-192.

1090. If a case is tried as an equitable one

in the court below, and the proper steps are taken to secure a trial *de novo* on appeal, the case must be so tried, and not upon assignment of errors. The method of trial in the supreme court is dependent upon the manner in which the case was tried below, and not upon the nature of the case: *Blough v. Van Hoorebeke*, 48-40.

And see *supra*, §§ 996-1002.

1091. Questions as to admissibility of evidence: On the trial of an equitable action *de novo* on appeal, questions as to competency of testimony, admissibility of depositions, etc., come up as original questions upon the objections made in the court below, and upon their decision the testimony is considered or rejected, as the case may be. If found competent and admissible the testimony is considered, although it was excluded in the court below, but the decision is not thereby reversed, unless the consideration of such testimony makes a different conclusion necessary: *Blough v. Van Hoorebeke*, 48-40.

1092. Error in the admission of evidence in an equity case triable *de novo* on appeal does not constitute a ground of reversal: *Hasner v. Patterson*, 70—.

1093. Immaterial evidence will be disregarded, whether objected to on the trial below or not: *Cook v. Smith*, 50-700.

1094. Upon trial of an equitable action *de novo*, the supreme court passes upon the sufficiency of the evidence properly admitted, and need not consider the objections to the admissibility of evidence made in the court below: *Hanks v. Van Garder*, 59-179.

1095. The fact that evidence has been erroneously admitted in the lower court in such a case will not render a reversal necessary, but such evidence will be disregarded, and the final determination of the case will be made upon evidence properly received: *Van Bogart v. Van Bogart*, 46-359; *Putney v. O'Brien*, 53-117.

1096. If, however, testimony which is properly admissible, but is rejected by the lower court, is not a part of the record, the determination that there was error in the action of the lower court in excluding it would render it necessary to reverse the judgment and remand the cause. The proper practice in such cases is to permit all testimony to which objections are sustained to be

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made part of the record, so that if held admissible by the supreme court it may be considered upon the trial in that court: *Blough v. Van Hoorebeke*, 48-40.

1097. As the provisions of Code, § 2742, as amended, can be complied with and the full benefit of a trial *de novo* be secured only by causing all the evidence offered to be written down, if questions asked are not permitted to be answered, and thus made part of the record, the defeated party must be allowed to have a review of such questions upon error. Otherwise he would be denied the benefit of an appeal: *Clinton Lumber Co. v. Mitchell*, 61-132.

1098. Where in the trial of an equitable action a deposition was erroneously stricken from the files, *held*, that the supreme court would not try the case *de novo*, considering such deposition, but would remand the case for a new trial, in order that the opposing party might have an opportunity to introduce further evidence on his part: *Sweet v. Brown*, 61-669.

1099. The supreme court will reverse a decree of the lower court where it is apparent upon the record that there is not sufficient evidence to sustain it; but if the record entry recites that there was other evidence, which would be sufficient, and which may have been lost, the case will be remanded for a retrial: *Webster County v. Taylor*, 19-117.

1100. It being the practice in the trial of equity cases in the trial courts to admit evidence offered, without ruling as to its admissibility, a party who, by cross-examining a witness, calls out the same evidence which he has objected to in chief, will not be deemed to have waived his objection: *Donnel v. Braden*, 70—.

1101. What questions considered: Where a case is tried *de novo*, all questions may be presented in the supreme court which legitimately arise on the record, whether they were urged or relied on in argument in the lower court or not: *Seymour v. Shea*, 62-708.

1102. Alleged errors in interlocutory proceedings will not be considered, but the supreme court will try the case on its merits: *Hackworth v. Zollars*, 30-433; *State v. Orwig*, 27-528.

1103. Case not to be remanded: It is not the duty of the court in a trial *de novo*, when

it appears that the evidence is not sufficient to support the judgment in the court below, to remand the case for a new trial in order that the party who is unsuccessful on the appeal may have the opportunity of introducing additional evidence: *Wickersham v. Reeves*, 1-413.

1104. Affirmance; former adjudication: A judgment in an equity case which is affirmed on appeal to the supreme court, for the reason that proper steps were not taken to secure a hearing on the merits, is conclusive as a former adjudication, and may be pleaded as such when the same question arises in another action, although the decision of the supreme court, if the case could have been heard on the merits, would have been different: *Trescott v. Barnes*, 51-409.

1105. When case will be remanded: Where the supreme court holds that an equitable action is not triable *de novo* on appeal for want of the proper steps having been taken, but reverses the judgment on errors assigned, it cannot enter a final decree but must send the case back for further proceedings: *Jordan v. Winser*, 48-180; *Kershman v. Swehla*, 62-654.

1106. Where objection to non-joinder of necessary parties defendant is made for the first time on the hearing of a case triable *de novo* in the supreme court, such want of proper parties will not cause the bill to be dismissed, but the action will be remanded with leave to have the necessary parties brought in: *Postlewait v. Howes*, 8-365.

1107. Where the trial court had struck a deposition of a party from the files because not taken within the time required by order of the court, *held*, on appeal, that although such action of the court was erroneous, the supreme court would not proceed to try the case anew on the evidence submitted below and the deposition thus stricken from the files, but would remand it for the purpose of allowing the opposite party to present additional evidence, so that the party whose deposition was thus stricken out would not be able to take advantage of the error of the court below in refusing to consider his deposition: *Sweet v. Brown*, 61-669.

1108. When an equity cause is, upon appeal, not tried *de novo*, but is reversed on errors assigned, and remanded, it stands for

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trial anew as a law action: *Jordan v. Winser*, 48-180.

1109. Modification of decree: The supreme court will not, on appeal, make a modification of a decree so as to render it more favorable to the party who does not appeal, even though it may seem from the record that such change would be proper if there had been an appeal by such party: *Smith v. Wolf*, 55-555.

1110. Where there was nothing in the record indicating that an appeal was taken for delay, and the judgment of the lower court was affirmed after the expiration of the time fixed therein for performance by the unsuccessful party, *held*, that the time for performance should be extended so as to allow an opportunity to such party to perform the decree as affirmed: *Daniels v. St. Louis, K. C. & N. R. Co.*, 56-192.

1111. Final decree: Where an equity case is appealed and tried anew, and the action of the court below is determined to have been erroneous, the successful party is entitled to have such decree as is proper on the record as made in the court below, entered up in the supreme court: *First Nat. Bank v. Baker*, 60-132.

1112. While the successful party is ordinarily entitled to a decree in the supreme court, and the cause cannot be remanded, yet there are exceptions to such rule. Where it appeared that by mistake the allegations of the petition were erroneous in the description of a highway with reference to which relief was asked, *held*, that the case might be remanded for the purpose of enabling plaintiff to amend his petition so as to secure such relief, it not appearing that plaintiff or his attorney were chargeable with negligence in connection with such mistake: *White v. Farlie*, 67-628.

1113. In lower court: While either of the parties is entitled, upon a trial *de novo*, to have a final decree entered in the supreme court, yet if the judgment is such as to affect the title to real estate, it should properly be entered in the court where the case was tried: *Hait v. Ensign*, 61-724.

1114. Proceedings in lower court after remand: After an equitable action has been tried *de novo* in the supreme court and remanded to the lower court for decree, in ac-

cordance with the decision of the supreme court, the party cannot amend his pleadings and present a defense that existed when the issues were first tried in the court below: *Sexton v. Henderson*, 47-131.

1115. After reversal in a suit in equity, which is remanded for further proceedings not inconsistent with the opinion, it stands precisely as any suit in equity stands between the submission and the entry of the decree, the court being fully advised in the premises and the decision announced as to what decree should be entered upon the pleadings and evidence as they stand. The introduction of new evidence, omitted by inadvertence, or the filing of additional or amended pleadings, might be allowed in the discretion of the court, in view of the circumstances and in furtherance of substantial justice; but could not be claimed as a right: *Adams County v. Burlington & M. R. R. Co.*, 44-335.

1116. The allowance of an amendment and tendering a new issue after trial *de novo* in supreme court, and remanding of cause for judgment in court below and *procedendo* filed, should be made only on the strongest showing of accident or mistake, or for matters arising subsequent to the decree or the like. A party cannot be allowed to try his cause by piecemeal. But where a showing of diligence is made by affidavits, sufficient to entitle a party to show mistake and introduce a new issue, the question of diligence in discovery of the mistake is not further in issue, and neither that issue nor any of the former issues in the case, but only the new issue, is to be tried: *Adams County v. Burlington & M. R. R. Co.*, 55-94.

1117. When an equity case is remanded for judgment in the lower court, the parties may introduce material evidence which has been discovered since the original trial, and may set up matters materially affecting the merits of the case which have occurred since the former trial, and the amendment to the pleadings necessary to such purpose may be made; but a party cannot set up by way of amendment matter existing at the time of the former trial, and which he omitted to set up at that time: *Sanzey v. Iowa City Glass Co.*, 68-542.

1118. A grant of leave, in a decree entered

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under *procedendo* from the supreme court, to one defendant to withdraw her answer, *held*, not to have the effect of continuing or dismissing the case as to such defendant, especially when the decree was immediately afterwards set aside, and a new decree entered without such leave: *McGregor v. McGregor*, 21-441.

1119. Where a cause is remanded to the lower court after trial *de novo*, merely for judgment, without further directions, judgment must be rendered as a matter of course, and upon motion, unless the unsuccessful party shall bring himself within some recognized rule which would entitle him to a new trial: *Austin v. Wilson*, 57-586.

1120. Where, in an equity case, there cannot be a trial *de novo* because of error in excluding evidence in the lower court which does not appear of record, the supreme court cannot render a final judgment, but will remand the cause. In such a case the court below cannot render a final decree, but must permit a new trial: *Kershman v. Swehla*, 62-654.

1121. Erroneous action of the lower court in allowing a party to introduce additional evidence after an equitable cause has been remanded to the court below for a decree in conformity with the opinion of the court, is not an order so materially affecting the final decision that an appeal can be taken therefrom before the rendition of final judgment: *Garmoe v. Sturgeon*, 67-700.

e. Rehearing.

1122. Provisions applicable in criminal cases: The provisions as to rehearing found in the code of civil procedure are applicable in criminal cases as well as in civil, and in favor of the state as well as the defendant: *State v. Jones*, 64-349.

1123. At what time: In the absence of any statute upon the subject or rule of court (see now, Rule 87), *held*, that a rehearing would not be granted at a term subsequent to that at which the decision was rendered: *Emerson v. Tomlinson*, 4 G. Gr., 398.

1124. Upon the same case and record: A new case cannot be made on a petition for rehearing, nor matters insisted upon which were not presented in the original case:

Hintrager v. Hennessy, 46-600, 604; *Mann v. Sioux City & P. R. Co.*, 46-637, 643.

1125. So the court cannot, upon rehearing, consider an additional abstract or amended record not before them at the first hearing: *Cramer v. Burlington*, 45-627; *Nixon v. Downey*, 49-166; *Parsons v. Parsons*, 66-754.

1126. An additional abstract filed by appellee upon rehearing cannot be considered: *Simplot v. Dubuque*, 49-630.

1127. The fact of an appeal having been taken not being shown by the abstract, *held*, that such fact could not be shown on a petition for rehearing: *Hintrager v. Hennessy*, 46-600.

1128. The fact that additional evidence has been discovered since the trial of the case in the court below is no ground for rehearing: *Zuver v. Lyons*, 40-510.

1129. Certificate of appeal to U. S. supreme court: The certificate that the validity of a statute was drawn in question in the case on the ground that it was in conflict with the constitution of the United States will not be given where the question of such conflict was first raised in the petition for rehearing in the supreme court. The fact which is essential to give the supreme court of the United States jurisdiction on appeal from the state supreme court must appear on the face of the record. It is not sufficient that it be made in the argument of counsel: *Martin v. Cole*, 38-141.

1130. Copy of opinion: Before the modification of Rule 90 of the supreme court, *held*, that the requirement that a copy of the petition for rehearing should be delivered to the attorney of the adverse party must be observed: *Austin v. Wilson*, 52-731.

1131. A petition for rehearing which does not contain the original opinion printed in full, or a reference to the number and page of the Northwestern Reporter in which the opinion is printed, will be stricken from the files: *Kervick v. Mitchell*, 63-273.

1132. Remitting excess on rehearing: Where a cause was reversed on appeal because the judgment for plaintiff included an item erroneously allowed, *held*, that appellee might, on rehearing, offer to remit the excess over the amount of the proper judgment, and judgment for the balance would

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be entered in the supreme court: *Hyde v. Minneapolis Lumber Co.*, 53-243.

1133. Not granted to party who has not argued; may be granted on court's own motion: The supreme court will not grant a rehearing upon the application of a party who failed to file or make an argument when the cause was submitted. But if it is satisfied that error has been committed, it will, on its own motion, order a rehearing for the purpose of correcting the error: *Wachendorf v. Lancaster*, 61-509.

1134. Argument on rehearing: After the opposite party has filed a reply to the petition for rehearing, neither party has the right to file any other argument: *Webster County v. Hutchinson*, 60-721.

1135. Bill of review: The statute having provided for a petition for rehearing and not for a bill of review, an implication arises against the right to file a bill of that kind: *McGregor v. Gardner*, 16-538.

1136. Effect of curative act: Where a curative act is passed while a case in which the defect sought to be cured is raised is pending in the supreme court on rehearing, the case will be regarded precisely as if no opinion had been previously filed, and the defect will be deemed cured: *Iowa R. Land Co. v. Sac County*, 39-124, 151.

1137. In case of division: Where the judgment on appeal stands affirmed by reason of a division in the supreme court, such affirmance is subject to reconsideration on rehearing as any other judgment: *Zeigler v. Vance*, 3-528.

1138. If, on rehearing, the court is equally divided as to whether the former opinion should be adhered to, the case will stand as if the court had been equally divided on the first hearing, and the judgment will be affirmed: *Richards v. Burden*, 59-723, 754.

1139. Effect of rehearing after procedendo: After the decision of a cause by the supreme court, a *procedendo* was filed in the court below, whereupon the proper steps were taken to remove the cause to the federal court. Subsequently, and within the proper time, a petition for rehearing was filed in the supreme court and allowed; *held*, on a motion to dismiss in the supreme court, that the cause was still pending there, and had not been removed to the federal court by

proceedings in the court below: *McKinley v. Chicago & N. W. R. Co.*, 44-314; *Railroad Co. v. McKinley*, 99 U. S., 147.

f. Effect of appeal upon proceedings below.

In attachment proceedings: As to the effect of appeal on a judgment in an attachment proceeding, see ATTACHMENT, VIII, f.

Supersedeas bond: As to liability of the sureties upon the *supersedeas* bond, see *supra*. §§ 641-646.

1140. Restoration of property taken under the judgment appealed from cannot, in case of reversal, be given as a summary remedy where such property has, by voluntary sale or by seizure and sale, passed to an innocent purchaser, or has in the bona fide discharge of a trust, pursuant to an order of court, been turned over to another: *Hanschchild v. Stafford*, 27-301.

1141. Where, upon appeal, it was decided that a writ of possession had been irregularly issued by the court below, held, that such fact did not, of itself, entitle the appellant to a restoration of the possession taken from him by such writ: *Lombard v. Atwater*, 46-501.

1142. Where, at the time of sale under a judgment, an appeal therefrom was pending, upon the subsequent determination of which the judgment was reduced to an amount less than that for which the plaintiff bought in the property at the sale, held, that defendant was not entitled to an order upon plaintiff to repay the excess, but that the property should be restored to defendant: *Munson v. Plummer*, 58-736.

1143. Where the judgment under which the successful party has acted is reversed, it becomes his legal duty to restore to the other party all the property or its value taken under the judgment, and, upon failure to do so, action may be brought against him without previous demand: *Zimmerman v. National Bank*, 56-133.

1144. Purchaser with notice: Purchase at sheriff's sale by the plaintiff in execution, or his attorney, with actual knowledge of a pending appeal, is at the peril of the purchaser, and such person is not protected as a *bona fide* purchaser: *Twogood v. Franklin*, 27-239.

Rules, etc.—What sufficient to constitute.

1145. In case of a purchase by a judgment creditor before notice of appeal, if he again recovers on another trial, his title is not affected: *Frazier v. Crafts*, 40-110.

1146. Where the purchaser at a judicial sale, and the grantee holding under him, paid only the costs and not the whole amount bid, *held*, that not having paid value they could not be regarded as good faith purchasers; and *held*, further, that the attorney for the plaintiff in the lower court and on appeal could not, upon purchase of the property, become entitled to protection as a good faith purchaser: *O'Brien v. Harrison*, 59-086.

1147. The provisions for the protection of a purchaser at judicial sale as against a subsequent reversal are not designed for the benefit of parties claiming under a distinct title: *Wood v. Young*, 38-102.

1148. Additional recovery on appeal; foreclosure of mortgage: Where the mortgagee in an action to foreclose a mortgage accepted and receipted the record for the amount found due thereon, and thereafter the mortgagor conveyed the property to a third person, and afterward the mortgagee, within due time, prosecuted his appeal and obtained a decree for an additional amount, *held*, that the additional decree thus secured was not a lien as against the purchaser who took without notice of any intention on the part of the mortgagee to prosecute such appeal: *Davis v. Bonar*, 15-171.

1149. Money paid over in pursuance of judgment: Where plaintiff, in an action to ascertain which of two persons was entitled to certain money due on real property purchased by him, paid the money into court, and it was adjudged to belong to one of the parties defendant, and was paid over to him, and thereafter the other defendant appealed, *held*, that upon reversal of the judgment the appellant was not entitled to a recovery against the plaintiff for the money thus brought into court and already paid over to the other defendant: *White v. Butt*, 32-335.

g. Rules, and exercise of powers.

1150. The rules of practice in courts of last resort ought to be framed and interpreted rather with a view to the submission of causes upon their merit, than to their dis-

position merely upon technical grounds: *Palo Alto County v. Harrison*, 68-81.

1151. The rules of the supreme court as to the practice therein have the force and effect of laws duly enacted. They cannot be regarded as matter of mere form, and until abrogated must be substantially, at least, obeyed in the preparation of abstracts: *State ex rel. v. O'Day*, 68-213.

1152. The constitution gives the supreme court jurisdiction and power to "exercise a supervisory control over all inferior judicial tribunals throughout the state," and while ordinarily such control must be exercised in strict accordance with the rules of procedure which obtain in actions at law or in equity, yet in anomalous and exceptional cases the court is not bound hand and foot and rendered powerless to redress palpable injustice caused by the erroneous action of a lower court: *Poole v. Seney*, 70—.

APPEARANCE.

As to JURISDICTION conferred by, see that title.

1. What sufficient to constitute: Under a statutory provision (Code, § 2626), the memorandum in writing of appearance need not in terms state that the defendant appears. If he files a pleading in the action it will be sufficient. Such an appearance will be an appearance in court although the court be not in session: *Conklin v. Johnson*, 34-266.

2. The written memorandum of appearance in a particular case, *held* sufficient: *Shaw v. National State Bank*, 49-179.

3. Time to plead: It is not error to enter up a judgment by default on the day of the filing of such appearance without giving time to plead when no time is asked: *Ibid*.

4. Defendant is not entitled to a continuance except for cause upon appearing to a defective notice: *Des Moines Branch, etc., Bank v. Van*, 12-523.

5. Where by statute defendant was given in equity a longer time in which to answer than that allowed in law cases, *held*, that he would nevertheless be in default in failing to enter an appearance on the return day, although not required to answer on that day: *McKinley v. Betshtel*, 12-561.

By attorney without authority.

6. **By attorney without authority:** Where it is shown that appearance by attorney is made without authority, the case stands as if there had been no appearance, and if default has been entered it is the same as a default without service: *Rice v. Griffith*, 9-539; *Macomber v. Peck*, 39-351.

7. Such a judgment is a nullity, and not merely voidable, and even though the record recites that jurisdiction has been acquired, a sale thereunder will pass no title to an innocent purchaser: *Harshey v. Blackmarr*, 20-161.

8. The defendant in an action upon a foreign judgment may deny the authority of the attorney who appeared for him in the action: *Baltzell v. Nosler*, 1-588.

9. In an action to set aside a judgment defendant may show that an agent or attorney who entered appearance for him, or accepted service, had no authority to do so, for the purpose of showing that the judgment was without jurisdiction: *Newcomb v. Dewey*, 27-381.

10. The presumption is that an attorney who appears for a party is authorized to do so: *Potter v. Parsons*, 14-286; *Harshey v. Blackmarr*, 20-161.

11. But if the attorney is in fact not authorized, the party may be relieved against the judgment by direct action in equity to set it aside: *Bryant v. Williams*, 21-329.

12. The fact of an appearance by attorney being established, it is for the party insisting that the appearance was unauthorized and the judgment void, to show that fact: *Bond v. Epley*, 48-600.

13. Where a foreign judgment is resisted on the ground that the court rendering it had no authority, the fact that the attorneys who appeared for defendant were not authorized to do so is immaterial, if it is shown that defendant was duly served with notice, and would have been precluded without an appearance: *Woodward v. Willard*, 33-542.

14. A party who adopts the acts of an attorney appearing for him, although such appearance is without authority, by paying him for such services, thereby ratifies his acts and is bound by the judgment rendered: *Ryan v. Doyle*, 31-53.

15. Where an appearance by attorney is authorized, the court acquires jurisdiction of

defendant by reason of such appearance, and any irregularity in the original notice, or want of authority in the attorney to accept service of such notice, is immaterial: *Fanning v. Minnesota R. Co.*, 37-379.

16. Evidence in a particular case of the authority of an attorney to appear for a party, *held*, sufficient to overcome the denial of such authority on the part of the party: *Ellis v. White*, 61-644.

Further as to appearance by attorney, see ATTORNEYS, §§ 24-29, 39-50.

17. **What sufficient appearance:** Appearance to object to the service of notice is a general appearance to the action: *McFarland v. Lowry*, 40-467.

18. An appearance to object to the original notice because not properly stamped, and to cross-examine plaintiff's witnesses, is an appearance to the action: *Wilsey v. Maynard*, 21-107.

19. Appearance to object to the sufficiency of service upon a director of a corporation defendant is sufficient to give the court jurisdiction: *Robertson v. Eldora R., etc., Co.*, 27-245.

20. The rule that a special appearance to object to the notice confers jurisdiction is applicable in proceedings before a justice: *Church v. Crossman*, 49-444.

21. If defendant makes appearance for any purpose the notice has then served its purpose and a second one will not be required. Being in court with timely notice, he is held to answer unless he can show that by reason of defect in the notice, such as failure to specify the term at which he is required to appear, he has not been able to prepare his defense: *Des Moines Branch, etc., Bank v. Van*, 12-523.

22. Prior to the provisions of Code, § 2626, that a special appearance to object to the service of notice should constitute an appearance, *held*, that a special appearance to object to defect in the notice would not confer jurisdiction: *Hodges v. Brett*, 4 G. Gr., 345; *Milbourn v. Fouts*, 4 G. Gr., 346; *Weil v. Lowenthal*, 10-575; *Converse v. Warren*, 4-158.

23. Under such statute, *held*, also, that defendant might appear so far as to object to the jurisdiction of the court over the person or subject-matter, but if he appeared by mo-

Does not confer jurisdiction.

tion or otherwise, seeking to call into action any power of the court except such as pertains to its jurisdiction, it was an appearance: *Ulmer v. Hiatt*, 4 G. Gr., 439; *Stockdale v. Buckingham*, 11-45.

24. Therefore, *held*, that an application for a continuance amounted to an appearance: *Ibid.*; *Converse v. Warren*, 4-158.

25. *Held*, also, that an appearance by motion to suppress a deposition or quash an attachment constituted such appearance as to give the court jurisdiction: *Clark v. Blackwell*, 4 G. Gr., 441.

26. An appearance by motion to change the venue confers jurisdiction: *Post v. Brounell*, 36-497.

27. So *held*, also, as to a motion to dissolve an attachment: *Chittenden v. Hobbs*, 9-417; *Wood v. Young*, 88-102.

28. An appearance to a writ of attachment constitutes a general appearance in the action: *Winchester v. Cox*, 3 G. Gr., 575.

29. Appearance to set aside the sale of attached property does not constitute an appearance to the action: *Osborn v. Cloud*, 21-238.

30. The filing of a demurrer by a non-resident defendant constitutes general appearance, giving the court jurisdiction: *Johnson v. Tostevin*, 60-46.

31. Appearance to cross-examine plaintiff's witnesses, even though a general appearance is disclaimed, is sufficient to give jurisdiction: *Rahn v. Greer*, 37-627.

32. Where intervenors, residents of another county, voluntarily appeared in an action and filed their petition and an amended petition, *held*, that they were estopped from saying that the court did not have jurisdiction, and that they had no cause of action which by proper amendment could be joined with the pending action: *Jack v. Des Moines & Ft. D. R. Co.*, 49-627.

33. Appearance does not confer jurisdiction: A want of notice is not waived by appearance where notice is jurisdictional, except where a subsequent notice would have the effect to give jurisdiction: *Spurrier v. Wirtner*, 48-486.

34. An appearance does not waive the right to have an action discontinued if the petition is not filed by the time fixed in the

notice as provided in Code, § 2600: *Cibula v. Pitt's Sons' Mfg Co.*, 48-528.

35. An appearance after default, to have the default set aside as being rendered on insufficient notice, is not such an appearance as will cure the defect in entering default without proper notice, such a case being different from an appearance before the default to object to the insufficiency of the notice: *Boals v. Shules*, 29-507.

36. An appearance by motion to set aside a sheriff's sale is not an appearance to the original action: *Osborn v. Cloud*, 21-238.

37. An appearance of a party to testify as a witness is not an appearance to the action: *Nixon v. Downey*, 42-78.

38. Where an action is by statute required to be brought within a specified time, the appearance by defendant to such action brought after the time specified, and the filing of pleading by him setting out such facts, will not constitute a waiver of the objection: *Jones, etc., Lumber Co. v. Boggs*, 63-589.

39. The filing of a pleading to the jurisdiction of the court by defendant will not confer jurisdiction upon the court: *Elgin Canning Co. v. Atchison, etc., R. Co.*, 24 Fed. Rep., 866.

40. Where a motion is made to set aside a sheriff's sale in a court other than that in which the action is pending, the act of defendant in appearing and moving to strike the motion from the files will not confer jurisdiction upon the court: *White v. Hampton*, 14-66.

41. Where a judgment was rendered upon service by publication, and subsequently defendant therein filed a petition to set it aside, and afterwards filed a motion in that case for change of venue, *held*, that this did not make the judgment effective as a judgment *in personam*: *Mayfield v. Bennett*, 48-194.

Further as to the effect of appearance in waiving defects in notice and irregularities in the proceedings, see JURISDICTION, §§ 16-19.

APPLICATION OF PAYMENTS.

See PAYMENTS.

APPRAISEMENT.

See EXECUTIONS.

Submission without action.

ARBITRATION.

1. **Submission without action:** Under statute any "civil action" may be submitted to arbitration, and in this term is included everything except those cases which come under the criminal jurisdiction of the court. Therefore an equitable cause of action is subject to submission: *Tomlinson v. Hammond*, 8-40.

2. The question whether or not an alleged nuisance should be abated may be submitted to arbitration without the submission of any claim for damages: *Richards v. Holt*, 61-529.

3. **Method of submission:** The subject-matter of the award must be definitely specified: *Woodward v. Atwater*, 8-61.

4. Under the statutory provision as to submission, the arbitrators must be named in the agreement in order that the parties may have a judgment on the award: *McKnight v. McCullough*, 21-111.

5. If the submission is not acknowledged as required by statute, the award cannot be received as made under a statutory submission, although it may be good at common law, and an action maintained thereon: *Fink v. Fink*, 8-313.

6. If submission is by order of court, an acknowledgment is not necessary: *Ibid.*

7. The same degree of particularity is not required in the acknowledgment of an agreement of submission as is required in case of an instrument conveying real property: *McKnight v. McCullough*, 21-111.

8. An agreement for submission must contain a provision for judgment by some court upon the award. Without this, it will not be such a submission as contemplated by statute, though it may be binding at common law as a settlement; but, in such cases, the result cannot be treated as an award under the statute: *Love v. Burns*, 85-150.

9. Where submission of arbitration between a school district and its treasurer covered "the money alleged to be due and owing" by the treasurer of the district, *held*, that such submission properly covered money due for several years, including some for which there ought to have been previous settlement: *District T'p v. Rankin*, 70—.

10. The submission to arbitration in a particular case, *held*, to be sufficiently certain: *Donican v. Mulry*, 69-583.

11. A party in interest cannot be bound by an agreement to arbitrate made by other parties in interest without his authority: *Sweeney v. Davidson*, 68-886.

12. A corporation may submit controversies to arbitration although no such express power is conferred by its charter. Courts are disposed to encourage settlement by arbitration: *District T'p v. Rankin*, 70—.

13. **Common law submission:** The statutory provisions as to the method of submission, etc., must be followed, if the parties desire judgment upon the award; but a submission and award may be good as at common law between the parties, although these provisions are not observed, as, for instance, where the submission is in parol. An award so made may be enforced by action thereon, and may be set up as a defense to an action brought for the subject-matter therein settled: *Conger v. Dean*, 3-468; *Foust v. Hastings*, 66-522.

14. Parties may bind themselves by an agreement to submit a controversy to arbitration in a manner different from that required by statute, and if the submission and award are sufficiently certain to constitute a bar to a subsequent action for the same matter, the award will be upheld: *Zook v. Spray*, 38-273.

15. A common law submission to arbitration is always construed most liberally and with a view of effecting the purpose of the parties to it, even though it does not comply with the statutory requirements: *McKinnis v. Freeman*, 38-364.

16. To defeat a recovery on an award under a common law submission, it is necessary for defendant to impeach the award in some proper manner: *Foust v. Hastings*, 66-522.

17. **Submission of pending suit:** In case of submission by order of court, upon agreement of parties, the pleadings constitute the submission, and an agreement that judgment may be rendered on the award is not necessary. The court does not lose its control of the matter, and may render judgment upon the award, or may set it aside, in whole or in part: *Schohmer v. Lynch*, 11-461.

18. A submission of matters involved in a pending suit may be made by agreement of

Action of arbitrators.

parties without an order of court: *Higgins v. Kinneady*, 20-474.

19. The term "suit," used in the statutory provision as to submitting pending proceedings, is broader than the term "action," and a special proceeding may, by order of court, be submitted to arbitrators by agreement of parties: *Marion v. Ganby*, 68-142.

20. Submission of a pending suit may be made without any instrument in writing. The statutory provision requiring a written agreement, signed and acknowledged, is applicable to controversies in which no action has been commenced: *Ibid.*

21. Action of arbitrators: Unless the submission provides otherwise, or a consent to a majority award is in a proper manner shown, all the arbitrators must concur in the award: *Richards v. Holt*, 61-529.

22. Where an agreement for submission provided that the award might be made by the arbitrators or any two of them, and after the award had been made and set aside, a re-submission was ordered by the court, *held*, that if, before such re-submission, one of the arbitrators resigned, a submission for a finding by the two remaining arbitrators would not be valid, and that the agreement must be construed as contemplating a submission to three arbitrators: *Cary v. Bailey*, 55-60.

23. The finding of arbitrators upon a hearing of which one party had no notice and at which he was not present nor represented will not be binding upon him, though the instrument under which the arbitration is had does not expressly provide that the parties are to have notice or be heard: *Dormoy v. Knower*, 55-722.

24. The parties may, by agreement, determine the rules that shall govern the arbitrators, as that the award of the majority shall be binding: *Thompson v. Blanchard*, 2-44.

25. It need not appear affirmatively from the return that the witnesses were examined under oath, nor, it seems, that the arbitrators were sworn: *Tomlinson v. Hammond*, 8-40.

26. The arbitrators are not required, like referees, to make separate return of facts found and conclusions of law thereon: *McKnight v. McCullough*, 21-111.

27. Although the award is not transmitted to the court in the method required by

statute, yet it will be sufficient if it is delivered by one of the arbitrators to the clerk, and all chance for prejudice from the irregularity is expressly rebutted: *Higgins v. Kinneady*, 20-474.

28. A delivery of the award to the clerk in person in vacation *held* sufficient: *McKnight v. McCullough*, 21-111.

29. Where the affidavit of one of the arbitrators filed as required by statute did not give the names of the parties to the controversy, but by mistake gave the names of the other arbitrators as the persons by whom he had been appointed, etc., *held*, that the notary taking such affidavit might be allowed to testify that it was properly sworn to, and that the names of the arbitrators had been inserted by mistake in place of the names of the parties: *Higgins v. Kinneady*, 20-474.

30. Clerical defects working no prejudice should not invalidate the proceedings: *Ibid.*

31. An affidavit of arbitration made and filed after the making of the award, and in pursuance of agreement between the parties that it might be so done, *held* sufficient: *Ogden v. Forney*, 38-205.

32. The award; sufficiency: Where the award, under the submission of a controversy as to the amount due to a municipal corporation from its treasurer, stated the amount of his deficiency, *held*, that while it might have made a more detailed statement of the account, the finding would not be open to objection on the ground of uncertainty: *District T'p v. Rankin*, 70—.

33. Validity; presumptions: Every presumption is in favor of the correctness of the determination of the arbitrators: *Tomlinson v. Hammond*, 8-40.

34. Where no mistake or injustice in the award is shown, it will be upheld: *Struthers v. Clark*, 40-508.

35. Impeachment: The award may be impeached by proof that matters were considered by the arbitrators which were not submitted, or that they have committed material errors or mistakes to the prejudice of either party, or have omitted to consider matters submitted, or on account of fraud: *Thompson v. Blanchard*, 2-44.

36. Proof is admissible to show that no evidence was given to the arbitrators upon a particular subject, the burden being upon

Power of court over.

the party seeking to impeach the arbitration to satisfy the jury of any mistake of the arbitrators, and also that he was prejudiced thereby: *Ibid*.

37. The award may be impeached by showing that the arbitrators did not pass upon questions embraced in the submission and essential to determine the rights of the parties: *Sharp v. Woodbury*, 18-195; *Mississippi & M. R. Co. v. Sioux City & St. P. R. Co.*, 49-604.

38. In an action upon an award good at common law, but not made under a statutory submission, the fact that the arbitrators have considered matters not submitted, or have committed such mistakes as prejudice either party, or have omitted to consider matters which were submitted, may be shown for the purpose of impeaching the award: *Love v. Burns*, 35-150.

39. It is competent to introduce evidence to show that one of the arbitrators intrusted with the award for delivery to the court discovered a mistake in it before delivery and thereupon refused to deliver it: *Shulte v. Hennessy*, 40-352.

40. Power of court over: As to the power of a court over an award, there is a material difference between the cases where the reference is under a statute provision or is made by a rule of court, and those where it is solely by an agreement of the parties, as at common law. In the latter case the arbitrators constitute a tribunal created by the parties themselves, and the courts have but little authority over them. Nearly all the authority which does exist in regard to them is in courts of equity: *Burroughs v. David*, 7-154.

41. Therefore, *held*, that allegations of fraud of the opposite party in not making a full and true exhibit of the matters relating to the arbitration on the hearing before the arbitrators could not be considered in an action on the arbitration bond: *Ibid*.

42. Setting aside: To entitle a party to have an award set aside on the ground of mistake, he must not only clearly show a mistake, and that he was prejudiced thereby, but also that if it had not occurred the award would have been different: *Tomlinson v. Tomlinson*, 3-575; *Gorham v. Millard*, 50-554.

43. Although an award can only be set aside for mistake, partiality, or fraud in the arbitration, yet, to constitute such conduct, evil intention is not a necessary ingredient: and where one of the parties was informed by one of the arbitrators that no testimony upon a certain question would be received, and afterwards such testimony was received on the other side, *held*, that the award should be set aside: *Sullivan v. Frink*, 8-66.

44. An award should not be set aside for newly discovered evidence which is merely cumulative: *McDaniels v. Van Fosen*, 11-195.

45. The action of arbitrators in awarding costs to the successful party should not be interfered with unless a clear abuse of discretion is shown: *Ratliff v. Mann*, 5-423.

46. The court cannot change the award as to the taxation of costs. Its only authority is to recommit if improper: *Landreth v. Bass*, 12-606.

47. Resubmission: Under statutory provision, *held* that the award should only be rejected for want of jurisdiction in the arbitrators, but that it should be recommitted for any reason which would justify the granting of a new trial after verdict: *Depeu v. Davis*, 2 G. Gr., 260.

48. Upon recommitment the arbitrators need not be again sworn, nor need the award upon such recommitment show that they were sworn in the first instance: *Tomlinson v. Hammond*, 8-40.

49. Disqualification or misconduct of arbitrators: Where a contract of lease provided that the rents should be determined by an appraisal of the property by three persons, of whom each should appoint one, and the two thus chosen should select the third, *held*, that such contract implied that the persons to be selected should be indifferent between the parties, and that it appearing that the appraiser appointed by one of the parties was a brother and confidential agent of such party, which fact was unknown to the other, the appraisal was void: *Pool v. Hennessy*, 39-192.

50. Where it appeared that one of the arbitrators procured the signature of another by representing that the other would sign it, which was not done, and such arbitrator was persistent in signing the award, although counsel had not been heard in argument and

Setting aside in equity.

before the case was finally submitted, and when it appeared that plaintiff desired to introduce further evidence, and that such arbitrator was on unfriendly terms with plaintiff, *held*, that such arbitrator was not a proper person to act, and that a resubmission of the matter to the same arbitrators was error. In such case the award should have been rejected and the parties left to their ordinary remedies: *Brown v. Harper*, 54-546.

51. **Setting aside in equity:** Where a new school district had been organized from a part of the territory of an old one, and the two boards, upon failure to agree to the division of assets and liabilities, had appointed arbitrators as required by statute in such case (Code, § 1715), *held*, that a court of equity might entertain jurisdiction to set aside an award of such arbitrators for gross errors in computation: *District T'p v. District T'p*, 54-286.

52. **Judgment:** The court has no authority to change the award by adding interest thereto. It should enter judgment on the award according to its terms, unless it appears that the award is inequitable, or that the arbitrators abused their discretion in apportioning the costs: *District T'p v. Independent Dist.*, 60-141.

53. Where the agreement of submission specifies the court wherein the award is to be filed, this sufficiently indicates the court wherein judgment is to be rendered: *Ibid.*

54. The parties may agree that judgment on the award shall be rendered by a justice of the peace, and, if so, he will have jurisdiction, provided the amount is such as to bring the case within his cognizance: *Van Horn v. Bellar*, 20-255; *King v. Hampton*, 4 G. Gr., 401; *Whitis v. Culver*, 25-30.

55. Where it was provided in the agreement that judgment should be rendered "by any court having jurisdiction," and judgment was rendered by the district court of the county where both parties resided, *held*, that as such court was the only one which (at that time) had jurisdiction, the agreement was sufficient to warrant such judgment: *McKnight v. McCullough*, 21-111.

56. **Appeal:** An appeal will not lie from the judgment of a justice of the peace on an

award. Any error committed by him in rejecting or recommitting an award, or failure to do so, may be reviewed on writ of error: *Whitis v. Culver*, 25-30.

57. As the justice has no authority to try the case upon its merits, but only to render judgment on the award, or reject it and recommit it for a new hearing, no trial upon the merits can be had on an appeal from the action of the justice: *Ibid.*

58. An appeal will lie from an order resubmitting a cause to arbitrators: *Brown v. Harper*, 54-546.

59. The acts of the court, in sustaining a motion to set aside the award, cannot be reviewed where the record does not show upon what facts the court acted: *Hamble v. Owen*, 20-70.

60. **Effect:** Where an agreement for submission to arbitration provided that the award should be made within thirty days, and it was afterwards made and set aside by mutual consent, and an action at law was commenced after the expiration of the thirty days, no further steps having been taken under the submission by either party, *held*, that the submission would not bar the action, and it was not incumbent upon the party bringing the action to first apply to have the arbitrators act, or others appointed, and a new award made: *Simplot v. Simplot*, 14-449.

61. An award cannot be relied upon, unless pleaded: *Dougherty v. Stewart*, 48-648.

62. **Civil liability of arbitrators:** Arbitrators act in a judicial capacity, and cannot be held liable for damages for an award alleged to have been made fraudulently and corruptly, if within their jurisdiction: *Jones v. Brown*, 54-74.

63. Where an award was filed in defiance of an injunction, *held*, that it must be presumed that it was disregarded and worked no prejudice, and that an action for damages against the arbitrators would not lie: *Ibid.*

64. The fact that the award is valueless by reason of wilful misconduct of the arbitrators, may be shown for the purpose of defeating their claim for compensation for services: *Bever v. Brown*, 56-565.

Malice.—In general; what assignable.

ASSAULT.

As to the crime of Assault, or Assault and Battery, or Assault with intent to commit other offenses, see CRIMINAL LAW.

1. **Malice:** The averment that defendant wilfully, wickedly and violently assaulted plaintiff is sufficient to entitle plaintiff to recover for malicious assault without express allegations of malice: *Mallett v. Beale*, 66-70.

2. **Aggravation:** The fact that an assault and battery was committed in the hall of the court-house near the court room, and under such circumstances that the officers of the court and the people in the room would soon hear of the transaction, *held*, to be an aggravation of the offense: *Root v. Sturdivant*, 70—.

3. **Evidence:** In a civil action for assault and battery, where only compensatory damages are claimed, the record of a criminal prosecution for the offense is not admissible in evidence: *Lucas v. Flinn*, 35-9.

4. **Provocation:** Although provoking and insulting language do not constitute a defense in a civil action for assault and battery, yet such provocation may be shown as a palliation for the acts and results of anger, that is, in mitigation of damages, but not as a justification and defense. But a provocation must be so recent and immediate as to induce the presumption that the violence was committed under the immediate influence of passion thus excited. If the assault was committed after time for reflection and coolness, and under circumstances leading to the presumption that it was in revenge, then the party stands in the situation of an original trespasser, and the words applied to him will not amount even to an extenuation: *Ireland v. Elliott*, 5-478.

5. In a civil action for assault and battery, evidence of immediate provocation, such as happened at such time as to induce the presumption that the violence occurred under the immediate and continuing influence of the passion excited, is admissible to mitigate the damages, but not to defeat the right of recovery. The test is, whether the blood has had time to cool. Evidence is not admissible to establish the truth or falsity of the provo-

catory language or that plaintiff knew his statements to be false: *Thrall v. Knapp*, 17-468.

6. Provocation given at the time of the assault, or within a prior time so recent as to justify the presumption that the offense was committed under the influence of the passion excited thereby, may be shown in mitigation of damages, but if time for reflection intervened after the provocation, it will not extenuate the violence: *Gronan v. Kukukuck*, 59-18.

7. A provocation arising on a day prior to the assault cannot be shown in mitigation, for the law presumes sufficient time to have intervened before the assault to allow the passion to subside and reason to gain control of the mind: *Ibid*.

8. The fact that a person, upon being charged by another with making false statements concerning him, denies the making of such statements, will not be matter in mitigation of an assault thereupon committed by the latter upon the former: *Ibid*.

9. **Aiding and abetting:** An instruction that if the assault in question was made by one of the defendants in pursuance of a previous intention, known to the other without any objection on the part of the latter, and the latter aided or abetted or encouraged the other, then the one aiding and abetting was liable for the assault, *held correct*: *Ibid*.

10. **Military order:** While a military order may not excuse a wrongful act, it may nevertheless be proper to be shown in evidence as palliating such act, or to mitigate damages: *Carpenter v. Parker*, 23-450.

ASSIGNMENT.

I. IN GENERAL; WHAT ASSIGNABLE.

II. METHOD OF ASSIGNMENT.

III. EFFECT OF ASSIGNMENT.

IV. EQUITABLE ASSIGNMENTS.

V. ASSIGNMENTS FOR BENEFIT OF CREDITORS.

I. IN GENERAL; WHAT ASSIGNABLE.

1. **Statutory provisions:**¹ An instrument of guaranty is assignable: *First Nat. Bank v. Carpenter*, 41-518, 521.

¹ Code, § 2084. Bonds, due-bills, and all instruments in writing, by which the maker promises to pay to another, without words of negotiability, a sum of money, or by which he promises to pay a sum of money in property or labor, or to pay or deliver any property or labor, or acknowledges any money or labor or property

In general.—Method.

2. So is an attachment bond: *Moorman v. Collier*, 32-133.

3. So is a judgment: *Burtis v. Cook*, 16-104; *Ballinger v. Tarbell*, 16-491.

4. A policy of insurance, the assignment of which is expressly prohibited, is assignable *after loss*, the same as any other debt: *Walters v. Washington Ins. Co.*, 1-404; *Mershon v. National Ins. Co.*, 84-87.

5. Although a mining lease makes no provision for assignment, it is nevertheless assignable: *Steele v. Mills*, 68-406.

6. An assignment of a lease carries with it all the rights of the grantee, as well where the words "or assigns" are omitted after the grantee's name as where they are inserted: *Frederick v. Callahan*, 40-311.

7. A claim for personal tort may be assigned: *Weire v. Davenport*, 11-49; *Gray v. McCallister*, 50-497; *Vimont v. Chicago & N. W. R. Co.*, 64-513.

8. It seems to have been otherwise held before the passage of statutory provisions relating to survival of actions: *Taylor v. Galland*, 3 G. Gr., 17.

9. Rights vested *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property, may pass by assignment: *Ibid*.

10. The statutory provisions do not limit the assignability of claims to those specifically mentioned: *Weire v. Davenport*, 11-49.

11. Action upon a right of action arising from personal injury may be brought by the assignee thereof in a state where the assignment of such a cause of action is permitted by statute, although the assignment is made in a state where the common-law rule prohibiting such assignment is still in force: *Vimont v. Chicago & N. W. R. Co.*, 69-296.

12. The statutory provisions as to assignment do not render assignable a railway

ticket issued to a particular person by name and expressly made non-transferable, and another person attempting to ride upon such ticket would be guilty of fraud: *Way v. Chicago, R. I. & P. R. Co.*, 64-48.

13. In a particular case, *held*, that a certain contract did not import or contain a promise on the part of one of the makers to pay to the other any money or property, and was therefore not assignable under the provisions of Code, § 2084: *Sales v. Kier*, 50-699.

14. A time-check, drawn in the form of an account against a railroad company in favor of a contractor, signed by a subcontractor, and indorsed, does not transfer to the indorsee any claim against the contractor: *Nash v. Chicago, M. & St. P. R. Co.*, 62-49.

15. A license to keep a grocery store under statute requiring such licenses, and providing that it should be issued only upon giving bond, etc., *held* not assignable: *Lewis v. United States, Mor.*, 199.

As to assignment of causes of action and survival thereof, see ACTIONS, IV.

As to assignment of JUDGMENTS, see that title, III.

II. METHOD OF ASSIGNMENT.

16. No particular form is necessary to constitute an assignment of a debt. It need not be in writing. If the intention be clearly established, it is sufficient: *Moore v. Lowrey*, 25-336; *McWilliams v. Webb*, 32-577.

17. The assignment of a debt may be verbal or in writing, and if in writing, and the intent and contract of the parties is not fully expressed therein, such intent may be shown by parol evidence: *Foster v. Trenary*, 65-620.

18. The assignment of a contract or other chose in action may be made in parol: *Switzer v. Smith*, 35-269; *Howe v. Jones*, 57-130.

to be due, are assignable by indorsement thereon or by other writing, and the assignee shall have a right of action in his own name, subject to any defense or counter-claim which the maker or debtor had against any assignor thereof before notice of his assignment.

§ 2086. When by the terms of an instrument its assignment is prohibited, an assignment of it shall nevertheless be valid, but the maker may avail himself of any defense or counter-claim against the assignees, which he may have against any assignor thereof before notice of the assignment thereof is given in writing to the maker of such instrument. [As amended by 20 G. A., ch. 183, § 1.]

§ 2037. An open account of sums of money due on contract may be assigned, and the assignee will have the right of action in his own name, but subject to the same defenses and counter-claims as the instruments mentioned in the preceding section, before notice of such assignment is given in writing by the assignee to the debtor. [As amended by 20 G. A., ch. 183, § 2.]

§ 2083. The assignor of any of the above instruments, not negotiable, shall be liable to the action of his assignee without notice.

Method.—Effect.

19. Where a party to a contract enters into a partnership with others for the purpose of performing the stipulations of the contract, such transaction amounts to a parol assignment of the contract to the firm: *Switzer v. Smith*, 35-269.

20. Assent presumed: The weight of authority is that the assent of an absent person to a special assignment to him will be presumed unless dissent be expressed, provided the assignment is for a valuable consideration and beneficial purpose: *Randolph Bank v. Armstrong*, 11-515.

21. The delivery of an instrument constituting an assignment is essential to give it validity and effect. Therefore, where an instrument assigning books of account was executed for the benefit of a particular creditor without his knowledge or request, at the suggestion of a friend, and a general assignment was made, *held*, that the general assignment destroyed the effect of the partial assignment: *Gage v. Parry*, 69-605.

22. Acceptance: An assignment of an interest in the amount due for a loss under an insurance policy is not valid unless accepted by assignee: *Lamb v. Council Bluffs Ins. Co.*, 70—.

23. Indemnity of creditor; assignment by mail: If assignment be made by letter to an absent creditor for the indemnity of himself, or himself and others, and sent to him by mail, it takes effect from its date: *Ibid*.

24. The assignment of an open account under the statutory provision must be in writing. An assignment by delivery or in parol will not be sufficient: *Andrews v. Brown*, 1-154; *Williams v. Soutter*, 7-435, 448.

25. What sufficient: A certain writing *held* insufficient to constitute an assignment of balance of purchase money on real property: *Granfield v. Rowlings*, 53-654.

26. The description of a claim in an assignment thereof *held* sufficiently specific in a particular case: *Weire v. Davenport*, 11-49.

27. An indorsement of a note without recourse does not operate as an assignment of the indorser's right of action against a prior indorser for fraud practiced in the transfer to him: *Watson v. Chesire*, 18-202.

III. EFFECT OF ASSIGNMENT.

28. Passes legal title: The assignment of a personal tort vests the legal title in the assignee: *Vimont v. Chicago & N. W. R. Co.*, 64-513.

29. Under the statute, the assignment of an open account for money due on contract passes to the assignee the legal title to the account assigned: *Knadler v. Sharp*, 36-232.

30. The assignor of an account loses all legal interest therein: *Platt v. Hedge*, 8-392.

31. While a person for whose benefit an assignment is made may bring action to enforce payment thereunder, yet in a particular case, *held*, that the assignment 'was not shown to have been made for the benefit of the person attempting to enforce the same: *McHose v. Dutton*, 55-728.

32. Champerty: The fact that the assignee as a consideration for the assignment enters into an agreement to repay to the assignor the sum recovered in an action on the claim assigned or a portion of such recovery, will not be a defense to the action by the assignee on such claim: *Knadler v. Sharp*, 36-232; *Vimont v. Chicago & N. W. R. Co.*, 64-513.

Further as to champerty, see CONTRACTS, §§ 324-331; ATTORNEYS, §§ 94-102.

33. Assignor not relieved from liability under contract: The assignment of a contract by one party thereto will not relieve that party from his liability on such contract in the absence of an agreement by the other party to accept the assignee as debtor and release the assignor: *Martin v. Orndorff*, 22-504.

34. Assignment as security: Where an assignment absolute in form is shown to have been intended only as security, it may also be shown that it was intended as security for costs and expenses of making collection, as well as for the indebtedness: *Grow v. Crittenden*, 66-277.

35. Privity: An assignor is not privy to an adjudication binding upon his assignee to which he is not made a party: *McDonald v. Gregory*, 41-513.

36. Evidence: Where one party to a contract assents to an assignment thereof by the other party, he will be precluded from afterwards denying the assignee's rights therein when the contract is attempted to be enforced. Therefore, evidence of acts tending

Effect.

to show his knowledge and assent is admissible in proof of assignment: *Crawford v. Wolf*, 29-587.

37. Stipulation against assignment: A stipulation in an agreement to convey, that no assignment of the premises by the vendor should be valid unless indorsed on the agreement and countersigned by the vendee or his assignees, *held*, to be for the benefit of the vendee and not enforceable by his assignees: *Wilson v. Reuter*, 29-176.

38. How far assignee subject to counter-claims or defenses: Where parties on the one part in a contract, without notice of any assignment, make an agreement with the original parties on the other part for the alteration of the terms of such contract, such agreement will be binding upon the assignees of the latter parties. The want of such notice is a matter to be shown by the parties claiming to have been relieved from liability by the new contract, to be shown as a matter of defense when their liability, under the terms of the old contract, is sought to be established by such assignees: *Steele v. Mills*, 68-406.

39. The assignee of a judgment takes subject to equities against his assignor: *Burtis v. Cook*, 16-194; *Ballinger v. Tarbell*, 16-491.

40. The assignee of a non-negotiable note is subject to any defense or counter-claim which the maker had against the assignor before notice of the assignment: *Sayre v. Wheeler*, 31-112.

41. The assignee of negotiable paper stands in the same position as the assignee of a non-negotiable instrument and is subject to the same defenses: *Franklin v. Twogood*, 18-515.

42. And therefore such assignee is subject to any defense or set-off existing in favor of the maker against the assignor at the time of notice of assignment: *Younker v. Martin*, 18-148.

Further as to rights of assignee of negotiable paper, see **BILLS AND NOTES, VII.**

The *bona fide* assignee of a note and mortgage without notice of infirmities is not affected by such infirmities, but holds the mortgage as he does the note, free therefrom: See **MORTGAGES, §§ 230-234.**

An assignee of a mortgage which his assignor holds with notice of a prior unrecorded mortgage is not protected against such prior

mortgage, if the assignment is made after the prior mortgage is recorded: See **RECORDING ACTS, § 115.**

43. Defense to counter-claim: Where an assignee sues upon a chose in action, and a counter-claim is interposed thereto which exists as against the assignor, the assignee may introduce any defense to such counter-claim which could have been set up by the assignor himself: *Miller v. Centerville*, 57-640.

44. Defense or counter-claim against assignee of open account: Save for the statute (Code, § 2087), an open account is not assignable, and it was therefore wholly immaterial under the statute, as it stood prior to the amendment (20 G. A., ch. 188, § 2), whether a debtor had a defense against an assignor, when he received notice of the assignment, or whether such defense arose afterwards, for the reason that the statute created no right, by reason of notice. The point of time fixed by the statute was the commencement of suit. If at that time the debtor had a defense against the assignor, he might interpose it against the assignee: *Wing v. Page*, 62-87; *Zugg v. Turner*, 8-223; *Reynolds v. Martin*, 51-324.

45. While the debtor under such statute might voluntarily pay the assignor at any time before action brought, and thus avoid liability to the assignee, he was not under obligation to do so, and the assignor could not enforce such payment: *Bailey v. Union Pacific R. Co.*, 62-354.

46. The rights of parties under a mining lease, providing for monthly payments of royalty, do not constitute an open account under the statutory provisions referring to the assignment of such account: *Steele v. Mills*, 68-406.

47. Priority between assignments: If, after an assignment of which the debtor has no notice, another person obtains a second assignment, and first gives notice of his right, he will be preferred to the first assignee: *Merchants', etc., Bank v. Hewitt*, 8-98.

48. Liability of assignor to assignee: The statutory provision (Code, § 2088) does not limit the action of an assignee, on an instrument not negotiable, to his immediate assignor: *Huse v. Hamblin*, 29-501.

49. Assignment of judgment without recourse: Where the owner of a judgment

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transferred all his right, title and interest therein "without recourse," held, that he did not thereby warrant the validity of the judgment, and that he could not be held liable where it was shown that a portion of the judgment appearing by the record to be due had been paid to a former holder of such judgment: *Scofield v. Moore*, 81-241.

50. Where two parties being sureties for another, and bound by a judgment against them, received from him certain notes and securities to be by them converted into money and applied on the judgment, which transfer included a note described in their receipt as being lost or mislaid, and one of the sureties subsequently, by indorsement on said receipt, transferred all his interest therein to the other surety "without recourse," under an agreement by which the latter undertook to pay the judgment, it appearing that the note described as being lost or mislaid was never in fact delivered by the principal under his assignment, but had been transferred by him prior thereto to a *bona fide* purchaser, held, in an action by the latter surety, after payment of the judgment, to recover from the former surety on his assignment, that the liability of the assignor was that of a vendor rather than that of an indorser, and his assignment without recourse relieved him from liability by reason of the failure of the title to the note: *Wolcott v. Timberman*, 28-454.

Further as to liability of assignors of notes without indorsement, see **BILLS AND NOTES**, VI, c.

IV. EQUITABLE ASSIGNMENTS.

51. No particular form of words is required to create an equitable assignment of a fund. Anything which evinces an intent to do so is sufficient: *Des Moines County v. Hinkley*, 62-637.

52. An order for the whole of a fund operates as an equitable assignment of the fund, after notice to the drawee, although not accepted. It becomes his duty in such case to accept, and the order binds the fund in his hands: *McWilliams v. Webb*, 32-577; *First Nat. Bank v. Dubuque S. W. R. Co.*, 52-378.

53. A check drawn and accepted, payable out of a particular fund, is an equitable

assignment of such portion of the fund: *Des Moines County v. Hinkley*, 62-637.

54. While it may be that the custodian of the fund may not be bound to accept the order drawn on him for a part thereof, yet such an assignment should be upheld in equity: *Ibid.*

55. The drawing of checks upon funds in the hands of drawee amounts to an equitable assignment, valid against the claims of a subsequent assignee for the benefit of creditors: *Roberts v. Corbin*, 26-815.

56. A bill of exchange drawn on a general or particular fund operates as an assignment to the payee of the debt due from the drawee to the drawer, when the bill has been accepted by the drawee: *First Nat. Bank v. Dubuque S. W. R. Co.*, 52-378.

57. A bill of exchange drawn upon a general fund, but not accepted by the drawee, does not operate as an assignment of the fund, but is mere evidence of an assignment, and, with other circumstances showing that such was the intention, will vest in the holder an exclusive claim to the fund, and bind it in the hands of the drawee after notice: *Ibid.*

58. An order amounts to an equitable assignment of the sums named therein, and when notified thereof the drawee becomes equitably bound to pay such sums when they become due to the assignee. This will be true without acceptance, and an acceptance upon conditions, already existing between drawer and drawee, will not alter the liability: *Cutler v. McCormick*, 48-406.

59. Notice of an unaccepted order is sufficient to bind the fund and constitute an equitable assignment thereon: *Manning v. Mathews*, 70—.

60. Where a bank held an order from a contractor for the entire balance to be due him on the completion of a contract for the erection of a county building, and the contractor gave to persons who had furnished material for such building, checks for the amounts due them, across the face of which were written the words "to be paid as soon as we settle with the county," and these checks were marked by the bank "accepted, payable whenever we have funds properly applicable to this check, but subject to all prior acceptances," held, that the transaction

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constituted an equitable assignment by the contractor to the creditor which would take priority over a subsequent attachment and garnishment: *Des Moines County v. Hinkley*, 62-637.

61. Under the facts of a particular case, *held*, that an order given by the contractor upon a sum of money agreed by him to be paid to a third person, was intended to be paid out of the profits of the contract, and would not take priority over the claims of persons who had furnished material for the work: *Ibid*.

62. Portion of promissory note: An agreement to pay a certain portion of a promissory note when collected amounts to an equitable assignment of such portion: *Gallinger v. Pomeroy*, 3 G. Gr., 178.

V. ASSIGNMENTS FOR BENEFIT OF CREDITORS.

63. Preferences: Under the common law, in both England and America, a debtor in failing circumstances might dispose of his property in trust for the benefit of his creditors, and by such conveyance or otherwise give preference in payment to one creditor before another: *Lampson v. Arnold*, 19-479; *Cowles v. Ricketts*, 1-582.

64. Statutory provision:¹ The language of the statute clearly implies a trust and contemplates the intervention of a trustee, and the transfer of property by the debtor to the creditor in payment of indebtedness is not an assignment within the terms of such statute, and is not thereby rendered invalid, although it is not for the benefit of all the creditors: *Cowles v. Ricketts*, 1-582.

65. The statute does not make general transfers of a debtor's property invalid, but relates only to general assignments, and uses the latter word in its technical sense: *Lampson v. Arnold*, 19-479.

66. The debtor may, if he acts without fraud, transfer property in payment of debts to certain creditors, before making a general assignment, and such transfer will be valid even though made in contemplation of insolvency: *Ibid.*; *Van Patten v. Burr*, 52-518.

67. A sale of property to a creditor in payment of his debt is valid, although other creditors remain unpaid: *Hutchinson v. Watkins*, 17-475.

68. The statutory provision has no application where a debtor, without fraud, sells property to a creditor absolutely for a fixed consideration, a portion of which is the discharge of a debt due such creditor, and the balance is money paid to the debtor and to other creditors in discharge of debts due them: *Johnson v. McGraw*, 11-151.

69. An absolute sale in good faith for a valuable consideration of the entire property of an insolvent corporation will not be held to be void as a general assignment: *Buell v. Buckingham*, 16-284.

70. A debtor may in good faith secure the claims of a creditor at any time without reference to the claims of other creditors, and for that purpose may give a chattel mortgage: *Fromme v. Jones*, 13-474.

71. A trust deed not purporting to be a general assignment, made to secure a present loan of money, *held* not void: *Whittaker v. Lindley*, 14-598.

72. The execution of a mortgage to one or more creditors is not made void by the fact that the mortgage is executed in contemplation of insolvency and that the mortgagor immediately afterwards executes a general assignment: *Lyon v. McIlvane*, 24-9.

73. Therefore, *held*, that a mortgage of property in this state was not rendered invalid by the fact that a general assignment of all the debtor's property was on the same day executed in another state: *Ibid*.

74. A debtor may give all his property in payment or security to one of his creditors without violating the statutory provision, provided the transaction is free from fraud: *Davis v. Gibbon*, 24-257; *Farwell v. Howard*, 26-381.

75. Knowledge by the creditor who is preferred that other creditors are left unprovided for will not render the transaction void: *Cowles v. Ricketts*, 1-582.

76. A partial assignment in good faith, preferring certain creditors, is not void: *Gray v. McCallister*, 50-497; *Cole v. Dealham*, 13-551.

¹ Code, § 2115. No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims.

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77. If the assignment does not cover all the insolvent's property it will not be a general assignment, even though it purports to be general: *Meeker v. Sanders*, 6-61.

78. Where several instruments are executed consecutively, each one subject to those preceding, and together constituting a disposition of all the debtor's property for the benefit of his creditors, but not in proportion to the amount of their claims, the various instruments will be considered as constituting one transaction and as therefore void under the statute: *Burrows v. Lehn-dorff*, 8-86.

79. So held, also, as to mortgages and a general assignment executed at the same time: *Cole v. Dealham*, 13-551; *Van Patten v. Burr*, 52-518.

80. So held, also, as to an assignment and a deed in fee executed on the same day: *Moore v. Church*, 70—.

81. To justify the court in finding that a mortgage may be taken in connection with some other instrument as constituting an assignment, it should appear that the mortgagor, at the time he made the mortgage, had the intention to make an assignment: *Perry v. Vezina*, 63-25.

82. The fact that mortgages and an instrument purporting to be a general assignment were all made on the same day, acknowledged before the same officer, and delivered to the recorder by the same person, held, not sufficient to show that the mortgages were a part of the assignment, it being proved by positive evidence that the mortgages were executed in the forenoon, when the party did not contemplate making the assignment, and that the purpose to do so was conceived after noon, when the parties to whom the mortgages were given had separated. To render the instruments in such cases void as constituting a general assignment not for the equal benefit of all creditors, it must appear that they were all parts of the same transaction: *Farwell v. Jones*, 63-816.

83. Where chattel mortgages and assignments to secure particular creditors are followed by a general assignment, and it appears that the instruments were executed with the bona fide intention of securing such creditors, the law will not give to such acts a different

character from that intended: *Gage v. Parry*, 69-605.

84. Therefore, where chattel mortgages and the assignment of books of account were executed to different creditors, and within an hour after their execution a general assignment was made, and it was shown that the general assignment was not contemplated at the time of the execution of the other instruments, but that such general assignment was executed when the debtor was advised that the recording of the prior instruments would probably cause a levying of attachment, held, that the various instruments should be deemed valid: *Ibid.*

85. Where a debtor conveyed a stock of merchandise to his wife, who thereupon, and in consideration thereof, executed a chattel mortgage upon the same to secure the payment of her husband's indebtedness, in which mortgage certain creditors were preferred to others, held, that the transaction was in the nature of a general assignment and therefore void: *Van Horn v. Smith*, 59-142.

86. Intention governs: The question whether a conveyance by a debtor of all his property for the benefit of a portion of his creditors shall be regarded as an assignment for the benefit of creditors or a mortgage for the security of particular debts, is to be determined by the intention as it may be ascertained from the circumstances of the transaction. If the conveyance is to a trustee, and the debtor intends to divest himself not only of the title of the property, but of all control over it, for the purpose of securing the distribution of all his property among his creditors or a portion of them, it is an assignment for the benefit of creditors, no matter what name the parties may have given it. On the other hand, if the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as void, even though the debtor is insolvent at the time and it covers all his property, and but a portion of his debts are secured by it: *Cadwell's Bank v. Crittenden*, 66-237.

87. A chattel mortgage, though executed by an insolvent person and covering all his property, is not necessarily an assignment.

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Whether it is to be construed as such or not depends upon the intent with which it is made. It is not to be considered an assignment where there is nothing to indicate that the mortgagor intended anything but the giving of security: *Kohn v. Clement*, 58-589.

88. A chattel mortgage given to one creditor to secure his claim will not operate as a general assignment, it appearing that none of the parties intended at the time that it should have such an operation, and that it does not include all of the property of the debtor: *Carson v. Byers*, 87-606.

89. The execution of a mortgage by the directors of a corporation to secure its indebtedness, although at a time when the corporation had become insolvent, *held*, not to constitute a general assignment for the benefit of creditors so as to be void because not for the benefit of all: *Garrett v. Burlington Plow Co.*, 70—.

90. The fact that in an instrument or instruments making general disposition of all the debtor's property for the benefit of his creditors, no trustee is appointed, will not prevent its being an assignment and therefore void as such, if not made for their benefit proportionally: *Burrows v. Lehdorff*, 8-96.

91. Under the facts in a particular case, *held*, that mortgages to creditors were not shown to be intended as a full disposition of the debtor's property and therefore were not to be treated as an assignment: *Jaffray v. Greenbaum*, 64-492.

92. That a conveyance of real estate to one creditor in payment or security of his debt was executed by the debtor at the same time he executed a general assignment for the benefit of his creditors does not make the two conveyances parts of one transaction: *Lampson v. Arnold*, 19-479.

93. The fraudulent intent of the assignor in a general assignment for the benefit of creditors will render the assignment invalid, notwithstanding the assignee was not a party to such intent: *Ibid*.

94. In order to render void an instrument of general assignment on the ground that it was made to defraud creditors, it is not necessary to show knowledge of the fraud on the part of the assignee: *Ruble v. McDonald*, 18-493.

95. To render a sale to a creditor invalid, as

constituting a preference, it must appear not only that the debtor was insolvent, but also that the sale was with intent to give such preference: *Graves v. Alden*, 13-573.

96. Effect of reservation: If it appears that the debtor has kept back a portion of his property not exempt from execution, the assignment will be treated as void although sufficient in form: *Moss v. Humphrey*, 4 G. Gr., 443.

97. No assignment is valid which contains a reservation or condition for the benefit of the assignor, such as requiring an absolute discharge upon part payment or partial distribution: *Williams v. Gartrell*, 4 G. Gr., 287.

98. An assignment is not rendered invalid by the fact that a reservation is therein made as to property exempt from execution: *Perry v. Vezina*, 63-25.

99. What sufficient in form: Where the intention of the grantor can be ascertained with reasonable certainty, the want of minute accuracy of language and the disregard of the usual forms will not render the instrument void: *Meeker v. Sanders*, 6-61.

100. The fact that the deed contains no schedule of the debts intended to be secured, that no inventory is given of the property intended to be conveyed, that the rights of the creditors are not distinctly defined, and that no specific directions are given to the trustee as to the time within which the property is to be converted into money, will not be sufficient to render the deed void: *Ibid*.

101. What constitutes insolvency: The fact that a party is unable to pay his debts according to the usage of trade, or proceed in business without general arrangement with his creditors or indulgence by way of extension of time of payment, is sufficient to constitute an insolvency, so that he may rightfully make an assignment for the benefit of creditors: *Savery v. Spaulding*, 8-239.

102. An assignment may be void as made in contemplation of insolvency if it is not for the benefit of all the creditors proportionally, although the assignor was not at the time actually insolvent: *Loving v. Pairo*, 10-282.

103. Law of the place: The validity of assignments, so far as they affect real property, must be judged by the law of the place where the property is situated: *Ibid*; *Moore v. Church*, 70—.

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104. An assignment by one partner without the consent of his copartner, who might be consulted and is capable of giving assent or dissent, is void and does not prevent attachment by a creditor, although no proceedings are taken by the partner not consenting to set the assignment aside: *Loeb v. Pierpoint*, 58-469.

105. But if both partners have agreed to an assignment, it will be valid though signed by but one: *Osborne v. Barge*, 29 Fed. Rep., 725.

106. When void: A direction to the assignee to sell the property when convenient and as soon as it can be done without material sacrifice will not constitute conclusive badge of fraud: *Wooster v. Stanfield*, 11-128.

107. An assignment executed for the payment of debts "as fast as they become due," held not to necessarily imply a payment otherwise than *pro rata* and therefore not void: *Meeker v. Sanders*, 6-61.

108. It seems that a provision in the assignment authorizing the assignee to sell for credit will render it void, but authority to dispose of property upon such terms as in his judgment seem best will not have that effect: *Ibid.*; *Berry v. Hayden*, 7-469.

109. Nor will a provision authorizing the assignee to compound with debtors render the assignment void: *Ibid.*

110. Misconduct of assignee: The fact that the assignee is offering to sell the goods on credit or to exchange them will not render the conveyance void. No neglect of duty by the assignee, and no misapplication of the trust fund by him, can have that effect. The remedy for such negligence or misfeasance is by application to the court: *Meeker v. Sanders*, 6-61.

111. Failure of the assignee to report the amount and condition of the assets will not affect the validity of the assignment: *Savery v. Spaulding*, 8-239.

112. The fact that the grantor in a deed of assignment is employed in the business by the assignee in the capacity of clerk will not in itself be evidence of fraud in making the assignment: *Ibid.*

113. Delivery of the assignment to the attorney of the assignor with direction to file it for record is, in effect, delivery to the assignee: *American v. Frank*, 62-202.

114. The assent of the creditors to a general assignment for their benefit will be presumed: *Price v. Parker*, 11-144.

115. The assent of creditors will not be presumed to a conditional assignment: *Williams v. Gartrell*, 4 G. Gr., 287.

116. Where a debtor transferred a note to a creditor with the understanding that he should collect it and apply so much of the proceeds as should be necessary for the satisfaction of his own claim, and pay the balance upon another claim, held, that the provision in favor of the second creditor as to the balance did not constitute an assignment to him, he not being a party to the agreement, and therefore the excess remained in the hands of the first assignee liable to garnishment by other creditors: *Witter v. Little*, 66-431.

117. Where certain accounts were by the debtor assigned to a trustee to be collected and applied *pro rata* to the payment of debts due certain creditors, held, that the trustee in such assignment was not subject to garnishment at the suit of other creditors, and that assent of the creditors of the assignor would be presumed, they having been notified of the arrangement and having made no objection thereto: *Van Winkle v. Iowa Iron, etc., Fence Co.*, 56-245.

118. Who may be assignee: A creditor or a co-debtor may be made assignee: *Wooster v. Stanfield*, 11-128.

119. Acceptance by assignee: If an assignee take possession of property, it is evidence of an acceptance, and he may bring action in relation to such property even before filing an inventory and bond: *Price v. Parker*, 11-144.

120. Inventory: Where the assignee filed a valuation signed and sworn to by other disinterested persons, instead of by himself as required by statute, held, that such inventory should not be treated as a nullity nor as authorizing the court to appoint another assignee. It may do so, only where the assignee refuses to accept: *Drain v. Mickel*, 8-438.

121. The assignment is not void for want of inventory: *Wooster v. Stanfield*, 11-128; *Price v. Parker*, 11-144.

122. Recording: The provision as to recording the assignment is intended for the protection of subsequent purchasers. Where

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the assignment was duly executed and acknowledged, and the assignee consented to accept the trust before the levy of an attachment, the failure to record it until thirty seconds after the writ of attachment came into the sheriff's hands, *held* not to render it invalid: *American v. Frank*, 62-202.

123. What passes by assignment: The right of action for damages for the wrongful suing out of an attachment upon property subsequent to a general assignment thereof is in the assignee, and not in the person making the assignment: *Rumsey v. Robinson*, 58-225.

124. The equity of redemption of a mortgagor of personal property passes by an assignment: *Gimble v. Ferguson*, 58-414.

125. The assignee may, therefore, maintain an action for possession of personal property of the assignor as against third parties, although it is covered by a chattel mortgage conferring upon the mortgagee the right of possession: *Goldsmith v. Willson*, 67-662.

126. By a general assignment, the property of which the assignor is at the time possessed is passed to the assignee for the benefit of creditors; therefore *held*, that such general assignment would destroy a partial assignment by an instrument intended to secure a creditor and made prior to the execution of the general assignment, but not delivered until after general assignment: *Gage v. Parry*, 69-605.

127. A deed of assignment headed "General Assignment," and deeding "all the lands and all the personal property of every name and nature whatsoever of the said party of the first part, more particularly enumerated and described in the schedule hereto annexed and marked Schedule A," etc., is an assignment of the property mentioned in the schedule, merely, and does not include property not mentioned therein. Hence, if any property of the assignor is omitted from the schedule, the assignment is not a general but a special one: *Bock v. Perkins*, 28 Fed. Rep., 128.

128. Rights of assignee: The assignee and the creditors have no higher rights under the assignment than the assignor had. The assignee cannot question a prior chattel mortgage on the ground that it was given to

secure an antecedent indebtedness: *Meyer v. Evans*, 66-179.

129. The assignee may maintain an action to set aside a fraudulent conveyance by his assignor and subject the property thus conveyed to the payment of the creditors' claims. The debtor who has made a fraudulent conveyance must be deemed, as to the creditors, to have an interest in the property which passes to the assignee: *Schaller v. Wright*, 70—.

130. While an assignee cannot, either at the common law or under the statute, set aside a conveyance made by his debtor on the ground of fraud, he may defeat the enforcement of a mortgage against the realty of the assignor, the title of which is in the assignee, by showing that the mortgage is a mere sham, given without consideration and in fraud of creditors: *Sandwich Mfg Co. v. Wright*, 22 Fed. Rep., 631; *Rumsey v. Town*, 20 Fed. Rep., 558.

131. Under the Code a deed of assignment for the benefit of creditors does not confer upon the assignee the right to enforce special equities on behalf of one or more creditors, so as to deprive a creditor of his right to assert, in his own name and right, such equity against a third party: *Rumsey v. Town*, 20 Fed. Rep., 558.

132. But where the case does not involve the simple question of the right of the assignee to recover property fraudulently conveyed away by his assignor, the assignee may defeat the enforcement of a mortgage against the realty the title to which is in the assignee, by showing that the mortgage is a mere sham given without consideration and in fraud of creditors: *Sandwich Mfg. Co. v. Wright*, 22 Fed. Rep., 631.

133. An assignee holding under a deed of assignment cannot deny and defend against the validity of chattel mortgages, which though not recorded yet represent a valid subsisting indebtedness, in the interest of general creditors. Such right is confined to creditors having a lien upon the property, or having a judgment at law with a right to perfect their lien upon property they may discover: *Simon v. Openheimer*, 20 Fed. Rep., 553.

134. Power to borrow money: If the assignee procures money for the purpose of

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paying creditors by a pledge or mortgage of the property assigned, the assignor has no right to complain, provided, as between him and the assignee, such a power under the assignment existed and the proceeds thereof have been properly applied, and it was for the interest of the assignor that the money should be so procured instead of by a sale of the property: *Waterman v. Baldwin*, 68-255.

135. Invalid mortgage foreclosure: Where defendants had foreclosed a chattel mortgage, invalid as to the general creditors of the mortgagor, who had made an assignment for the benefit of his creditors, *held*, that a decree in equity would be rendered declaring the mortgage void and estopping the defendants from any prior right to the proceeds of the sale of the mortgaged property at the suit of a creditor, who, without delay, after the assignment, procured judgment at law against the mortgagor, and brought his action in equity against the mortgagees, although the mortgagees would thereby be deprived of all security for their debt: *Rumsey v. Town*, 20 Fed. Rep., 558.

136. Special security: A creditor under a general assignment, who has a special security, may be required by the other creditors to resort to this, and can only claim a dividend upon the amount remaining unpaid after exhausting the property upon which he has such special lien: *Wurtz v. Hart*, 15-515.

137. Security for costs: The provisions as to requiring security for costs from a non-resident plaintiff are not applicable in proceedings under an assignment for the benefit of creditors: *Meyer v. Evans*, 66-179.

138. Filing of claims: Claims entitled to share in the first dividends are only those filed within three months from the first publication of notice: *In re Assignment of Holt*, 45-301.

139. Where the claim is not filed within the requisite time after the publication of notice and after the report of the assignee, the creditor cannot participate in the benefits of the assignment, and there is no provision by which such a creditor can have equitable relief from the bar thus created: *McKindley v. Nourse*, 67-118.

140. So *held* where the creditor, not presenting nor seeking to obtain payment of his

claim through the assignee, sought to recover against the assignee property sold by him to the assignor before the assignment: *Ibid*.

141. Contesting claims: There being no provision for pleadings in contesting claims, further than exceptions by creditors objecting to claims of other creditors, it is quite probable that no further pleadings are required by the statute: *In re Assignment of Guyer*, 69-585.

142. Jurisdiction: The court having jurisdiction of proceedings in an assignment for the benefit of creditors has authority to determine priority among creditors, and a party objecting to the right of the creditor should make such objection in that proceeding. An order of the court as to the jurisdiction of the property will be an adjudication, binding in a collateral proceeding although erroneous: *Perry v. Murray*, 55-416.

143. An original and independent action in equity may be brought in the same or another court for the purpose of determining equities and priorities of the creditors to the fund in court under the assignment. Therefore, *held*, that where the validity of a chattel mortgage was involved in determining the rights of creditors, an independent action with reference thereto might be brought in another court and transferred to a federal court, and that the adjudication of the federal court on such question, of which it had jurisdiction, would be final: *Knoxville Nat. Bank v. Hanirick*, 67-583.

144. The fact that a deed of assignment has been executed and that the assignee gives bond and files the proper schedules and inventory in the state court, does not *ipso facto* confer upon that court the exclusive jurisdiction to hear and determine all questions existing between the creditors of the assignor: *Rumsey v. Town*, 20 Fed. Rep., 558.

145. Any one whose legal rights are affected thereby may contest the validity of an assignment, and to that end invoke the aid of the state courts; and if he is a citizen of another state, and the amount exceeds five hundred dollars, he may invoke the aid of the United States circuit court: *Fleisher v. Greenwald*, 20 Fed. Rep., 547.

146. An order made by a state court in an action of replevin, wherein it was found that

For benefit of creditors.— Power of majority.

several mortgages were valid liens upon the property, paramount to the assignment, and entitled to be first paid out of the proceeds realized from a stock of goods, *held* not an adjudication binding on the complainants in the federal court who were not parties to the proceedings in the state court, whose right to contest the validity of the mortgages was not derived from the deed of assignment, and was not represented by the assignee: *Ibid.*; *Rumsey v. Town*, 20 Fed. Rep., 565.

147. An order made by a court having control of assignment proceedings, approving payment of a mortgage debt by the assignee, is not an adjudication of the validity of the mortgage as against creditors not appearing in the assignment proceedings, and whose rights, as against the mortgage, are not conferred by the deed of assignment: *Rumsey v. Town*, 20 Fed. Rep., 558.

148. Sale; dower: The sale of real property by an assignee is a judicial sale, and cuts off contingent right of dower in the property: *Stidger v. Evans*, 64-91.

149. Preferences of taxes: A tax levied upon personal property, at least if subsequent to the assignment, should be paid by the assignee, rather than allowed to become a lien upon real property as against a mortgagee: *Brooks v. Eighmey*, 53-276.

150. It is the duty of the assignee, to the extent of the property which comes into his hands, to devote the same to the payment of taxes, subject possibly to the payment of expenses of executing the trust. No claim for taxes is required to be filed, nor need any demand be made. The assignee must, at his peril, inquire whether the property or fund in his hands is liable for assessments or levies of taxes: *Huiscamp v. Albert*, 60-421.

151. Discharge not valid as to foreign creditors: A discharge under a state insolvent law will not discharge a debt due to a citizen of another state, no matter where the debt originated or was made payable, unless the creditor appears and voluntarily submits to the jurisdiction of the court by becoming a party or claiming a dividend thereunder: *Hawley v. Hunt*, 27-303.

152. Insolvent laws not superseded by bankrupt law: It has been held by our supreme court as sound in principle, and in the absence of an authoritative adjudication

by the United States supreme court, in accordance with the weight of authority, that the enactment of the federal bankrupt law did not operate to nullify, supersede or suspend the insolvent laws of the states: *Reed v. Taylor*, 32-209.

ASSOCIATIONS.

1. Power of majority: Where property is held by voluntary associations or corporations absolutely and without any limitation, a majority may manage it as they please, admitting the minority to the same benefits as themselves. But if there is any limitation, express or implied, the rights of the minority are protected by it, and they cannot be divested of the right to have the property appropriated to the trust under which it was held: *First Const. Presb. Church v. Congregational Society*, 23-567.

2. A majority of an unincorporated society may direct and control the disposition of its property upon due notice of the meeting at which such disposition is made: *Hubbard v. German Catholic Congregation*, 34-31.

3. In a particular case, *held*, that the announcement to the children at the Sunday school and the ringing of a bell in the evening was a sufficient notice of such meeting of a church society: *Ibid.*

4. Power of trustees: Where the trustees of a religious society were duly authorized to execute a mortgage, but such mortgage was not executed by all of the trustees, *held*, that although it might not be valid in law, it would be carried out in a court of equity for the purpose of preserving the rights of the parties: *Ibid.*

5. Liability of members: Persons becoming parties to an unincorporated organization are liable for the debts they contract, and all are included in such liability who consent to the undertaking or subsequently ratify it: *Lewis v. Tilton*, 64-220.

6. Persons who enter into a contract on behalf of such an alleged principal render themselves personally liable: *Ibid.*

7. Action by: As a general rule the members of a voluntary association should be joined in a petition in an action in its behalf, unless so numerous as to cause inconvenience. Therefore, *held*, that the action in his own name by a person subscribing himself as

Ecclesiastical. — When allowable.

elder of a church, in relation to property of the church, was not properly brought: *McConnell v. Gardner*, Mor., 272.

8. An unincorporated association for pecuniary profit cannot maintain suit in its own name, nor can its members maintain such suit in behalf of themselves and their fellow members: *Pipe v. Bateman*, 1-360.

9. Ecclesiastical associations; judicial control: The civil courts will not revise decisions of churches or religious associations upon ecclesiastical matters, but they will interfere with such associations when rights of property or civil rights are involved: *Bird v. St. Mark's Church*, 62-567.

10. Where the canons of a church provided that a rector canonically elected and in charge could not be removed by the parish against his will, and it appeared that the pastor had been properly elected by the parish with a contract for salary at a certain rate, *held*, that the parish could not, without consent of the pastor, decrease the compensation, and that the pastor might recover judgment against the parish for salary at the contract price: *Ibid*.

11. The courts will not interfere with the action of a church in expelling a member for alleged offenses against it, when no property rights are involved: *Sale v. First Regular Baptist Church*, 62-26.

12. Although the expulsion of a member from a mutual benefit association might not deprive him of the right to recover relief to which he had become entitled before such expulsion, yet where the expulsion was for fraud in connection with the attempt to secure such relief, *held*, that he was thereby deprived of any benefit which he might otherwise have claimed: *Woolsey v. Independent Order O. F. Lodge*, 61-492.

As to trusts for religious purposes, see **TRUSTS**.

ATTACHMENT.**I. WHEN ALLOWABLE; WHERE COMMENCED.****II. PETITION.**

- a. *Form; amendments.*
- b. *Statement of grounds.*
- c. *Statement of amount due.*
- d. *Allowance of amount of property to be attached.*

III. THE BOND.**IV. THE WRIT.****V. THE LEVY AND RETURN.****VI. RIGHTS ACQUIRED BY LEVY; LIEN.****VII. CUSTODY OF THE PROPERTY.****VIII. RELEASE OR DISCHARGE; JUDGMENT; APPEAL.**

- a. *Release from levy.*
- b. *Bond to discharge attachment.*
- c. *Delivery bond.*
- d. *Dissolution of attachment or release of property on motion.*
- e. *Release upon motion of third party.*
- f. *Dissolution upon judgment; appeal.*

IX. REMEDY FOR WRONGFULLY SUING OUT.

- a. *Form of action.*
- b. *What constitutes wrongful suing out.*
- c. *Pleading conditions and breach of bond.*
- d. *Action on bond.*
- e. *Evidence of wrongful suing out.*
- f. *Measure of damages; attorneys' fees; exemplary damages.*
- g. *Judgment on bond.*

Judgment in attachment commenced by publication, see **JURISDICTION**, §§ 178-187.

I. WHEN ALLOWABLE.

1. In equitable actions: An attachment may issue in an equitable proceeding as well as in an action at law: *Baldwin v. Buchanan*, 10-277; *Crouch v. Crouch*, 9-269.

2. In an equitable action by one partner against another to recover the amount due on partnership account, plaintiff may have an attachment, if there are proper grounds, although he may also be entitled to a receiver: *Curry v. Allen*, 55-318.

3. Against one of several defendants: In an action against several defendants, the plaintiff may have an attachment against any as to whom there are proper grounds therefor, without regard to whether there are any grounds as to the others or not (overruling *Courrier v. Cleghorn*, 3 G. Gr., 528; *Ogilvie v. Washburn*, 4 G. Gr., 548): *Chittenden v. Hobbs*, 9-417; *Austin v. Burgett*, 10-302.

When allowable.—The petition.

4. Where there are several defendants, the property of a non-resident defendant may be attached, it being shown that the resident defendants are insolvent: *Smith v. Coopers*, 9-878.

By landlord against property of tenant to enforce landlord's lien for rent, see LANDLORD AND TENANT, §§ 125-132.

5. When action deemed commenced: Under the statute allowing an attachment "at the commencement or during the progress of the proceeding," the action may be regarded as commenced as soon as the petition is filed, and before notice is placed in the hands of the sheriff, or served: *Hagan v. Burch*, 8-309.

6. Where it appears that the original notice and attachment were issued at the same time, it will be considered that the suit was commenced before the issuance of the attachment: *Nuckols v. Mitchell*, 4 G. Gr., 432.

7. So, where the filing of petition and issuance of writ bear the same date, it will be presumed that the writ was issued after the filing of the petition: *Pitkins v. Boyd*, 4 G. Gr., 255.

As to what deemed commencement of action in general, see ACTIONS, III.

8. Return of "not found" unnecessary: In case of attachment against a non-resident it is not necessary that the return of "not found" be made before issuance of attachment: *Elliott v. Stevens*, 10-418.

9. Where brought: Proceedings by attachment against a resident are, by Code, § 2580, required to be brought in the county of the defendant's residence or the county in which the contract is to be performed, and if they are brought in another county the attachment will be invalid and should be dismissed, even if the case is, upon application of defendant, transferred to the county of his residence: *Wasson v. Mellsap*, 70—.

As to service by publication, in proceedings against non-residents, see ORIGINAL NOTICE.

II. THE PETITION.

a. Form; amendment.

10. Separate petition: Even when the attachment is asked at the beginning of the action it is not improper to file a separate pe-

tition setting forth the grounds of the attachment: *Shapleigh v. Roop*, 6-524; but it is not necessary: *Van Winkle v. Stevens*, 9-264; *Shaffer v. Sundwall*, 33-579.

11. The attachment and the suit are distinct, and any irregularity in the former will not affect the latter: *Elliott v. Mitchell*, 3 G. Gr., 287.

12. Amount due: If the amount due is stated in the body of the petition asking judgment, it need not be repeated in that part asking the writ. It is not essential that the portion of the petition asking an attachment be separate and distinct from that in the main cause and contain all the essential averments: *Shaffer v. Sundwall*, 33-579.

13. Verification by affidavit: Under the statutory provision that "the petition which asks an attachment must in all cases be sworn to" (Code, § 2951), the verification of the petition may be by a person other than the plaintiff without any peculiar means of knowledge as to the facts being shown: *Pitkins v. Boyd*, 4 G. Gr., 255.

14. But it is desirable that the means of knowledge of such party be shown: *Bates v. Robinson*, 8-318.

15. Affidavit by plaintiff's attorney, stating a knowledge on his part of the facts, held sufficient: *Chittenden v. Hobbs*, 9-417.

16. If the petition is actually sworn to, the fact that the jurat is not signed by the officer administering the oath will not invalidate subsequent proceedings: *Cook v. Jenkins*, 30-452.

17. Attachment must be asked for in the petition: *Dawson v. Jewett*, 4 G. Gr., 157; *Queen v. Griffith*, 4 G. Gr., 113.

18. Amendments to petition are allowable which do not interpose any new cause of action and will not affect the attachment: *McCarn v. Rivers*, 7-404.

19. But that an amended petition shall support an attachment already issued, the petition as amended must state the cause to have existed at the date of the attachment: *Wadsworth v. Cheeny*, 10-257; *Crouch v. Crouch*, 9-269; *Bundy v. McKee*, 29-253.

20. If the amendment changes the cause of action, and under the petition as amended no cause of attachment appears to have existed at the time of the issuance of the attachment, it will be deemed to have been

Form; amendment.—Statement of grounds.

wrongfully sued out: *Young v. Broadbent*, 23-539.

21. Amendments to the petition setting up no new ground of attachment, but merely making the original more specific, and to the bond as to the amount of the penalty, should be allowed: *Gourley v. Carmody*, 23-212.

22. Verification of amendment: Where the amendment does not change the ground of the attachment nor introduce a new cause of action, nor claim a greater amount, but is merely a new statement of the same cause, it need not be verified: *Hamill v. Phenicie*, 9-525.

23. Defective affidavit of verification to the petition may be cured by amendment: *Bunn v. Pritchard*, 6-56; *Langworthy v. Waters*, 11-432; *Shaffer v. Sundwall*, 33-579; *Lowenstein v. Monroe*, 52-231. And see Code, § 248.

24. Effect of amendment: A party is not to be prejudiced by any defects which are corrected by amendment: *Wadsworth v. Cheeney*, 13-576.

25. And the attachment should not be dissolved for such a defect after its correction: *Gourley v. Carmody*, 23-212.

26. Where, after the filing of a motion to quash for a defect in the affidavit, such defect is cured by amendment, the motion should not be sustained: *Stout v. Folger*, 34-71.

27. So, where the action of the lower court in overruling a motion to quash the attachment for a defect in the affidavit was reversed on appeal and the cause remanded, and thereupon the defect was cured by amendment, *held*, that the proceedings under the attachment were thereby rendered valid: *Stadler v. Parmlee*, 14-175.

28. Leave to amend: Where it does not appear that plaintiff asked for leave to amend, to cure a defect raised by motion to dissolve the attachment, it is not necessary that it appear from the record that leave to amend was given: *Pittman v. Searcey*, 8-352.

b. Statement of grounds.

29. Following statute: In alleging the cause of attachment the petition need not follow the exact language of the statute. It is sufficient if there is a substantial compli-

ance with its provisions, the requisite facts being clearly stated: *Drake v. Hager*, 10-556; *Crew v. McClung*, 4 G. Gr., 153.

30. Alternative: Two or more causes for attachment may be stated, but they cannot be stated in the alternative: *Stacy v. Stich-ton*, 9-399. And see Code, § 3021.

31. Non-residence: The allegation that defendant is "not now an inhabitant of this state" is equivalent to saying that he is a "non-resident of the state:" *Wiltse v. Stearns*, 13-282.

32. Removing property out of state: To justify an attachment on the ground that defendant is about to remove his property out of the state, etc., the contemplated removal must be of a permanent character, and not merely temporary. Where defendant's property was a team which he contemplated taking out of the state for a journey of four or five months with intention of returning, *held*, that there was no ground for an attachment: *Warder v. Thrilkeld*, 52-134.

33. Where attachment is asked on that ground, an intention to defraud creditors need not be averred: *Branch of State Bank v. White*, 12-141; *Sherrill v. Fay*, 14-292.

34. Actual fraud need not exist in such cases. (Overruling *Lockard v. Eaton*, 3 G. Gr., 548; *Bowen v. Gilkison*, 7-503; *Pittman v. Searcey*, 8-352, all decided under the Code of 1851): *Mingus v. McLeod*, 25-452.

35. Disposal of property with intent to defraud creditors is not shown by allegation of disposal "with intent to delay and hinder creditors and prevent and defeat them from the collection of their claims." An intention to defraud must be alleged to bring the case within that ground: *Torbert v. Tracy*, 12-20.

36. Evidence of intent to defraud: Where the ground is that defendant is about to dispose of his property with intent to defraud his creditors, the allegation should be predicated upon some indication by word or act warranting a reasonable belief that defendant is about to defraud his creditors. Evidence that ten years previously he put his property out of his hands to defraud creditors would not be relevant on the issue as to the existence of such intent. (Decided under a former statute allowing the truth of the averment of the ground of the attachment

Statement of grounds.

to be put in issue by plea): *Lewis v. Kennedy*, 3 G. Gr., 57.

37. Contemplated removal of property from state is not ground for attachment unless it also appears that sufficient is not left to pay debts: *State v. Morris*, 50-208.

38. Absconding: That defendant is absconding himself from the state does not alone constitute an absconding: *Ibid*.

39. The fact that defendant appears to the action does not disprove the allegation that he has absconded: *Phillips v. Orr*, 11-288.

40. Contemplated removal of person: To make a contemplated removal and refusal to pay or secure the debt a ground for attachment, it must appear that defendant was not willing either to pay or secure: *Drummond v. Stewart*, 8-841.

41. Inconsistent grounds: The allegation, in stating one ground, that defendant has property not exempt from execution and refuses to pay or secure, and in stating another, that he has disposed of all his property with intent to defraud creditors, are not necessarily inconsistent and contradictory: *Holloway v. Herryford*, 9-853.

42. For unmatured indebtedness: A surety upon indebtedness not yet due, and which he has not paid, cannot have an attachment against the principal, under the provisions for attachment in case of unmatured indebtedness (Code, § 2956): *Dennison v. Soper*, 83-188.

43. To bring a case within these provisions, a disposition or removal of the property must be with intent to defraud: *Pride v. Wormwood*, 27-257.

44. That defendant is about to dispose of his property with intent to defraud his creditors will bring a case within these provisions, without alleging a refusal to make any arrangements for securing the indebtedness: *Danforth v. Carter*, 1-546.

45. In an action under these provisions in regard to unmatured indebtedness, the defense that the debt is not due cannot be set up: *Churchill v. Fulliam*, 8-45.

46. Where suit was brought for a debt as due, and attachment procured, and defendant denied the indebtedness on the ground that it was not mature, and asked damages for wrongful suing out of the attachment, *held*, that it was proper to give him judgment for

such damages, without giving plaintiff judgment for the amount of the claim: *Wetherell v. Sprigley*, 43-41.

47. For indebtedness due the state: It is evidently contemplated that an attachment shall issue for indebtedness due the state from a debtor who has refused to pay or secure the same, only when demand has been made upon the debtor for payment or security and is refused; and that defendant is absent from the state, so that demand cannot be made upon him, does not change the rule: *State v. Morris*, 50-208.

48. "Property" need not be defined: Under a statutory provision authorizing an attachment where defendant had "property, goods or money," etc., which he refused to give in payment or security of the debt, *held*, that an allegation that he had "property" was sufficiently specific: *Bates v. Robinson*, 8-818.

49. Specific attachment: Under particular facts, *held*, that no ground appeared for a specific attachment as provided for by statute: *Allerton v. Eldridge*, 56-709.

50. Sufficiency of grounds not raised by demurrer: The averments of the grounds of attachment are not a part of the petition in the sense that they can be demurred to. If they are insufficient, a motion to dissolve the attachment is the proper remedy; if inconsistent grounds are alleged, the plaintiff may, on motion, be required to elect between them: *Holloway v. Herryford*, 9-353; *Hunt v. Collins*, 4-56.

51. Truth of grounds of attachment not in issue: No issue can be joined in the principal suit on the averment of facts constituting the ground for the attachment. The party injured by the wrongful suing out of the writ has no other remedy than by an action on the bond, unless in cases where an action of trespass would lie: *Veiths v. Hagge*, 8-163, 192; *Churchill v. Fulliam*, 8-45; *Sackett v. Partridge*, 4-416; *Sample v. Griffith*, 5-376; *Berry v. Gravel*, 11-135; *McLaren v. Hall*, 26-297.

52. Therefore an answer raising such an issue may be stricken from the files on motion: *Burrows v. Lehdorff*, 8-96.

53. Much less can such an issue be made by an entire stranger to the suit: *Whipple v. Cass*, 8-126.

Amount due.—Property to be attached.

54. Truth of grounds cannot be raised by motion to dissolve: A motion to dissolve the attachment, based upon affidavits that the cause for attachment, as stated in the petition, is not true, cannot be sustained. No issue can be joined as to the facts stated as cause for the attachment. The only remedy is on the bond: *Sturman v. Stone*, 31-115.

c. Statement of amount due.

55. In action on contract: A writ of attachment should be quashed when the petition therefor founded on contract does not state that something is due, and as nearly as practicable the amount due: *Blakley v. Bird*, 12-601; *Kelley v. Donnelly*, 29-70.

56. It is the petition, and not the affidavit attached to it, which is to state the amount claimed to be due: *Chittenden v. Hobbs*, 9-417.

57. It is not necessary that the portion of the petition asking the attachment state the amount due when that amount is stated in the portion of the petition asking judgment: *Shaffer v. Sundwall*, 33-579.

58. But where the petition stating the cause of action on contract is not under oath, the sworn petition asking an attachment must state the amount due: *Blakley v. Bird*, 12-601.

59. False statement as to amount due: That the amount sworn to as due is unconscionable and unreasonable is no ground for dissolving an attachment, although it may render plaintiff liable on his attachment bond: *Lord v. Gaddis*, 6-57.

60. In actions for tort: When the plaintiff's claim is not founded on contract, he is not required to state in his petition the amount due: *Sherrill v. Fay*, 14-292.

61. Nor is it required in such actions, as it is in actions on contract, that the amount sued for must exceed five dollars to authorize an attachment: *Weller v. Hawes*, 49-45.

d. Allowance of amount of property to be attached.

62. Not necessary in actions on contract: Where plaintiff's right of action arises out of contract, no allowance of the amount for which attachment may issue is necessary, although the case is one in which, under the

common law rules of pleading, an action in tort might have been brought: *McGinn v. Butler*, 31-160.

63. Unliquidated damages; penal bond: If the action is on contract and not in tort, no allowance is necessary even though the damages are unliquidated. The distinction intended by the statute is that between actions arising *ex contractu* and those arising *ex delicto*. Therefore, no allowance is necessary in an action on a penal bond: *Lord v. Gaddis*, 6-57.

64. Action on judgment: Where a judgment has been recovered for a tort, the cause of action on such judgment is no longer *ex delicto* but is *ex contractu*, and the amount due being properly stated, no allowance is required: *Johnson v. Butler*, 2-535.

65. Action to recover penalty: No allowance is required in an action to recover a liquidated sum as a forfeiture provided by a penal statute or ordinance, the remedy being by action of debt: *Decorah v. Dunston*, 34-360.

66. Action for false representations: An action for damages for false representations as to the soundness of sheep sold, *held*, to be an action founded on contract, so that no allowance was required: *Swan v. Smith*, 26-87.

67. In actions for tort: An attachment under any circumstances in actions for tort is not allowed in many of the states; and never, unless under some restrictions other than those provided in actions on contract; and hence, under our Code, an allowance is required of the amount of property to be attached which is not required in actions on contract: *Raver v. Webster*, 3-502.

68. Conversion: Action for tortious conversion of property still in possession of defendant cannot be considered as on contract, and an allowance is necessary: *Moses v. Arnold*, 43-187.

69. Misrepresentation in sale of land: In an action for damages sustained by reason of misrepresentations as to the quality of land sold, not being founded upon a written contract, and the damages being unliquidated, there must be an allowance: *Gates v. Reynolds*, 13-1. (This case is not consistent with the later one of *Swan v. Smith*, 26-87; *supra*, § 66. The statute does not, and did

The bond.—The writ.

not when the above case was decided, require the action to be on *written* contract to render an allowance unnecessary.)

70. Allowance relating back; amendment: Where a writ of attachment, in an action not founded on contract, issues and is levied, without an allowance being made as required by statute, and a motion is made to quash the writ on that ground, the court may then make an allowance, to relate back, as between the parties, to the issuance of the writ, and fix the additional amount of property which may be levied on: *Magoon v. Gillett*, 54-54.

71. Allowance to be by judge: The allowance is to be made by a judge acting in his individual capacity and need not be attested by the seal of his court: *Sherrill v. Fay*, 14-292.

72. But it would seem that an allowance by the judge of the court in which the action is pending, while sitting as the court and not as a judge individually, would be sufficient: *Magoon v. Gillett*, 54-54.

73. Subsequent allowance: Upon a motion to discharge attached property on the ground that there has been no allowance when required, the court may make an order as to how much property shall be held: *Ibid.*

III. THE BOND.

74. The amount of the bond is to be double the value of the property which the sheriff may attach, or three times the amount sworn to by plaintiff. It is not sufficient that it be double the amount sworn to, or double the value of the property which is actually attached: *Churchill v. Fulliam*, 8-45; *Hamill v. Phenicie*, 9-525; *Van Winkle v. Stevens*, 9-264; *Hamble v. Owen*, 20-70.

75. Surety: One surety is sufficient if his pecuniary responsibility satisfies the requirements of the law: *Elliott v. Stevens*, 10-418.

76. Signature of plaintiff is not essential: *Pitkins v. Boyd*, 4 G. Gr., 255.

77. Partnership name: A bond signed by both principal and sureties in their partnership name is not *prima facie* insufficient: *Danforth v. Carter*, 1-546; *Churchill v. Fulliam*, 9-45.

78. Where an attachment was sued out against a member of a firm for a partnership

indebtedness, *held*, that a bond executed to the firm was not sufficient: *Courrier v. Cleg-horn*, 3 G. Gr., 523.

79. Where the bond runs to a firm and the writ issues against firm property, it will not cover damages for wrongful attachment of the individual property of a member of the firm, although such partner is joined as defendant in the action: *Mason v. Rice*, 66-174.

80. Giving an appeal bond does not release from liability on the attachment bond: *McCall v. Bradley*, 3 G. Gr., 200.

81. Motion to dissolve the attachment for insufficiency of the bond may be made where the amount is not as large as required by statute: *Hamble v. Owen*, 20-70.

82. And this remedy, and not demurrer, is available for failure to give bond: *Brace v. Grady*, 36-352.

83. Amendment of the bond: The objection that the bond is not sufficient in amount may be avoided by substitution of a sufficient bond: *Van Winkle v. Stevens*, 9-264.

84. A mistake in the recital of the bond as to the county in which the proceeding is pending is a defect which may be cured: *Holmes v. Budd*, 11-186.

85. A defect in the bond may be cured by amendment, and it is therefore error to discharge the attachment for such defect when the party offers to substitute a proper bond: *Cheever v. Lane*, 9-193.

86. A substituted bond is to be treated in all respects as if filed at the beginning of the action: *Branch of State Bank v. Morris*, 13-186.

As to amending bonds in general, see BONDS.

Remedy on the bond: See *infra*, IX, d.

IV. THE WRIT.

87. Proceedings under, are independent of main action: The object of the writ is to seize and hold the property of the defendant, or its equivalent, to await the event of the suit. If plaintiff recovers, the property is considered as having been levied on under execution, and defects in the writ or the proceedings thereunder cannot vitiate the proceedings in the suit in which the attachment is secured, the proceedings by attachment being merely auxiliary: *Carothers v. Click*, Mor., 54.

The writ. — The levy and return.

88. The cause of action or its nature need not be stated in the writ: *Wadsworth v. Cheney*, 13-576; *Pitkins v. Boyd*, 4 G. Gr., 255; *Westphal v. Sherwood*, 69-364.

89. The fact of bond being given need not necessarily be recited in the writ: *Hays v. Gorby*, 3-203 (commenting upon *Barber v. Swan*, 4 G. Gr., 352); *Ellsworth v. Moore*, 5-486; *Westphal v. Sherwood*, 69-364.

90. The duties of the officer as to manner of making levy, return, etc., need not be stated in the writ: *Westphal v. Sherwood*, 69-364.

91. Against one of several defendants: It is not necessarily a ground for quashing the writ, that it is against only one of several defendants in the action, or that the bond is to the one against whom the writ issues and not to all: *Patterson v. Stiles*, 6-54.

92. Successive writs may issue in the same county until the proper amount of property is attached: *Hamill v. Phenicie*, 9-525.

93. Or to different counties without the filing of a new affidavit or bond: *Elliott v. Stevens*, 10-418.

94. Defects in affidavit: The writ is not void in the hands of the officer for defects in the affidavit which might be cured if objected to: *State v. Foster*, 10-435.

95. Amendment; absence of seal: Under the provisions of Code, § 3021, it is held that the absence of the seal of the court, or the affixing of the seal of the wrong court, is a defect which may be cured by amendment: *Murdough v. McPherrin*, 49-479.

96. But prior to the change made by the enactment of the section last referred to, it was held that the seal was essential, and its absence, or the affixing of the seal of the wrong court, was a fatal defect which could not be remedied by amendment: *Foss v. Isett*, 4 G. Gr., 76; *Shaffer v. Sundwall*, 39-579.

97. Also held, that a failure of the writ to recite that previous steps necessary to authorize its issuance had been taken, could not be cured by amendment: *Barber v. Swan*, 4 G. Gr., 352.

98. Amendment as to amount claimed: Where the writ is defective in not stating the sum claimed in the action, it may be amended in this respect after levy: *Atkins v. Womeldorf*, 53-150.

99. Lost writ; evidence; presumptions: Where the writ under which a levy has been made is lost, but the date and title of the cause and amount of property authorized to be attached are established, there will be a *prima facie* presumption that the writ was issued by the proper officer, in due form, and under seal: *French v. Reel*, 61-143; *McNorton v. Akers*, 24-369.

V. THE LEVY AND RETURN.

100. Beyond jurisdiction: An attachment levy made by a sheriff outside of his county, or secured by fraud or violence, is void, and may be dissolved by motion: *Pomroy v. Parmlee*, 9-140.

101. What acts constitute: To constitute a valid levy, even between the parties, the officer should do that which would amount to a change of possession, or something equivalent to a claim of dominion coupled with the power to exercise it: *Crawford v. Newell*, 23-153.

102. Therefore, held, that the act of the sheriff in barricading the front door of the building in which a stock of goods was situated, without entering and taking possession of the goods, the owner of the stock having a key to the back door, by which he might have access thereto, such door not being barricaded or guarded, was not sufficient to constitute a levy: *Bickler v. Kendall*, 66-708.

103. The officer must do such acts as that, but for the protection of the writ, he would be liable in trespass therefor: *Allen v. McCalla*, 25-464.

104. Therefore, held, that a levy upon certain patterns, which remained locked up in a building, the key of which was in the possession of the owner, was not sufficient: *Rix v. Silkknitter*, 57-262.

105. The mere intention to levy, where no levy is actually made, will not create a lien as against a subsequent mortgagee: *Collier v. French*, 64-577.

106. Abandonment of levy: Where the officer, after levying his attachment, put the property in the possession of a workman on the premises, taking his receipt for it, and did not afterwards, either himself or through his agent, assert any possession over or control of the property, and permitted an as-

The levy and return.

signee to take possession of such property and apply it to the payment of the debts of the owner, and gave him no notice of the fact of levy, and made no claim upon him for the property until more than two years after the levy, *held*, that the lien of the attachment was lost and the levy would be regarded as having been abandoned: *Littleton v. Wyman*, 69-248.

107. An attachment lien upon personal property is lost by surrender of possession: *Ibid*.

108. Possession must be taken: It seems that a levy upon property not capable of manual delivery may be valid as between the parties, although the same is left in possession of the attachment defendant; but where property capable of possession, such as beer in tubs and vats, was left in defendant's possession, with authority to use as he wished by sale or otherwise, provided he should keep the quantity good, *held*, that the levy was not sufficient and was invalid, even as between the parties: *Nockles v. Eggspieler*, 47-400.

109. The thing against which the proceeding is directed must be brought within the jurisdiction of the court by virtue of a seizure, the evidence of which is the service of the writ and the return: *McDonald v. Moore*, 65-171.

110. Following property: Under the statutory provision (Code, § 2966), authorizing the sheriff to pursue and attach in an adjoining county property removed from the county after the writ is placed in his hands has no application to the case of the removal of the debtor: *Budd v. Durall*, 86-815.

111. Time of levy: Levy of the attachment may be made at any time before judgment and before the return: *Westphal v. Sherwood*, 69-364.

112. Notice of the levy, as required by Code, § 2967, in case of attachment of property in possession of defendant or a third person, is not necessary in case of garnishment: *Phillips v. Germon*, 43-101.

113. Corporate stock: At common law, shares of stock in an incorporated company could not be levied on. The only method, at present, of effecting levy under attachment is to follow the method pointed out by statute (Code, § 2967, ¶ 3), by giving to the presi-

dent or other officer or agent of the company, as there specified, notice of the attachment: *Moor v. Walker*, 46-164.

114. Debts due defendant are levied on by garnishment, which is a mode of attachment: *Woodward v. Adams*, 9-474.

And see GARNISHMENT.

115. Judgments owned by defendant are only to be reached as other debts due him, by garnishment, there being no statutory provision, as there is in case of execution (Code, § 3046), for levy of the writ thereon: *Ochiltree v. Missouri, I. & N. R. Co.*, 49-150. And see *Osborn v. Cloud*, 21-238.

116. Interest of mortgagee: The lien of a mortgagee upon land cannot be levied on by attaching the land. Garnishment is the method of reaching such interest: *Courtney v. Carr*, 6-238.

117. The interest of mortgagor in chattels covered by a chattel mortgage cannot be attached. Code, § 2964, directing the officer to give property in which defendant has a legal and unquestionable title preference over that in which his title is doubtful or only equitable, relates to the duty of the officer as to the order in which property shall be seized, but does not establish a rule as to what interests may be levied upon: *Wells v. Sabelowitz*, 68-238.

118. Unassigned dower right of a widow in lands of her deceased husband was not at common law subject to attachment, nor did the act of 1882 (9 G. A., ch. 151, § 1), which enlarged the dower to a fee-simple interest, change the rule. Whether the provisions of Code of 1878 (§ 2440) have changed it, *quære*: *Rausch v. Moore*, 48-611.

119. Landlord's share of crops: The right of a landlord to receive as rent a share of the crops grown upon the premises does not give him such interest in the crops, before his share is set off to him, that such share can be levied on under attachment. The landlord's interest can be reached only by garnishment of the tenant: *Howard County v. Kyte*, 69-307.

120. A mere license or privilege to erect buildings upon real property and use the same for a particular purpose, which may be surrendered at any time, does not constitute an interest in real estate, but is personal property, which can be levied upon only as

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other personal property: *Melhop v. Meinhardt*, 70—.

121. **Equitable interests in real property**, the legal title to which is in third persons, are not to be reached by garnishment: *Seymour v. Kramer*, 5-285.

122. The statement in the incumbrance book of an attachment of an equitable interest in land, not appearing of record, does not constitute notice to a purchaser or mortgagee of the person holding the legal title: *Farmers' Nat. Bank v. Fletcher*, 44-252.

123. **Entry in incumbrance book**: The mere entry in the incumbrance book of a statement of the fact of levy (as required by statute), coupled with the intention to make a levy, will not constitute a levy. The purpose of the entry is not as a part of the levy, but as constructive notice thereof: *Collier v. French*, 64-577.

124. An entry of the fact of levy on lands under an attachment against the husband constitutes no notice to a purchaser from the wife holding the legal title: *Bailey v. McGregor*, 46-667.

125. **Indexing incumbrance book**: Failure to enter the levy in the index of liens will not defeat the effect of the entry of the proper statement in the incumbrance book. The entry in the incumbrance book constitutes notice and affects the lien; the indexing, while directed to be made, is not made essential to the validity of the entry in the incumbrance book: *Blodgett v. Huiscamp*, 64-548.

126. **Summary proceedings against defendant**: To warrant a proceeding as provided by statute (Code, § 2908) against a defendant whose property cannot be found, to compel its disclosure, it is not necessary to show, outside the affidavit on which the summary proceeding is commenced, that a suit is pending in which attachment has been issued: *Lutz v. Aylesworth*, 66-629.

127. **Wrongful levy; trespass of officer**: Where the writ is substantially defective, it will constitute no defense in an action against the officer for trespass in acting under it: *Deforest v. Swan*, 4 G. Gr., 357.

128. A United States marshal seizing property under attachment issued from a federal court can be sued personally by the owner of property seized by him which is not

subject to the writ: *Sperry v. Ethridge*, 70—.

129. A bond to indemnify the officer for not levying, in accordance with his legal duty, is void both as to the officer and the party injured: *Cole v. Parker*, 7-167.

130. **Trespass in plaintiff**: The possession of an officer who has taken property under an attachment is the possession of plaintiff in the attachment proceeding, and the latter will be held liable for a wrongful levy to the same extent as the former, whether he has actual knowledge of the seizure or not: *Robinson v. Keith*, 25-321.

131. Where chattel property in the possession of the mortgagor under a valid mortgage is levied upon in an attachment proceeding, and sold by order of the court procured by the attachment plaintiff, such plaintiff becomes liable to the mortgagee in an action of trespass: *Meyer v. Gage*, 65-606.

132. **Conversion; liability of plaintiff**: Where the seizure under the writ is not shown to be wrongful, the attachment plaintiff cannot be held liable for conversion without an allegation and proof that he did, or authorized the officer to do, some unlawful act with reference to the property: *Burt v. Decker*, 64-106.

133. **Liability of attorney**: An attorney is not liable for causing property to be seized under attachment, if he acts in obedience to the instructions of his client: *Dawson v. Buford*, 70—.

134. **Appraisalment of the property levied on** is not necessary to make the levy good; it is only required where a delivery bond is given: *Smith v. Coopers*, 9-376; *Woodward v. Adams*, 9-474.

135. **Return**: The officer may justify under a writ under which a levy has been made, although the writ has not yet been returned: *Kingsbury v. Buchanan*, 11-387.

136. It is the levy of the attachment, and not the sheriff's return on the writ, that gives the court jurisdiction of the subject-matter; and a defect in the return will not render the proceedings void, nor subject to collateral attack; but they will be voidable only, and subject to correction in a direct proceeding: *Rowan v. Lamb*, 4 G. Gr., 468.

137. The fact that the return does not state the property levied on to be that of de-

Rights acquired by levy; lien.

fendant will not render subsequent proceedings under such levy void. (Overruling *Tiffany v. Glover*, 8 G. Gr., 387): *Rowan v. Lamb*, 4 G. Gr., 468.

138. Irregularities or defects in the return of an officer to the attachment are waived by acquiescence in the levy and consenting to the property being put into the possession of the officer. Such consent is shown by executing a delivery bond for the release of the property as authorized by law: *Case Threshing Machine Co. v. Merrill*, 68-540.

139. When to be made: Code, § 3010, requires that return be made immediately after the attachment of property, and at least not later than the first day of court succeeding such levy, but it is not required that the writ be returned the first day of the first term succeeding its issuance. The levy of the writ may be made at any time before judgment or before its return: *Westphal v. Sherwood*, 69-364.

140. The return as evidence; parol to vary: The return of the writ, being the act of a sworn officer, is *prima facie* evidence of the facts therein stated. Whether it can be contradicted by parol testimony, *quære*: *Kingsbury v. Buchanan*, 11-387.

141. The return is the statutory evidence of what it purports to show. It constitutes, with the writ, one record. Without a return the court has no proper evidence before it on which to base any proceedings against specific property levied upon, or credits garnished: *Rock v. Singmaster*, 62-511.

142. The service and return of the writ are the evidence of the levy: *McDonald v. Moore*, 65-171.

143. Levy after return of the writ and after default upon service by publication will not confer jurisdiction over the property, and a sale thereunder will be a nullity: *Osborn v. Cloud*, 23-104.

VI. RIGHTS ACQUIRED BY LEVY; LIEN.

144. Inconsistent rights: An attaching plaintiff who has seized property as that of defendant cannot afterward assert a prior right in himself thereto, as under a pledge or sale: *Citizens' Bank v. Dows*, 68-460; *Crawford v. Nolan*, 70—.

145. Rights not greater than those of defendant: An attaching creditor acquires

no greater right in the property attached than was held by the defendant at time of attachment: *Manny v. Adams*, 32-165; *Harshberger v. Harshberger*, 26-503; *Bacon v. Thompson*, 60-284; *Rogers v. Highland*, 69-504.

146. Prior unrecorded conveyance: The lien of an attachment does not, under our registry laws, take priority over an unrecorded conveyance, even though the attaching creditor had no notice of such conveyance: *First Nat. Bank v. Hayslett*, 40-659; *Savery v. Browning*, 18-246; *Norton v. Williams*, 9-528.

147. Notice to the officer before receiving the writ of attachment under which the levy is made of prior claims on the property must be deemed notice to the attaching plaintiff: *Lyons v. Hamilton*, 69-47.

And further, see NOTICE, I, b.

148. Assignment: If the property has been assigned prior to the levy and the assignee is diligent in asserting his rights, he will be entitled to a release of the levy: *Stephenson v. Walden*, 24-84.

149. Evidence of transfer; bill of sale: But evidence of a bill of sale, not accompanied by evidence of change of possession, cannot be received to defeat a levy of attachment on the property as that of the grantor: *Bevan v. Hayden*, 13-122.

150. Judgment; *res inter alios acta*: Where an intervenor sought to defeat an attachment lien, under claim that he was the owner of the property attached, *held*, that a decree in an action between him and attachment defendant, to which attaching plaintiff was not a party, was not admissible: *McBride v. Harn*, 48-151.

151. The burden of proof is upon an attachment creditor claiming priority over an attachment which is first in point of time: *Allen v. Loring*, 37-595.

152. Actual levy necessary: The mere intention to levy, where no levy is actually made, will not give the attaching creditor any priority over a mortgage of the property subsequently executed: *Collier v. French*, 64-577.

153. No lien in garnishment: In case of attachment a lien is acquired against the property, but no personal claim against a third party; while in garnishment there is no lien upon the property, but a personal claim

Custody of property.—Release or discharge.

is acquired against garnishee: *Moore v. Walker*, 46-164.

154. **Lien on corporate stock:** A levy on shares of stock by notice to the officers of the corporation, as provided by statute, gives rise to a lien. The proceeding is not in the nature of a garnishment: *Ibid*.

155. The lien is a vested right which nothing subsequent can destroy, except the dissolution of the attachment. The legislature may suspend the enforcement of such liens, but cannot destroy them: *Hannahs v. Felt*, 15-141.

156. Therefore *held*, that a statute providing that levies already made upon property of volunteers in the United States army should be discharged was unconstitutional: *Ibid*.

157. The death of defendant will not destroy a lien already acquired: *Lord v. Allen*, 34-231.

VII. CUSTODY OF THE PROPERTY.

158. **In custody of the law:** Where property was held by the sheriff under attachment in an action for breach of warranty in the sale thereof, *held*, that being thus in the custody of the law, defendant was not entitled, on application to the court, to an order allowing him temporary possession thereof, for the purpose of trying whether it would conform to the terms of the warranty: *Rogers v. Hanson*, 35-233.

159. **Appointment of receiver of mortgaged property:** To justify the appointment of a receiver of attached property under the statute (Code, § 2970), some facts must be shown rendering the exercise of the power proper; and *held*, that there was no ground for such appointment, where the attachment was by garnishment of the mortgagee in possession of mortgaged property, selling in usual course of trade, and not shown to be an improper person: *Silverman v. Kuhn*, 53-436.

160. **Care required of officer:** The officer holding property under writ of attachment is only held to the exercise of ordinary care in the preservation of the property in his hands: *Cresswell v. Burt*, 61-590.

161. **Compensation for keeping:** While the sheriff is entitled to be allowed his necessary expenses for keeping the attached property, he is not to have any compensation for

personal services in addition to his statutory fees and salary: *King v. Shepherd*, 63-215.

162. The sheriff is liable to a person employed by him to take care of attached property, and this claim for necessary expenses of keeping such property is to be presented by the sheriff, and not by the person employed by him for that purpose: *Rowley v. Painter*, 69-432.

VIII. RELEASE OR DISCHARGE; JUDGMENT; APPEAL.

a. Release from the levy.

163. **Exempt property:** Where property which is exempt from execution is seized under attachment, defendant may have it released by motion or by proceedings in replevin: *Wilson v. Stripe*, 4 G. Gr., 551.

164. **Property of third person discharged:** The officer may, at the peril of showing the real ownership of the property, discharge it on the ground that it is not the property of defendant in attachment, the burden of proof being on him to show that fact. Therefore, in an action against the officer for damages for wrongfully discharging attached property, evidence of ownership of the property by another person than the defendant in attachment should be admitted: *Wadsworth v. Walliker*, 45-395; *S. C.*, 51-605.

165. **Doubtful title; release:** An officer who has levied upon property, the title of which is in doubt, will render himself liable on his official bond by releasing such property if it is found that it was in fact subject to the attachment: *Wadsworth v. Walliker*, 51-605.

166. **Discharge of excessive levy:** If the officer levies upon goods exceeding in value the amount authorized, he may discharge the excess, but he should not release the entire levy: *Ibid*.

167. **Indemnity bond; notice of claim:** The provisions of statute (Code, §§ 8055-8060) authorizing the sheriff, on levying an execution, to require from the plaintiff in execution an indemnity bond in case notice is served upon him of a claim to the property on the part of a third person, and to release the property in case such bond is not given, were not originally applicable to levies under attachment; but *held*, that in case the prop-

Bond to discharge the attachment.— Delivery bond.

erty was afterwards held under an execution subsequently issuing in the same case, such provisions would apply: *Allen v. Wheeler*, 54-628; *Wadsworth v. Walliker*, 45-395.

168. And *held*, that even if such bond should be given in an attachment case, it would only have the effect of a common law bond, and would not render the officer liable absolutely for releasing property from the levy: *Wadsworth v. Walliker*, 45-395.

169. A bond to indemnify the officer for not levying under the writ, in accordance with his official duty, is void, both as to the officer and the party injured: *Cole v. Parker*, 7-167.

170. But by 20 G. A., ch. 45, provisions similar to those above referred to in case of executions are made in case of attachments, and such statute is not unconstitutional: *Cheadle v. Guittar*, 68-680.

171. The notice to the officer by a third person, claiming the property, stating the nature and extent of his interest therein, and under what right he claims, is sufficient. Where such claim is based upon a mortgage securing notes, the consideration for the notes and mortgage need not be stated: *Crawford v. Nolan*, 70—.

b. Bond to discharge the attachment.

172. **Terminates the lien:** Where the statutory bond (provided for in Code, § 2994) discharging the attachment is executed, the property seized may be levied on under other attachments. The lien of the attachment is discharged by giving the bond: *Jones v. Peasley*, 3 G. Gr., 52.

173. The bond here contemplated must be for the performance of the judgment. A bond for the return of the property on demand does not release it from the lien of the attachment and terminate the detention for which the defendant may claim damages on the attachment bond, in case the attachment is wrongful: *Selz v. Belden*, 48-451.

174. This bond is a new security taking the place of the attachment lien, and a motion to dissolve the attachment cannot properly be made after such bond is given: *Austin v. Burgett*, 10-302.

175. **Charges for keeping; costs:** When such bond is given it is erroneous to require defendant to pay the charges accrued for

keeping the attached property before releasing it to him. Such charges go with the costs in the case: *Milburn v. Marlow*, 4 G. Gr., 17.

176. **Formalities of the bond:** The plaintiff may sue on the bond, although not executed to him but to the sheriff: *Moorman v. Collier*, 32-188.

177. It is not essential that it be signed by defendant: *Selz v. Belden*, 48-451.

178. A bond, irregular in form, held sufficient: *Sheppard v. Collins*, 12-570.

179. **Presumption of regularity:** It will be presumed, in the absence of anything in the record to the contrary, that a bond taken and approved by the clerk was taken under such circumstances as to render his action proper: *Budd v. Durall*, 36-315.

180. **Not released by appeal bond:** The giving of a *supersedeas* bond on appeal does not affect a bond previously given to discharge the attachment. The plaintiff may recover to the full amount of the discharge bond if necessary to satisfy his judgment, and if there is any part of the judgment unsatisfied, may also recover upon the *supersedeas* bond to that extent: *State v. McGlothlin*, 61-312.

181. **Remedy on the bond:** The statutory provision for the entry of judgment on the bond is merely additional to the remedy by action at common law: *Ibid*.

182. **Discharge of sureties:** Where the sureties on such bond have been discharged upon judgment against plaintiff without exception to the order of discharge, but on reversal, upon appeal, there is a new trial and plaintiff recovers, he cannot have judgment against the sureties if, after the order of discharge, they have surrendered indemnity previously held: *Barton v. Thompson*, 66-526.

c. Delivery bond.

183. **Does not discharge attachment:** A bond given as provided by statute (Code, § 2996) to secure the release of certain property, conditioned that it be returned to satisfy any judgment rendered against defendant, does not terminate the attachment, nor prevent defendant from moving for its discharge: *Allerton v. Eldridge*, 56-709.

184. Nor does it prevent a third party claiming title to the property from disputing the validity of the attachment by summary

Delivery bond.—Dissolution of attachment.

proceedings (under Code, § 3116): *Tuttle v. Wheaton*, 57-304.

185. The execution of a delivery bond for the release of the property constitutes a waiver of any objection to irregularities or defects in the return of the attachment: *Case Threshing Machine Co. v. Merrill*, 68-540.

186. Being for benefit of plaintiff, the bond is not limited to the officer serving the process, but delivery must be made, if delivery becomes necessary, to the officer who has the final process: *Ramsey v. Coolbaugh*, 13-164.

187. Defects in form: A mistake in the bond as to the court in which the attachment issued will not render the bond invalid as to the sureties: *Ripley v. Gear*, 58-460.

188. A delivery bond, though so defective as not to be sufficient under the statute, may still be enforced as a common law bond, and the attachment defendant will be liable thereon if judgment goes against him in the proceedings in which the attachment was issued: *Garretson v. Reeder*, 28-21.

189. Order for sale of the property, upon the rendering of judgment against defendant, is not necessary in order to fix liability on a delivery bond on which the property has been released: *Ibid.*; *Waynant v. Dodson*, 12-22.

190. Applicable in garnishment: Under Code of '51, § 1876, held, that debts or property attached by garnishment might be released in the same way as property actually seized, and that the provisions as to appraisement were applicable to such cases: *Woodward v. Adams*, 9-474.

191. Action on the bond may be brought by the assignee of the attachment plaintiff: *Bowley v. Jewett*, 56-492.

192. An alteration made in the bond at the time of delivery to the officer, for the purpose of more fully describing the property, held not to release the sureties, although made without their knowledge, for the reason that the bond would have been sufficient without the alteration, which was therefore immaterial: *Ibid.*

193. The validity of the levy, not being questioned on the trial of an action on the delivery bond, cannot be first objected to on appeal in the supreme court: *American Ex. Co. v. Smith*, 57-242.

194. The execution of an appeal bond, on appeal to the supreme court from a judgment rendered in an attachment proceeding, does not operate to discharge the delivery bond. The plaintiff may avail himself of either or both such securities: *Williams v. Robison*, 21-498.

195. An appeal bond does not take the place of the delivery bond: *Jennings v. Warnock*, 87-278.

196. The appraisement provided for by statute to determine the amount of the bond to be given is not *prima facie*, at least, essential to the validity of the bond, and need not be shown in the first instance in an action thereon: *Woodward v. Adams*, 9-474.

197. Defense; another's property: A defendant in an action on a bond, who seeks to take advantage of the fact that the property did not belong to him, must state in his answer to whom it did belong: *Blatchley v. Adair*, 5-545.

d. *Dissolution of attachment or release of property on motion.*

198. For a defect apparent on the record: Attached property will be discharged on motion only where it is apparent of record that it should not have been levied on; a third party claiming the property should proceed in accordance with the provisions of Code, § 8016: *Tidrick v. Sulgrove*, 38-339; *Williams v. Walker*, 11-77.

199. That the petition for attachment does not state sufficient ground therefor, cannot be raised by demurrer, but must be reached by motion as here provided: *Hunt v. Collins*, 4-56.

200. Discharge not defeated by ground of attachment subsequently accrued: Where it appears that, at the time the writ issued, plaintiff had no cause of action, the property should be discharged, although a cause of action, as made out in an amended petition, has accrued subsequently to the writ: *Cramer v. White*, 29-336.

201. For defects in petition: In a particular case, held, that an attachment should have been quashed for defects in the affidavit to the petition: *Stadler v. Parmlee*, 10-23.

202. Insufficiency of amount of bond may be a proper ground for motion to dissolve: *Hamble v. Owen*, 20-70.

Dissolution.—Release upon motion of third party.

203. Defect in writ or want of bond is to be raised in this manner, and not by demurrer: *Brace v. Grady*, 36-352.

204. Failure of plaintiff to recover on the whole of the claim sued on is not ground for quashing the attachment, *pro tanto*, after judgment: *Sackett v. Partridge*, 4-416.

205. The truth of the facts alleged as ground of attachment cannot be questioned on motion to dissolve. The remedy is by suit on the attachment bond: *Sturman v. Stone*, 81-115.

206. Exemption: That property levied on is exempt from execution may be set up as a ground for its release: *Wilson v. Stripe*, 4 G. Gr., 551.

207. Where it was shown that the property attached was exempt, *held*, that it should have been discharged upon motion, and that such showing was not inconsistent with the allegations in the petition for attachment, that plaintiff was about to remove his property from the state: *Hastings v. Phoenix*, 59-394.

208. If the party fails to take advantage of his exemption by motion to have the property released, he may still do so by replevin: *Wilson v. Stripe*, 4 G. Gr., 551.

209. Where attached property was released on motion as exempt, *held*, that upon seizure of the same property upon execution in the same action defendant might recover it by replevin, although a writ of error had been taken from the decision on the motion, no *supersedeas* bond being filed: *Pellersells v. Allen*, 56-717.

210. Exemption must be clearly shown: To justify the discharge of property on motion on the ground of exemption, the case should be made clear and entirely satisfactory. Otherwise the party should be left to other and ordinary means for testing the liability of the property to seizure under the writ: *McLaren v. Hall*, 26-297.

211. Wrongful levy: The fact that the property was attached by the sheriff outside of his county, or that the levy was secured by fraud or violence, is a ground for discharge of the property on motion: *Pomroy v. Parmlee*, 9-140.

212. Title to real property: The question whether certain real estate is subject to attachment may properly be determined on

motion, but if the title to such property be a matter of dispute between the parties, upon the facts, it cannot properly be determined in this manner: *Rausch v. Moore*, 48-611.

213. Want of an allowance of the amount of property to be attached, as required in actions on tort, will not be ground to discharge the entire attachment where the action is both on contract and tort; but if more property is seized than can be held under attachment on the portion of the action founded on contract, the excess may be released: *Moses v. Arnold*, 48-187.

214. Where there is an absence of such allowance in an action on tort, and motion is made to discharge the attachment on that ground, the court may then make an allowance to relate back, as between the parties, to the issuance of the writ, and refuse to discharge the attachment: *Magoon v. Gillett*, 54-54.

215. Pleading; evidence; estoppel: No pleading controverting the motion is required or allowed. Evidence of any facts controverting the ground for release set up in the motion may be introduced without pleading them, even though they establish an estoppel: *Joyce v. Miller*, 59-761.

216. Dissolution after discharge by bond: Dissolution of the attachment should not be ordered after the attachment has been discharged by bond: *Austin v. Burgett*, 10-302.

217. Appearance by motion to release attached property is a general appearance to the action: *Chittenden v. Hobbs*, 9-417.

e. Release upon motion of third party.

218. A third party claiming the property may avail himself of the summary proceedings provided by statute (Code, § 3016) to have his right to the property determined, although he has already secured possession of the property by a delivery bond: *Tuttle v. Wheaton*, 57-304.

219. This section simply provides an additional remedy to the third person whose property is wrongfully seized. He is not bound to follow it: *Sperry v. Ethridge*, 70—.

220. Damages for the use or loss of service of the property cannot be recovered in such proceeding. Such relief can be had

Dissolution upon judgment; appeal.

only in an independent action: *Jennings v. Hoppe*, 44-205.

221. Any claim, lien, interest or title to or in the property attached may be set up at any time before the proceeds are paid to the plaintiff in attachment: *Howe v. Jones*, 57-130.

222. Applicable in general as well as specific attachments: These provisions are not limited to cases of specific attachment: *Jennings v. Hoppe*, 44-205.

223. Upon appeal from judgment of a justice against a garnishee, taken by the defendant in the action, a third person may intervene and assert his claim to the debt under these provisions although the garnishee does not appeal: *Daniels v. Clark*, 38-556.

f. Dissolution upon judgment; appeal.

224. Judgment against plaintiff upon demurrer or nonsuit discharges the attachment: *Harrow v. Lyon*, 3 G. Gr., 157; *Brown v. Harris*, 2 G. Gr., 505.

225. Not revived by reversal: Where attachment has been dissolved by judgment against plaintiff, it is not revived by reversal of the judgment on appeal: *Harrow v. Lyon*, 3 G. Gr., 157.

226. Nor by setting aside nonsuit: Where the attachment is released by judgment of nonsuit, it is not revived by an order setting aside the nonsuit upon motion: *Brown v. Harris*, 2 G. Gr., 505.

227. Judgment dissolving the attachment on motion is suspended by appeal, if the appeal is taken within a reasonable time, and if the judgment is reversed the attachment remains: *Danforth v. Carter*, 4-230.

228. Such a judgment is a final adjudication upon all questions involved therein, unless appealed from in proper time. To continue the lien as to third persons, the appeal must be taken forthwith [but see now, statutory provision referred to below], but as between the parties four days is a reasonable time. In the absence of notice that the plaintiff purposes appealing from the judgment dissolving the attachment on motion, the officer holding money which is the proceeds of the attached property may at once pay it over to the party thus appearing to be

entitled thereto: *Danforth v. Rupert*, 11-547.

229. Where the special verdict of the jury showed that at the time the attachment issued plaintiff had no cause of action, held, that the attached property was discharged, although there was a verdict for plaintiff on an amended petition subsequently filed: *Cramer v. White*, 29-336.

230. Judgment against plaintiff discharges the attachment without any order of court, and an appeal, taken after the two days from the rendition of such judgment, allowed by Code, § 3019, within which to appeal, will not revive the attachment: *Harger v. Spofford*, 44-369.

231. The fact that defendant afterward formally moves for a dissolution will not enable plaintiff, by appealing within two days from such order, to keep the attachment in force: *Ibid*.

232. Sureties discharged: Where no exception was taken to an order discharging sureties on a discharge bond upon a judgment being entered against plaintiff, held, that a subsequent reversal would not entitle plaintiff to judgment against the sureties, it appearing that after the order discharging them they had released indemnity which they held: *Barton v. Thompson*, 66-526.

233. The invalidity of judgment for plaintiff, for whatever cause, does not defeat the attachment lien, but the case stands as if no judgment had been rendered, all rights depending upon the preceding steps being unimpaired: *Hodson v. Tibbetts*, 16-97.

234. Special execution: The lien of the attachment is not lost by reason of an omission to order a special execution: *Kingsbury v. Buchanan*, 11-387.

235. Where attached property is sold under execution, it will be presumed that it is sold under special execution: *Peterson v. Foli*, 67-402.

236. Notice by publication; jurisdiction: In an attachment suit commenced by publication of notice, in which the court does not acquire jurisdiction over the person of defendant by personal service or appearance, the plaintiff cannot have judgment for a general execution for any residue of the debt left unsatisfied after exhausting the attached property: *Johnson v. Dodge*, 19-106.

 Remedy for wrongfully suing out the attachment.

IX. REMEDY FOR WRONGFULLY SUING OUT THE ATTACHMENT.
a. Form of action.

237. Independently of statute: An action might be maintained independently of the statute against a party who, maliciously and without probable cause, should sue out a writ of attachment; but in the absence of proof of malice and want of probable cause, the only remedy is on the bond: *Tallant v. Burlington Gas Light Co.*, 36-262.

238. Where a writ of attachment is sued out maliciously and without probable cause, and damage ensues, the defendant has a remedy on common law principles, aside from the remedy on the attachment bond: *Preston v. Cooper*, 1 Dillon, 589.

239. The only remedy of the attachment defendant, *it seems*, is upon the bond, or by an action for malicious attachment, in which latter case it is not sufficient to allege that the writ was *wrongfully* procured, but there must be allegations of malice and want of probable cause: *Ibid*.

240. Where by statute no bond in attachment is required and none given, the defendant, in the absence of legislation giving the right, cannot maintain an action against the plaintiff in attachment, by showing merely that the writ was wrongfully sued out, because there was no debt due from him, but he must show malice, want of probable cause, and damage, as required by the principles of the common law in actions for malicious prosecution: *Ibid*.

241. Action should be on bond: An action for wrongfully suing out an attachment should be brought on the bond: *Abbott v. Whipple*, 4 G. Gr., 320.

The only method of questioning the truth of the grounds alleged for the issuance of the attachment is by action on the bond: See cases *supra*, §§ 51-54.

b. What constitutes wrongful suing out.

242. Want of actual ground or reasonable belief: The question in an action on the bond, for improperly suing out the writ, is not alone whether the facts alleged as grounds for attachment were actually true,

but whether plaintiff, exercising that degree of caution that a reasonably prudent man should have exercised, had good cause to believe that they were true: *Winchester v. Cox*, 4 G. Gr., 121; *Mahnke v. Damon*, 3-107; *Burton v. Knapp*, 14-196; *Nordhaus v. Peterson*, 54-68.

243. Defendant may show as a defense, either that he had good cause to believe the ground stated to be true, or that it was true in fact, irrespective of his grounds of belief: *Vorse v. Phillips*, 37-428.

244. To constitute reasonable ground of belief that the facts alleged for securing an attachment are true, it is not necessary that the facts be such as to lead a reasonably prudent man to act in matters of the highest moment to himself. Reasonable grounds of belief of their truth is sufficient: *Carey v. Gunnison*, 51-203.

245. A verdict allowing a recovery on the bond necessarily implies a finding that the plaintiff in attachment had not reasonable grounds to believe his allegations true, as well as that they were not true: *Nockles v. Eggspieler*, 58-730.

c. Pleading conditions and breach of bond.

246. Breach must be alleged: In an action on the bond, the conditions of such bond must be set out, and facts alleged constituting their breach: *Ryder v. Thomas*, 32-56.

247. As, for instance, the non-payment of damages which the party injured claims to have suffered: *Horner v. Harrison*, 37-378.

248. A failure to make such averment may be raised for the first time on motion in arrest of judgment, at least where no evidence of damage is offered: *Hencke v. Johnson*, 62-555.

And see, in general, PLEADINGS, §§ 90-97.

249. "Wilful wrongfulness:" An allegation that "the attachment was wrongfully sued out with wilful wrongfulness," *held*, a sufficient allegation of want of reasonable belief of the truth of the grounds set out on the part of the plaintiff in the attachment: *Abbott v. Whipple*, 4 G. Gr., 320.

d. Action on bond.

250. Accrues when: The breach of the bond consists in the wrongful suing out of

Action on bond.—Evidence of wrongful suing out.

the writ, and whatever damages have resulted to defendant are to be deemed a claim held by him at the commencement of the suit and filing of the bond, when they are concurrent acts; but otherwise, if the attachment is sued out subsequently to the commencement of the action: *Reed v. Chubb*, 9-178.

251. The right of action on the bond accrues as soon as the defendant in the attachment is disturbed in the possession of the property levied on by virtue of the writ, if it is wrongfully issued, and he need not wait until the termination of the principal suit to sue on the bond: *Campbell v. Chamberlain*, 10-337.

252. By way of counter-claim: Therefore (without the statutory provision to that effect now found in Code, § 3017), held, that where the attachment was sued out at the commencement of the action, a claim on the bond for damages for the wrongful suing out of the attachment might be interposed as a set-off or counter-claim: *Reed v. Chubb*, 9-178; *Stadler v. Parmlee*, 10-23.

253. The decision of the court on this point in the foregoing cases would be subject to very grave doubts did not the statute now expressly authorize suit on the bond by way of counter-claim: *Branch of State Bank v. Morris*, 13-136.

254. Such a counter-claim is an answer in the action sufficient to prevent default against defendant: *Town v. Bringolf*, 47-133.

255. Assignment of claim on bond: Where the debtor, after the suing out of the attachment, makes a general assignment, the assignee may intervene in the attachment proceeding in which the debtor has set up the claim for damages on the bond as a counter-claim: *Dunham v. Greenbaum*, 56-303.

256. Where defendant had previous to the attachment made an assignment of his property, held, that the right of action on the attachment bond inured to the assignee, and that a subsequent assignment thereof by the latter to the defendant would not enable defendant to set it up as a counter-claim in the action against him: *Rumsey v. Robinson*, 58-225.

e. Evidence of wrongful suing out.

257. No indebtedness: If there was no indebtedness from defendant to plaintiff in the attachment suit, that fact alone would probably be conclusive evidence that the attachment was wrongfully sued out: *Nordhaus v. Peterson*, 54-68.

258. The plaintiff's belief in such case with reference to the truthfulness of the grounds of attachment would not prevent such liability: *Porter v. Wilson*, 4 G. Gr., 314.

259. Dismissal of attachment suit by plaintiff therein and release of attached property does not, of itself, show that the attachment was wrongfully sued out: *Nockles v. Eggspieler*, 47-400.

260. Amendment: Where the petition stating the indebtedness in an attachment suit was amended after the suit was brought, so as to set up another cause of action, held that, as the second cause of action, as stated, arose after the bringing of suit, and was also inconsistent with the first, the filing of the amendment must be deemed an abandonment of the first cause of action and an admission that it did not exist when the attachment was sued out: *Young v. Broadbent*, 23-539.

261. Recovery of less than five dollars does not, in actions of tort, show that the attachment was wrongfully sued out. (See Code, § 2953; distinguishing *Gaddis v. Lord*, 10-141): *Weller v. Hawes*, 49-45.

262. The judgment in the attachment suit may be introduced in evidence in an action on the bond, and is conclusive as to the indebtedness between the parties, but not as to the plaintiff's belief in regard to the truth of the matters stated in his petition: *Gaddis v. Lord*, 10-141; *Raver v. Webster*, 3-502.

263. Proof of cause of action not conclusive: The attachment may be wrongful, or even wilfully wrongful, although the cause of action is a just one: *Drummond v. Stewart*, 8-341.

264. The burden of proof is upon the party claiming that the attachment was wrongfully sued out, to establish that fact: *Burrows v. Lehdorff*, 8-96; *Veiths v. Hagge*, 8-163, 191.

265. The party seeking to recover for the wrongful suing out of the writ has the bur-

Evidence of wrongful suing out.—Measure of damages.

den of showing, not only that the grounds stated therefor were not true, but also that the party suing out the writ did not have reasonable ground to believe that they were true: *Dent v. Smith*, 53-262.

266. Intent of debtor: Where the ground alleged for an attachment was that defendant was about to dispose of his property with intent to defraud his creditors, *held*, that on the trial of a counter-claim for damages for the wrongful suing out of such attachment, defendant could not testify what his intention in disposing of his property really was, the true question being whether plaintiff had *reasonable cause* to believe that defendant's intention was fraudulent: *Selz v. Belden*, 48-451.

267. The opinion of a witness as to the debtor's intention in disposing of property is not admissible: *Carey v. Gunnison*, 51-202.

268. Refusal to secure or pay, while no ground for suing out an attachment, is admissible in evidence on the question whether the attachment was wrongfully sued out: *Myers v. Wright*, 44-38.

269. So, also, refusal of defendant to secure or pay indebtedness to others, such fact being known to plaintiff before suing out the attachment, may be shown: *Dent v. Smith*, 53-262.

270. Defendant's indebtedness at the time of attachment may be material as bearing on the question whether plaintiff was actuated by malice in suing out the attachment: *Mitchell v. Harcourt*, 62-349.

271. Deeds of conveyance by defendant of his property, made subsequent to the issuance of the attachment, are not admissible on the question as to whether he was about to dispose of his property at the time of attachment with intent to defraud his creditors: *Dynes v. Robinson*, 11-187.

272. The writ and return thereon are admissible as evidence in an action on the bond: *Drummond v. Stewart*, 8-341.

273. Statements of attaching plaintiff at the time of suing out the attachment are not admissible in evidence for the purpose of showing want of malice: *Shuck v. Vanderventer*, 4 G. Gr., 264.

274. Such statements made after the commencement of suit, and not connected with

its commencement, are not receivable to show malice: *Burton v. Knapp*, 14-196.

275. Evidence that plaintiff, on the day on which attachment was levied, said, concerning the levy, that defendant therein "had had his time, and now he [plaintiff] would have his," *held* admissible to show the wrongful suing out: *White v. Beck*, 64-122.

276. Advice of counsel will go to rebut the idea of malice, but it must be proved that the party submitted his cause to the attorney, and was by him advised that he had a right to sue out an attachment. Proof of such advice may defeat the recovery of exemplary, but not of actual, damages: *Raver v. Webster*, 8-502.

277. It must appear that a full and fair statement of the facts was made to the attorney: *Porter v. Knight*, 63-365.

f. *Measure of damages; attorney fees; exemplary damages.*

278. Expenses of defending: In an action on the bond, either original or by way of counter-claim, the party, if entitled to recover at all, may recover all expenses incurred in making defense to the attachment proceeding: *Vorse v. Phillips*, 37-428.

279. Attorneys' fees: In the absence of any express statutory provision, the party suing on an attachment bond cannot recover as a part of the costs or expenses covered by the bond, the fees of his attorney in prosecuting such suit: *Ibid*.

280. Nor even his attorneys' fees on defending against the principal suit: *Plumb v. Woodmansee*, 84-116.

281. Attorneys' fees, how assessed: Under the present statutory provision (Code, § 2961) authorizing the recovery by a party suing on an attachment bond of reasonable attorneys' fees to be fixed by the court, the jury have nothing to do with fixing the amount of such fee. The better practice would be not to introduce any evidence as to the fee during the trial, but if, in answer to a special interrogatory, the jury find that the attachment was wrongfully sued out, then evidence as to the amount of the fee should be introduced to the court and a finding made, and the amount so fixed should

Measure of damages.

then be added to or deducted from the amount found by the jury, as the case may require: *Selz v. Belden*, 48-451.

282. Attorneys' fees constitute a part of the costs, and the legislature may authorize the court to fix the amount, without submitting the question to a jury: *Weller v. Hawes*, 49-45.

283. A verdict for actual damages, in an action on the bond, and a special finding that the attachment was wrongfully sued out, are sufficient to warrant the allowance of an attorney's fee. That there was no reasonable cause to believe the ground upon which the attachment was issued to be true, is implied in such verdict and special finding: *Nockles v. Eggspeler*, 59-780.

284. In fixing the attorney's fee the court is not to take into account the trial of the principal case, but only the fee for prosecuting, by original action or counter-claim, the cause of action on the bond, on account of the wrongful suing out of the attachment: *Porter v. Knight*, 63-365.

285. Actual and not remote damages: Where the suing out of an attachment was not wilful and malicious, the damages recoverable are confined to actual compensation for damages immediately consequent upon the wrongful act: *Plumb v. Woodmansee*, 84-116.

286. Use: While the party against whom the attachment issues is entitled to compensation for the loss sustained by reason of being deprived of the use of property levied on, the value of this use must be predicated upon the condition of the property when it was attached and not upon what its condition was before, or what it was intended to be in the future: *Ibid.*

287. Value of goods: In an action on the bond the true measure of the value of the goods attached is the cost of replacing them at the place where levied upon: *Selz v. Belden*, 48-451.

288. The measure of damage is the fair cash value of the property at the time when it was wrongfully taken and interest thereon: *Porter v. Knight*, 63-365.

289. The elements of damage to be considered include diminution in value of stock by reason of the levy and the closing up or stopping the business; also rent of store dur-

ing the time the business is stopped; also loss of employment during the interruption in business if the debtor had been giving his personal labor and attention to the business and has been unable to obtain other employment: *Lowenstein v. Monroe*, 55-82.

290. The defendant in the attachment is to recover such losses as he may have sustained by reason of being deprived of the use of the property levied on, and any injury thereto by its loss or depreciation in value: *Ibid.*; *Campbell v. Chamberlain*, 10-337.

291. Injuries to character, or credit, or business are too remote and speculative to be considered: *Ibid.*

292. Loss of profits in the retail of the goods is to be disregarded: *Lowenstein v. Monroe*, 55-82.

293. Injuries to credit cannot be shown as an element of damage: *Mitchell v. Harcourt*, 63-349.

294. Chattel mortgage: Where property levied on in attachment was taken from the officer under a prior chattel mortgage and sold, the balance only in excess of the mortgage being turned over to the officer by virtue of his levy, the damage for the wrongful act in suing out the writ will be limited to the balance paid the officer after the satisfaction of the mortgage, and interest, and the damages sustained by being deprived of the property during its detention under the attachment: *Porter v. Knight*, 63-365.

295. Rents: Where the rent of a mill was included in the claim for damages on the bond given in an attachment sued out by the landlord against the tenant on an independent indebtedness, *held*, that the tenant was thereby barred from afterward setting up the interruption of his possession as a defense in an action for the rent, although the claim on the bond had been interposed before the entire damage had accrued and the whole amount thereof was not then recoverable: *Davis v. Milburn*, 4-246.

296. Attachment of property of wrong party; trespass: Where the proceeding was commenced against a firm and its members, but the bond was to the firm only and the writ was directed against firm property only, *held*, that although the attachment was wrongfully sued out, yet there could not be a recovery on the bond by a member of the

Control of cases on appeal.— Authority of.

firm for damages caused to him by the levy of the attachment on his property, for the reason that the levy was not authorized under the writ and was a trespass by the officer for which the plaintiff in attachment was not liable on the bond: *Mason v. Rice*, 66-174.

The attorney who acts in procuring an attachment is not liable for damages: See ATTORNEYS, § 82.

297. Exemplary damages: To entitle a party to exemplary damages, it must appear that the attaching plaintiff procured the attachment without reasonable grounds to believe the truth of the matter stated in his application, and with the intention, design or set purpose of injuring the defendant therein: *Gaddis v. Lord*, 10-141; *Raver v. Webster*, 3-502.

298. Something more must be made to appear than that the ground alleged for the attachment did not exist, and that attaching plaintiff had no ground to believe it did. These facts must be proven to establish the right to recover actual damages. To recover exemplary damages it must be shown that plaintiff acted with the intention, design or set purpose of injuring him: *Nordhaus v. Peterson*, 54-68.

299. There cannot be a recovery of exemplary damages where actual damages are not recoverable: *Myers v. Wright*, 44-88

g. Judgment on bond.

300. Not binding on sureties: A judgment on the bond, in an action to which the sureties are not parties, is not binding upon them: *Bunt v. Rheum*, 52-619.

ATTORNEY-GENERAL

1. Control of cases on appeal: When a criminal case is appealed to the supreme court, the attorney-general obtains control of it, but any agreements made by the district attorney while the case is in the lower court, are binding as against the attorney-general (Code, §§ 150, 205): *State v. Fleming*, 13-443.

ATTORNEYS.

I. AUTHORITY; HOW FAR CLIENT BOUND BY ACTS.

II. DUTIES AND LIABILITIES.

III. COMPENSATION.

a. *Contract for; who liable for.*

b. *Champerty; contingent fee.*

c. *Liability of county for services in prosecuting and defending.*

d. *Lien.*

IV. TAXATION OF ATTORNEYS' FEES AS COSTS OR RECOVERY AS DAMAGES.

V. MISCONDUCT; SUSPENSION; DISBARMENT; CONTEMPT.

VI. ATTORNEY AS WITNESS.

As to privileged communications, see EVIDENCE, III, 7, d.

I. AUTHORITY; HOW FAR CLIENT BOUND BY ACTS.

1. Before bringing suit: An attorney may be employed in contemplation of a suit to be brought, and his client will be bound by his stipulations with reference thereto, to the same extent as if such stipulations had been made after the bringing of suit: *Hefferman v. Burt*, 7-320.

2. Granting extension: Where the attorney was directed to "secure or collect" the claim, he'd, that he had authority to extend the time of payment on receiving additional security: *Crauford v. Nolan*, 70—.

3. To carry on suit; presumption: A regular attorney has authority to bring a suit and continue it to its final determination. He cannot be called upon to prove his authority, but the want of it must be shown by the objecting party: *State v. Carothers*, 1 G. Gr., 464.

4. Agreement for judgment and stay: An attorney appearing for a party may make an agreement in writing for judgment and an extension of time of payment: *Potter v. Parsons*, 14-236.

5. Collection of judgment; satisfaction: The authority of an attorney with respect to a claim does not terminate with the rendition of judgment, but he may control the judgment until its collection: *Death v. Bank of Pittsburg*, 1-382; and he has au-

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thority to receive payment and enter satisfaction of the judgment: *McCarver v. Nealey*, 1 G. Gr., 360.

6. On appeal: An attorney retained to attend to a suit in a particular court is not thereby authorized without further authority to appeal the case, and cannot recover, under such circumstances, for services rendered in the appellate court: *Hopkins v. Mallard*, 1 G. Gr., 117.

7. Employment of another attorney: An attorney intrusted with the business of his principal has no authority to employ another attorney to represent his principal, and the latter will not be liable for costs incurred by the attorney thus employed: *Antrobus v. Sherman*, 65-230.

8. Although one attorney may not have authority to turn over a case to another, yet where by reason of reliance on an agreement with such second attorney the adverse attorney was not present when the case was called and a judgment was recovered by default, *held*, there was sufficient surprise to warrant a new trial: *Chicago & N. W. R. Co. v. Gillett*, 88-434.

9. Contract to turn over business: An attorney to whom notes have been intrusted for collection has no authority to turn them over to another for that purpose, and a contract to do so is illegal, so that damages cannot be recovered for its breach: *Smalley v. Greene*, 52-241.

10. Compromise: An attorney cannot, without express authority, make a compromise which will operate injuriously upon his client: *De Louis v. Meek*, 2 G. Gr., 55; *Pocell v. Spaulding*, 3 G. Gr., 448.

11. Where an attorney, retained in an action to recover possession of real property, entered into a contract that his client should pay defendant a specified sum, whereupon defendant should surrender possession, *held*, that such agreement was not binding upon the client and that he could recover without payment of the sum stipulated: *Stuck v. Reese*, 15-122.

12. Agreement of client not to compromise: A construction of a contract between an attorney and client which would prevent settlement of the suit by the client will not be favored by the courts: *Ellwood v. Wilson*, 21-523.

13. Agreement to convey land: An agreement by attorney for plaintiff in an action of right, for conveyance of a portion of the premises, *held*, not binding on the client: *Rayburn v. Kuhl*, 10-92.

14. Compromise; judgment by consent: Where an attorney has, in good faith, compromised the suit and consents to judgment against his client, the latter cannot, afterward, in an action in another state on such judgment, defend on the ground of want of authority in the attorney to make the compromise: *Crawford v. White*, 17-560.

15. May receive money only in payment: An attorney has no authority to receive anything but money in payment of a claim left with him for collection, unless specially so authorized: *Drain v. Doggett*, 41-683; *McCarver v. Nealey*, 1 G. Gr., 360.

16. An attorney who has a claim for collection has no power, in the absence of special authority, to receive anything but money in payment of the claim, nor has he the power to accept as payment a less amount of money than the whole sum due. If it is sought to prove that an attorney has been given special power not embraced in his employment, it must be established in the same way that the authority of other agents must be shown, but cannot be shown by his declarations: *Bigler v. Toy*, 68-687.

17. Affidavits, verification of pleadings, etc.: An attorney may make affidavit on an application of his client for change of venue: *State v. Mooney*, 10-506; or for continuance: *Widner v. Hunt*, 4-855.

18. The attorney may verify a petition where he shows a knowledge of the facts: *Chittenden v. Hobbs*, 9-417; *Bates v. Robinson*, 8-318.

19. But if the knowledge of the attorney is not shown, the verification is insufficient: *Clute v. Hazleton*, 51-855.

See, generally, PLEADINGS, II.

20. Authority to sign bond: Where the lower court upheld an attachment bond signed by the attorney for his client, *held*, that on appeal it would be presumed that it appeared to the lower court that the attorney had such authority, in the absence of any showing to the contrary: *Goddard v. Cunningham*, 6-400.

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21. Action by attorney in his own name: It seems that it is not unusual nor improper for an attorney to whom a claim has been sent for collection, to bring action thereon in his own name: *Seevers v. Hamilton*, 6-199.

22. Recovery back of money paid over: In such a case, the money collected on the judgment thus recovered having been paid to the client, *held*, that the attorney could not recover back from the client the amount thus paid over, upon being compelled to refund the sum collected on account of irregularities in the proceeding in which the judgment was recovered, unless he could put the client *in statu quo* as to the original claim: *Ibid*.

Appearance by attorney, see APPEARANCE, §§ 6-16.

23. Want of authority; how raised: Absence of authority on the part of plaintiff's attorney to bring a suit may be a ground for dismissing it, or, if the attorney wants time in order to make a showing of authority, for continuance, but it cannot be taken advantage of as a ground to defeat recovery: *Savary v. Savary*, 3-271.

24. The showing to require an attorney to prove his authority, *held* insufficient in a particular case: *Savary v. Savary*, 8-217.

25. A judgment by default entered against a defendant upon an appearance for him by attorney, which is made without authority and by mistake, should be set aside: *Rice v. Griffith*, 9-539.

26. Where a demurrer is filed without authority and a valid appearance is afterward made, a new demurrer may be filed: *Winterstien v. Walker*, 10-198.

27. Ratification by claiming benefit of plea: A party claiming the benefit of a plea put in by an attorney cannot deny the authority of such attorney to act in the case: *Ottroge v. Schutte*, 51-279.

28. Ratification inferred from long silence: Where an attorney accepted part payment in full satisfaction of a judgment procured for his client, and no further steps were taken for the enforcement of said judgment for eleven years, *held*, that it would be inferred that the attorney had authority to make such settlement or that the client was informed of his action, if without authority, and had by long silence ratified it: *Reid v. Dickinson*, 87-56.

29. Ratification by paying attorney: The client, having ratified the act of the attorney appearing for him by paying him for his services, is bound by the judgment: *Ryan v. Doyle*, 81-53.

30. Client chargeable with fraud of attorney: An attorney, when acting in court procedure for his client, acts in his stead, and a judgment recovered may be set aside for fraudulent representations made by the attorney in procuring it, when such representations would have been a ground for setting it aside if made by the party himself: *De Louis v. Meek*, 2 G. Gr., 55.

31. Client chargeable with negligence of attorney: The law regards the negligence of an attorney as the client's own neglect, and will give no relief from the consequences thereof: *Jones v. Leech*, 46-186.

32. Negligence of attorney's clerk: Negligence of the clerk of the attorney, in filing pleadings, must be imputed to the client himself: *Hayward v. Goldsberry*, 63-436.

33. Negligence in failing to prosecute action; default: The negligence of the attorney is imputed to the client, when it is sought to set aside default where verdicts or judgments binding upon the parties have been entered, but not where the action has merely been dismissed for want of prosecution: *Byington v. Quincy*, 61-480.

34. Setting aside judgment for mistake of attorney: While the law exacts of attorneys diligence in their business, and will not relieve against their negligence, yet relief may be granted where mistake has occurred without fault. Attorneys are not required to be diligent and careful beyond the capacities of human nature: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 49-657.

35. Notice to attorney: Knowledge of the attorney is, in general, considered notice to the client: *De Louis v. Meek*, 2 G. Gr., 55. And see AGENCY, III, d.

36. Service upon attorney: In ordinary actions service upon an attorney is not sufficient to give a court jurisdiction: *Death v. Bank of Pittsburg*, 1-382.

37. In actions to enjoin judgment; chancery rule: Under the English chancery practice, where the judgment plaintiff was a non-resident, service in an action in equity to enjoin the collection of the judgment might

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be made upon a resident attorney having charge of such collection; but under our procedure such an action might be brought to enjoin the sheriff from levying execution under the judgment: *Ibid.*

38. Acceptance of service; presumption: Where the record recites an acceptance of service by attorney, it will be presumed, in favor of the judgment, that authority to accept service existed, or that some other form of service was shown: *Prince v. Griffin*, 16-552.

39. Appearance of authorized attorney cures any defect by reason of want of authority in such attorney to accept service of the notice: *Fanning v. Minnesota R. Co.*, 87-879.

40. Appearance; presumption: Although the attorney cannot, without special authority, admit service of jurisdictional process upon his client, yet it will be presumed, in all collateral attacks and perhaps on appeal or writ of error, that a regular attorney who appeared for a defendant, though not served, had authority to do so: *Harshey v. Blackmarr*, 20-161.

41. In action on foreign judgment: But in an action upon a foreign judgment the defendant in the judgment may successfully contest it by showing that the attorney entering an appearance for him, without service having been made, did so without authority: *Ibid.*

42. In action on domestic judgments; laches: In case of a domestic judgment rendered upon such unauthorized appearance and without service, the party against whom the judgment is thus improperly rendered is entitled to relief if the judgment is unjust and relief is sought by bill or motion without laches; but the party must promptly disavow the action of the attorney upon receiving knowledge thereof: *Ibid.*

43. Attacking foreclosure; redemption: A junior lien holder may, for the purpose of establishing his right to redeem from the foreclosure under a senior mortgage to which it was sought to make him a party, show that although the decree recites service upon him, it was actually rendered upon acceptance of service and appearance by an attorney without authority, and this may be shown as against third persons purchasing at the sale: *Newcomb v. Dewey*, 27-381.

44. Judgment on unauthorized appearance void: A judgment rendered without service of notice and upon appearance by attorney without authority is void: *Macomber v. Peck*, 39-351.

45. Attorney exceeding authority: The right to contest a judgment, on account of want of authority of the attorney appearing for a defendant not served, exists only when the want of authority is total, and not where an attorney, regularly employed, has merely exceeded his authority: *Harshey v. Blackmarr*, 20-161.

46. Foreign judgment; equitable defense: When want of authority of attorney to enter appearance is made the ground of an equitable defense in an action on a foreign judgment, it should be alleged also that defendant is not indebted to plaintiff on the claim on which the judgment was based: *Crawford v. White*, 17-560.

47. Appearance; presumption; injury: The appearance of an attorney for a party is *prima facie* evidence of authority, and before his act can be avoided, injury resulting from the unauthorized appearance must be shown: *Piggott v. Addicks*, 8 G. Gr., 427.

48. Defense should be shown: A party, seeking to have a judgment set aside on the ground that it was rendered on appearance by an attorney without authority, should allege and show a defense to the claim: *Russell v. Pottawattamie County*, 29-256.

49. Presumption; burden of proof; amount of evidence: Where the record shows appearance by attorney, a party attacking the judgment, on the ground of want of authority of the attorney to appear, must overcome such presumption: *Potter v. Parsons*, 14-286; and must do so by clear and satisfactory evidence: *Wheeler v. Cox*, 56-36; *Russell v. Pottawattamie County*, 29-256.

50. Authority, evidence of: Authority to appear, held sufficiently established by the attorney's own testimony and a written receipt signed by the party for whom appearance was made, acknowledging receipt of money collected by the litigation, although the party himself testified that no such authority was given: *Ellis v. White*, 61-644.

51. Where the statement of the attorney in showing his authority discloses the fact that he is acting on written authority, he

 Authority of.— Duties and liabilities.

may properly be required to produce it: *State ex rel. v. Tilghman*, 6-496.

52. An affidavit of an attorney, that he appeared in the lower court for defendant, cannot be received on appeal to show that the lower court had jurisdiction: *Stout v. Fortner*, 7-183.

53. Authority not questioned on appeal: Where the record, without setting out the evidence, shows that the lower court was satisfied by affidavit of the authority of the attorney to appear, the ruling will not be disturbed on appeal: *Huston v. Stringham*, 21-36.

54. The authority of the attorney cannot be first questioned by his client on appeal, when he has acquiesced in his action in the court below: *Hefferman v. Burt*, 7-320.

55. Fraud of attorney in accepting retainer: The malfeasance of an attorney in accepting a retainer for one party, after having previously been employed by the other, the fact being known to the first client from the time of the wrongful act, will not constitute fraud, vitiating the judgment recovered for the second client against the first: *Humphrey v. Darlington*, 15-207.

56. Stipulations of attorney: Stipulations made in open court by an attorney of record in the case, and while the case is pending, if free from fraud and mistake and clearly established, will be enforced by the court: *Lockwood v. Black Hawk County*, 34-235.

57. Agreement of record; statute: Under a statute (Code, § 213) requiring evidence of an agreement by an attorney, binding his client, to be in writing, signed and filed with the clerk, or by an entry of record, held, that a *nunc pro tunc* record of such agreement, made a year after the agreement was entered into, and upon affidavits, after a dispute had arisen with reference to the agreement, was not sufficient: *Hiller v. Landis*, 44-223.

58. Where a new trial was asked on the ground of an agreement of the opposite attorney that the cause should not be tried that week, held, that as the agreement was denied by the attorney and did not appear to have been made of record and signed by the attorney, or made in open court and entered of record, the motion could not be granted: *Barnes v. Ennenga*, 53-497.

59. Under the same statutory provision,

held, that an agreement of the attorney that a case should be presented to the supreme court upon an abstract, waiving a transcript of the evidence, could not be enforced, if denied, unless in writing or of record: *Preston v. Hale*, 65-409.

60. The facts appearing from an affidavit of the attorney of a party, held sufficient to establish implied consent to the determination of a cause in vacation: *Myers v. Funk*, 51-92.

61. While the client might bind himself by a stipulation in the case, his affidavit is not receivable as evidence of an agreement by his attorney binding him: *Sapp v. Aiken*, 68-699.

Authority of district attorney: See DISTRICT ATTORNEY.

II. DUTIES AND LIABILITIES.

62. Contract for contingent fee: If the attorney visits the client for the purpose of entering into a contract of employment, it is his duty, before making the contract, to distinctly and clearly advise the client as to all the facts and circumstances within his knowledge relating to the case. So held in regard to a contract for a share of the amount to be recovered as a contingent fee: *Ryan v. Ashton*, 42-365.

63. Purchase of client's property: While the relation exists, an attorney is not permitted to take advantage of the client's affairs, against his interest, to make money. This rule forbids the attorney to purchase, against the interest of his client, property sold in the course of litigation in which he is retained, and such a sale will be held void, or the attorney will be held as the trustee of his client and be required to account as such: *Harper v. Perry*, 28-57.

64. An attorney who procures in himself legal title to property of which his client is owner, holds the property in trust for his client: *Byington v. Moore*, 62-470.

65. Conveyance to attorney: A conveyance from client to attorney will be set aside whenever advantage has been taken of the client through the influence or knowledge of the attorney possessed by reason of their peculiar relations: *Polson v. Young*, 37-196.

66. Purchase of property under execution; trustee: An attorney buying in prop-

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erty at a sale, under a judgment secured by him, will be presumed to do so for the benefit of his client, and to hold only as trustee: *Reichhoff v. Brecht*, 51-633.

67. **Tax title on client's property; trustee:** An attorney who is acting as agent of the owner with respect to property, and has money in his hands derived from the property, buying in the property at tax sale, will be held to have acquired the same in trust for such owner, and cannot take and hold, as against his principal, a tax deed, although the principal is negligent in reimbursing him for his expenses in acquiring such title, unless he has first made a full and fair statement to his principal of the account between them, and of the amount necessary to reimburse him: *Continental L. Ins. Co. v. Perry*, 65-709.

68. **Attorney not held as trustee; bad faith of client:** Good faith and fairness is also required of the client in his relations with the attorney, and an attempt of the former to defraud the latter will authorize the latter to sever the relation and act for the protection of his own interests: *Eckrote v. Myers*, 41-324.

69. Where the attorney, having procured a decree of foreclosure for his client, and demanded the payment of his fees and advances without avail, bought in at tax sale the property covered by the decree and notified his client of that fact, still urging payment, which was not made, *held*, that a tax deed, subsequently taken by him in pursuance of the sale, could not be set aside seven years afterward at the suit of the client: *Ibid*.

70. Where the attorney, after in vain requesting payment of his fees by his client, by consent of the client caused property to be sold under his client's judgment, and bought the same at the sale, *he'd*, that such purchase was not fraudulent: *Page v. Stubbs*, 30-537.

71. The fact that an attorney retains in his possession papers relating to a transaction affecting land, under a claim of a lien on such papers for services, does not continue his relation as attorney of the owner in such sense as to defeat a tax title acquired thereon by him after the performance of his duties with reference to the matter is entirely completed: *Baker v. Davis*, 85-184.

72. **Liability for interest and rents; demand:** An attorney is not ordinarily liable for interest on money collected by him until demand therefor is made; nor is he liable for rent of property bought in by him in his own name at execution sale under a judgment in behalf of his client, where such purchase is not in fraud of his client's rights: *Johnson v. Semple*, 31-49.

73. But the commencement of suit to recover money in the attorney's hands constitutes sufficient demand to authorize the allowance of interest from that time: *Hollenbeck v. Stanberry*, 38-325.

74. The attorney is not liable for interest on money if kept on hand for his client or deposited in bank to the client's credit, but if used by the attorney he is liable for interest: *Manafeld v. Wilkerson*, 26-482.

75. **Estopped by fraud or negligence:** An attorney who obtains a judgment for his client which is void for want of service of notice, due to his own culpable negligence or fraudulent intention, and allows the client, in ignorance of the defect, to purchase property at execution sale under such judgment, is estopped as against the client from asserting title to the same property acquired from the execution defendant, even after the relation of attorney and client has ceased. In such case whatever title is acquired by the attorney inures to the benefit of his former client: *Phillips v. Blair*, 38-649.

76. **Retainer against opinion:** While an attorney ought not to accept a retainer in a case where he feels that the law is against his client, yet the fact that he has, under a prior retainer, advocated views of the law and facts different from those upon which his client rests his cause, or has officially, as a judge or officer of the government, held a different view of the rights of the parties, will not, of itself, disqualify him to accept a retainer; and it will not constitute fraud on his part not to reveal to his client the fact of such prior opinion: *Smith v. Chicago & N. W. R. Co.*, 60-515.

77. **Not liable for exercise of discretion:** Where an attorney was employed with the understanding that he was to use his best judgment as to the steps necessary to be taken in the case, *held*, that he was not liable in an action for damages, in view of the care

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taken in the particular case: *Bennett v. Phillips*, 57-174.

78. Liability for officers' fees; evidence; custom: An attorney is not liable to a sheriff for fees for services performed for the client at the request of the attorney, and *held*, in such case, that evidence was not admissible to prove a custom among attorneys to become responsible in such cases: *Doughty v. Paige*, 48-483.

79. Liability on bond for costs, etc.: Under a statute (Code, § 2931) providing that no attorney shall be received as security in any proceeding in court, *held*, that although an officer might refuse to accept an attorney as security, yet if he tenders himself and is accepted, he cannot escape liability on the ground of being an attorney: *Wright v. Schmidt*, 47-233.

80. This provision, though found among the sections of the Code relating to security for costs, relates not only to bonds for costs, but to injunction, attachment and other bonds: *Massie v. Mann*, 17-131.

81. Liability for trespass: An attorney cannot be held liable for the wrongful seizure of property in the suit in which he acts, unless his acts or directions are shown to have in some way caused the seizure: *Rice v. Melendy*, 41-395.

82. An attorney who simply obeys the instructions of his client in directing the seizure of property under attachment is not liable therefor. It is immaterial that he has neither belief nor suspicion as to the ownership of the property and seeks no information with respect thereto: *Dawson v. Buford*, 70—.

83. Not jointly liable with client: An attorney who has acted as a mere agent for his client should not be made a party to a suit against his client in regard to acts so done, unless he is charged with fraud: *Lyon v. Tevis*, 8-79.

84. If the attorney is thus improperly made a party defendant, he is entitled to be dismissed with costs: *Paton v. Lancaster*, 38-494.

III. COMPENSATION.

a. Contract for; who liable for.

85. Surety not liable for, to principal's attorney: One who is a party to an action

and interested in the result, as a surety in an action to which his principal is party, will not, for that reason alone, be liable for the compensation of an attorney rendering services for the principal, but his liability must be proven by evidence of retainer or recognition as attorney of the party sought to be charged: *Turner v. Myers*, 23-391.

86. Evidence as to value of services: In an action to recover the value of professional services, evidence as to the success attending the rendition of such services is admissible: *Berry v. Davis*, 84-594.

87. Under the general custom of the profession, the values in controversy control charges for services. Therefore, in an action by an attorney to recover for services rendered, *held* error to instruct the jury that the magnitude of the controversy and the great value of the property involved should not be considered in determining the amount of recovery: *Smith v. Chicago & N. W. R. Co.*, 60-515.

88. Contract for services in another state: Where an attorney is employed in this state to render services in another state, the rate of compensation is to be determined according to the value of the services at the place where the contract is made: *Stanberry v. Dickerson*, 35-493.

89. Liability of husband for fee of wife's attorney in divorce suit; necessities: The husband is liable for services rendered by attorney for the wife for establishing the innocence of the latter on a charge of adultery made by the husband in an action for divorce. Such services are deemed necessities: *Porter v. Briggs*, 38-166.

90. But the husband is not liable for wife's attorneys' fees in a suit brought by the wife for divorce where it is not shown that such services come within the scope of necessities: *Johnson v. Williams*, 3 G. Gr., 97.

91. Contract for excessive fees: Nothing but the best of reasons will justify an attorney in exacting from his client, after the work is partially completed, an agreement to pay more than an ordinary fee under a threat of withdrawing from the case if such agreement is not made: *Bolton v. Daily*, 43-348.

92. Implied contract: Where an attorney was employed by one of several defendants, and rendered services in the case for all, with

Champerty; contingent fee.—Liability of county for services.

the knowledge and implied consent of the others, *held*, that a recovery for services rendered might be had by such attorney as against all the defendants, although by contract between them, not known to the attorney, the one employing him was to bear the entire expense of attorney fees: *McCrary v. Ruddick*, 33-521.

93. Additional attorney; bound by contract: Where an attorney contracted to prosecute the case for a given sum, and afterward turned the case over to another attorney, stating to the client that he had taken the second attorney into the case with him, *held*, that in the absence of any other knowledge on the part of the client as to the relation of the second attorney to the case, the latter could not recover more than the contract price: *Ennis v. Hultz*, 46-76.

b. Champerty; contingent fee.

94. Expense; share of recovery: The mere agreement for a contingent fee is not champertous. To constitute champerty the agreement on the part of the champertor must be to carry on the suit at his own expense, as well as for a share of the recovery: *Jewel v. Neidy*, 61-299.

95. Neither is it champertous for a person who is a party in interest, and not an officious promoter of another's strife, to agree to bear the expenses of litigation; and an attorney agreeing to carry on the litigation for a proportion of the recovery, knowing that the costs are thus to be paid by a party in interest, is not guilty of champerty: *Ibid*.

96. Champerty and maintenance: There being no statute in this state against champerty or maintenance, and there being no necessity for enforcing the English doctrine on the subject, that doctrine is not deemed in force here: *Wright v. Meek*, 3 G. Gr., 472.

97. But this last case is seriously questioned in *Boardman v. Thompson*, 25-487.

98. Contingent fee; against public policy: A contract by which the attorney was to receive a per cent. of the amount recovered by the client in the suit or on settlement, the attorney to advance costs and expenses to be paid out of the recovery, and the client agreeing not to settle without the attorney's consent, *held* void as against public policy: *Ibid*.

99. But a mere contract for a contingent fee, without stipulation against settlement by client or for advancement of costs by attorney, is valid: *McDonald v. Chicago & N. W. R. Co.*, 29-170.

100. Agreement not to compromise: An agreement between attorney and client, by which the latter binds himself not to compromise or settle the claim without the attorney's consent, is not favored: *Ellwood v. Wilson*, 21-523; *Boardman v. Thompson*, 25-487.

101. Contract of attorney to hold client harmless: A contract between attorney and client, that the former will hold the latter harmless from any judgment to be recovered against him provided he will appeal the case, is against public policy and void: *Adye v. Hanna*, 47-264.

102. Champerty not a defense: The fact that an action is being prosecuted under a champertous contract cannot be set up as a defense therein: *Allison v. Chicago & N. W. R. Co.*, 42-274; *Small v. Chicago, R. I. & P. R. Co.*, 55-582.

Further as to champerty and maintenance, see CONTRACTS, §§ 824-831.

c. Liability of county for services in prosecuting and defending.

103. Defense of criminal: An attorney appointed by the court to defend a pauper prisoner may maintain action against the county for compensation for such services although under the statute no provision for such compensation is made (overruling *Whicher v. Cedar County*, 1 G. Gr., 217; *Hall v. Washington County*, 2 G. Gr., 478).

104. The provisions of the statute (Code, § 3829) limiting the amount which an attorney shall receive in such cases are not unconstitutional: *Samuels v. Dubuque County*, 13-536.

105. No duty is hereby imposed by statute upon an attorney appointed to defend a criminal, to present the case to the supreme court, but if, in the exercise of his discretion, he does appear there, the statute provides a compensation shall be paid him by the county. The amount of such compensation is not to be what his services would have been reasonably worth in case he had been employed by the county, but an enlarged compensa-

Liability of county for services.—Lien.

tion, graded on a scale corresponding to the prices fixed for a trial in the district court. Therefore, *held*, that an allowance of \$25 for arguing the case in the supreme court was proper: *Baylies v. Polk County*, 58-357.

106. **Assisting in prosecution:** The district attorney cannot render the county liable for services of an additional attorney employed by him to aid in criminal prosecutions: *Tatlock v. Louisa County*, 46-138; *Foster v. Clinton County*, 51-541.

107. The board of supervisors may employ counsel, in addition to the district attorney, to prosecute criminal cases: *Hopkins v. Clayton County*, 82-15.

108. A county can be made liable to pay for additional counsel, only as the board of supervisors has determined such counsel to be necessary. The court cannot, at the request of the district attorney, appoint assistant counsel and thereby bind the county to pay therefor, at least unless on account of the absence of the district attorney, and in order to prevent the failure of justice: *Seaton v. Polk County*, 59-626.

109. In the absence of the district attorney the county may appoint a special prosecutor, but as to whether in such case the county is rendered liable for his compensation the court were equally divided: *White v. Polk County*, 17-413.

110. Recovery against county for services rendered on appointment of court to assist in the prosecution in a particular case, *held* proper: *Curtis v. Cass County*, 49-421.

111. It may be that in proper cases the court may appoint and require a member of the bar to appear and represent the state in a *habeas corpus* proceeding, although no compensation therefor is provided: *Miller v. Buena Vista County*, 68-711.

112. The district attorney being the representative of the state in *habeas corpus* cases, the judge or court has no authority in such cases to appoint an attorney to represent the state and thereby render the county liable for his services, where the notice required by law of the bringing of the *habeas corpus*

proceeding has not been served upon the district attorney. Whether, when the district attorney has been duly notified and has failed to appear, the judge may appoint an attorney to represent the state and thereby render the county liable for his services, *quere: Ibid.*

113. A justice of the peace has no power to appoint an attorney to prosecute a criminal action in behalf of the state, and no compensation can be recovered by reason of such an appointment: *Davis v. Linn County*, 24-508.

114. **Employment by county:** A county has undoubted authority, through its board of supervisors, to employ counsel, and will be bound by a contract made for that purpose, even though it be not entered on the records of the board. Such contract may be proved by parol: *Jordan v. Osceola County*, 59-388.

115. The county judge, when that office existed, had the power, and it was his duty, to employ the services of an attorney whenever he thought such services were needed, and he might pay a reasonable compensation therefor out of the county treasury: *Chickasaw County v. Bailey*, 13-435.

116. **Services in liquor prosecutions:** Under the provisions of Code, § 8829, the county is not liable for fees of attorney appearing before a justice of the peace in a prosecution for illegal sale of intoxicating liquors, unless he was selected for that duty by the peace officer filing the information (under Code, § 1551): *Blair v. Dubuque County*, 27-181; *Foster v. Clinton County*, 51-541.

117. The peace officers contemplated in that section do not include a special constable, appointed under the provisions of Code, § 8630: *Foster v. Clinton County*, 51-541.

d. *Lien*.¹

118. **Notice:** An attorney's lien does not attach upon money due his client in the hands of the adverse party, until notice is

¹ Code, § 215. An attorney has a lien for a general balance of compensation upon:

1. Any papers belonging to his client, which have come into his hands in the course of his professional employment.

2. Money in his hands belonging to his client.

3. Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such

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given to such party: *Hurst v. Sheets*, 21-501. [Decided under the Revision, which did not contain a provision similar to ¶ 4 of Code, § 215, authorizing the giving of such notice by entry thereof in the judgment docket.]

119. **Set-off:** Therefore, *held*, that where a judgment was rendered by A. against B., on the same day as, but prior to, a judgment by B. against A., upon the latter of which B.'s attorney filed his lien, A.'s right to set off his judgment against B.'s was complete before the attorney's lien attached, and was, therefore, superior to such lien: *Ibid*.

120. Whether such right of set-off would have priority if it did not arise until after notice of lien, *quære: Ibid*.

121. The lien of an attorney is upon the interest of his client in the judgment, and it is subject to an existing right of set-off in the other party: *National Bank v. Eyre*, 3 McCrary, 175.

122. **Lien prior to garnishment:** The lien of an attorney upon money due his client, in the hands of the adverse party, attaches from the time of giving notice to such party, and his lien will not be postponed to a subsequent garnishment: *Myers v. McHugh*, 16-335.

123. **Settlement:** The parties may settle without the consent of the attorneys, and without first paying their fees, unless notice of an attorney's lien has been given: *Casar v. Sargeant*, 7-317.

124. But if notice is given, the lien will not be defeated by the fact that the case is settled without judgment having been rendered: *Smith v. Chicago, R. I. & P. R. Co.*, 56-720.

125. **Payment of money to clerk:** A party cannot avoid the lien by unconditionally paying the money to the clerk; but he may pay it to the clerk to be held by him subject to such lien: *Fisher v. Oskaloosa*, 23-331.

126. **Satisfaction of judgment; discharge of lien:** After the entry of the notice in the judgment docket, the attorney acquires an interest in the judgment, and may, by proper proceedings, have the same enforced to the

extent of such interest. His interest cannot be divested by a discharge of the judgment by the parties, or by their consenting that it be set aside: *Brainard v. Ekwood*, 53-30.

127. Where the attorney perfected the title of his client in real property attached in the action, and thereby satisfied the judgment as against the adverse party, *held*, that the entry of his lien in the judgment docket did not preserve it upon such property in the hands of a purchaser from his client: *Cowen v. Boone*, 48-350.

128. Where the attorney, by authority of his client, releases of record the lien of the judgment in behalf of the client, the attorney cannot afterwards assert, as against a subsequent purchaser, any lien or interest in himself under such judgment: *Wishard v. Biddle*, 64-526.

129. **Notice in writing:** The notice of the lien, to bind the adverse party, must be in writing: *Phillips v. Germon*, 43-101.

130. **Notice at commencement of suit:** A notice of a claim for a lien is sufficient if inserted in the original notice of the action (at least if signed by the attorney in his individual capacity as well as in his capacity as attorney for his client): *Smith v. Chicago, R. I. & P. R. Co.*, 56-720.

131. **Service of notice upon agent of corporation:** While service of notice of attorney's lien, in an action against a corporation, might not be sufficient if made upon one of the class of agents upon whom service of original notice is authorized, yet if such service of notice of lien is upon one of such agents in connection with the service of the original notice, such service of notice of lien is sufficient, the service of the original notice being sufficient to charge such agent with a duty in relation to the matter: *Ibid*.

132. **In action on tort:** An attorney's lien may properly be claimed, not only in all actions on contract, but also in actions for damages arising from tort: *Ibid*.

133. **For future services:** The lien attaches, after proper notice, not only for services then rendered, but for those thereafter rendered: *Ibid*.

adverse party, or attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what services.

4. After judgment in any court of record, such notice may be given and the lien made effective against the judgment debtor, by entering the same in the judgment docket opposite the entry of the judgment.

Lien.—Taxation of attorneys' fees as costs.

134. Subject to costs: An attorney cannot have a lien upon any greater amount than shall actually be found to be owing by the opposite party to his client. And where an attorney took an assignment of a judgment to secure his fees, *held*, that he stood in the shoes of his client, and must take the judgment with all the burdens, such as costs, taxed in favor of the opposite party, etc., attaching by the course of the litigation: *Tiffany v. Stewart*, 60-207; *Watson v. Smith*, 63-228.

135. Burden of proof: Where money collected by an attorney was retained by him under the claim of a lien, *held*, that it was for him to aver and prove the services and their value: *Stanton v. Clinton*, 52-109.

136. Subject to rights under trust deed: Where a suit was commenced to subject the property and income of a corporation to the payment of bonds secured by deed of trust, and a receiver was appointed, *held*, that the attorney of the corporation had no lien on its funds for services rendered after commencement of suit which would have priority over the claims of the bondholders: *Des Moines Gas Co. v. West*, 50-16.

137. Release of lien by bond: Under the provisions of Code, § 216, authorizing the release of the lien upon the giving of bond, with security, for the payment of any amount found due the attorney, *held*, that the filing of the bond released any lien which the attorney might have by statute: *Cross v. Ackley*, 40-493.

138. In an action by the client against the attorney to recover moneys collected by the attorney, the fact that the attorney is entitled to a portion of the money collected in payment for services will not render the proceeding one to discharge an attorney's lien in such sense as to make it necessary to tender a bond in order to obtain a release of the property: *Armitage v. Sullivan*, 69-426.

139. Assignment of lien: Where an attorney transfers to another securities on which he claims a lien, his assignee can only hold them for the reasonable value of the services rendered: *Collins v. Jennings*, 42-447.

140. The supreme court cannot grant an attorney's lien on a judgment when such lien is not secured in the proceedings in the

court below, as such relief would be the exercise of original jurisdiction: *Preston v. Daniels*, 2 G. Gr., 536.

IV. TAXATION OF ATTORNEYS' FEES AS COSTS, OR RECOVERY AS DAMAGES.

141. Contract for, valid: A stipulation in a contract or note for the payment of an attorney's fee in case action shall be brought thereon is valid: *Kuhn v. Myers*, 37-351; *Shugart v. Pattee*, 37-422. So in case of mortgage: *Williams v. Meeker*, 29-292.

142. Does not affect negotiability: Such a provision in a note does not destroy its negotiability: *Sperry v. Horr*, 32-184.

143. If the note is usurious an attorney's fee provided for therein cannot be recovered: *Miller v. Gardner*, 49-234.

144. Surety liable for: A surety on a note providing for attorneys' fees is liable therefor: *First Nat. Bank v. Breese*, 39-640.

145. What is bringing of action: Where a note provided for taxation of reasonable attorneys' fees for collection if an action should be brought thereon, *held*, that a resort to legal proceedings was contemplated as the occasion for taxing such fee, and that filing the note as a claim against the estate of the maker, and proving it as such claim, was sufficient to warrant the allowance of the fee: *Davidson v. Vorse*, 52-384.

146. Liquidated damages: Where the contract or note specifies the amount to be taxed as attorneys' fees, the amount thus specified is not in the nature of a penalty but is liquidated damages, for which recovery may be had without proof of the reasonable value of the services: *McIntire v. Cagley*, 37-676.

147. Evidence of value: Upon default in an action upon a note providing for the allowance of reasonable attorneys' fees, it is error to allow an amount for such fees without evidence as to their value: *First Nat. Bank v. Krance*, 50-235.

148. Attorney's testimony: The testimony of plaintiff's attorney as to the value of his services in an action on a contract providing for the allowance of attorneys' fees, will, in the absence of other evidence, be taken as establishing such value; and the court will not, for itself, judge of the value of such services: *Schlicht v. Stivers*, 61-746.

Taxation of attorneys' fees as costs.

149. Pleading: Where the claim for attorneys' fees is in a separate count of the answer, an answer to that count will not be regarded as putting in issue the averments of the other counts: *Musser v. Crum*, 48-52.

150. Where the provision is for the allowance of a reasonable amount as attorney fees, it is not necessary in the petition to aver what is a reasonable amount: *Nelson v. Everett*, 29-184.

151. Actual fee alone taxed: Whether the note provides for a fixed sum or a reasonable fee, no more can be taxed than the actual fee. It is not by such agreement intended that the party shall, in any event, have any part of the fee taxed: *White v. Lucas*, 46-319.

152. Taxed as costs; not assessed by jury: Attorneys' fees provided for in a contract are to be treated as costs in the action and not as a part of the amount in controversy: *Spiesberger v. Thomas*, 59-606.

153. The defendant is not entitled to have the amount thereof assessed by jury: *Musser v. Crum*, 48-52.

154. But where the parties consent, or fail to object, to a submission of the matter to the jury, they cannot be heard afterward to say that the trial was not in the proper tribunal: *Dent v. Smith*, 53-262.

155. The taxation of the fee is an independent matter and may be made after the services in the case are concluded. Therefore, where a motion to tax attorney's fee was not made until after taking appeal, *held*, that such taxation was improper at that time, and should be postponed until the termination of the appeal: *Mason v. Searles*, 56-532.

156. The amount of attorneys' fees to be taxed may be determined after the trial and decision of the case, and where it appears that they have been thus taxed, it will be presumed on appeal, in the absence of any showing on the subject, that there was evidence to support such taxation, and that the judgment was in accordance therewith: *Kelso v. Fitzgerald*, 67-266.

157. The attorney's affidavit required by statute, that there is no agreement to divide the fee, is not evidence to be introduced by the plaintiff; it is rather a condition precedent to be performed by the attorney be-

fore the attorney's fee can be allowed in his favor: *Spiesberger v. Thomas*, 59-606.

158. Such affidavit should be filed with the original petition prior to the return day; that is, the first day of the next term: *Wilkins v. Troutner*, 66-557.

159. The attorney's fee must be disallowed where the affidavit is not filed: *Sweeney v. Davidson*, 68-386.

160. A requirement that an attorney shall file an affidavit that he has not directly or indirectly received any compensation for his services from any source must be complied with; it is not sufficient that his affidavit states that the claim is just and true: *Ryce v. Mitchell County*, 65-447.

161. Collusive taxation of excessive fee: Where, apparently to reduce the balance which would remain after satisfaction of the mortgage, and be subject to a judgment lien, it was agreed between defendant and plaintiff's attorney in a foreclosure suit that a larger amount than the attorney claimed should be taxed as attorney's fee, and the excess returned to defendant, *held*, that action by defendant to recover such excess from the mortgagee purchasing under the foreclosure could not be maintained: *Remley v. Johnson County Savings Bank*, 52-575.

162. Provision in mortgage: Where the provision authorizing the taxation of attorneys' fees is in the mortgage and not in the note secured, judgment for the fee should be against the mortgagor alone and not against parties who are liable on the note but are not parties to the mortgage: *Floyd County v. Morrison*, 40-188.

163. Not usurious: A stipulation for attorneys' fee does not render a contract usurious: *Nelson v. Everett*, 29-184.

164. Attorneys' fees in former suit: In the absence of malice or want of probable cause, attorneys' fees for defending in a former suit cannot be allowed in an ordinary action on contract: *Newell v. Sanford*, 19-463.

165. Trustee allowed for: Where a trustee chargeable with collection of certain claims, with the right to deduct expenses of collection from the proceeds, placed them in the hands of an attorney, *held*, that attorneys' fees were properly allowed on all the claims although

 Misconduct, etc.—Attorney as witness.—Terms of sale.

suit was in fact brought on but one: *Abbott v. Downer*, 54-687.

As to fees in actions on attachment and injunction bonds, see ATTACHMENT, §§ 279-284, and INJUNCTION, §§ 157-164.

V. MISCONDUCT; SUSPENSION; DISBARMENT; CONTEMPT.

166. Improper conduct: A court should never hesitate to stop counsel in attempts to drag improper matters before a jury, and should visit merited punishment when such unprofessional conduct is indulged in. But it does not follow that in such cases a verdict will not stand. To require setting aside of the verdict prejudice must be shown: *Hammond v. Sioux City & P. R. Co.*, 49-450.

167. Where an attorney, in an excited manner, directly contradicted the statements of the court in ruling upon an objection to evidence, alleging that the facts upon which such ruling was based, as stated by the court, were not true, *held*, that he was guilty of contempt: *Russell v. French*, 87-102.

168. Suspension: Charges in a particular case against an attorney for making false representations to clients for the purpose of retaining money collected and defrauding them; also for collecting and refusing to pay over money, to which the attorney pleaded guilty, *held* sufficient to justify an order suspending the attorney and providing in a certain contingency for his final disbarment: *Slemmer v. Wright*, 54-164.

169. Proceedings to disbar: Proceedings under statutory provisions to disbar an attorney are special proceedings in which the provisions for change of venue in civil actions are applicable: *State v. Clarke*, 46-155.

170. The license of an attorney to practice can be revoked or suspended only as the result of proceedings instituted for that purpose and after he has had his day in court. It cannot be done summarily as a punishment for contempt: *State v. Start*, 7-499.

171. It is probable that the court could, in the exercise of its inherent authority, require a member of the bar to discharge the duty of conducting the prosecution of a proceeding for disbarment. But the exercise of such authority rests in the sound discretion of the judge, and the persons commencing the dis-

barment proceeding could not object to the action of the court in refusing to make such appointment: *Byington v. Moore*, 70—.

172. Disobedience of order of court: Wilful disobedience of order of court to pay over money due the client may be ground for suspending or revoking license: *Cross v. Ackley*, 40-498.

173. Proceedings for contempt: In proceeding against an attorney for contempt, the accusation should specify the manner in which the contempt was committed; if by words, the words used should be set out; if by acts, they should be described: *Perry v. State*, 3 G. Gr., 550.

Further as to CONTEMPT, see that title.

VI. ATTORNEY AS WITNESS.

174. Professional statement: Where the professional statement of an attorney is received it is to be regarded as an affidavit: *Rice v. Griffith*, 9-539.

175. Witness for his client: An attorney is a competent witness for his client: *Walsh v. Murphy*, 2 G. Gr., 227.

176. But no attorney having a just conception of his true and proper position will willingly unite the character of counsel and witness in the same case: *Alger v. Merritt*, 16-121.

Affidavits, etc.: That an attorney is competent to verify pleadings, make affidavits, etc., for his client in proper cases, see §§ 17-20, *supra*.

As to testimony of attorney relative to the value of his own services to be taxed as attorney's fee, see *supra*, § 148.

Privileged communications to attorney: See EVIDENCE, §§ 1108-1115.

AUCTIONS.

1. Terms of sale: The owner of property offered for sale at auction has the right to prescribe the manner, conditions and terms of sale, and where these are reasonable and known to the buyer they are binding upon him, and he cannot acquire a title in opposition to them, and against the consent of the owner: *Farr v. John*, 28-286.

2. Where it was publicly announced in the hearing of defendant that no bid less than

Warranty.— When bailment arises; kinds of.

five cents in addition to any former bid would be received, and an article was offered accompanied by the statement that an absentee had left a bid of two dollars on it, and any one who would bid more could have it, *held*, that a bid of one cent more, which was disregarded, did not entitle the last bidder to the article: *Ibid*.

3. **Warranty:** Statements made by an auctioneer that certain sheep sold were young and sound, *held* not to be a warranty, although made by authority of the seller: *McGrew v. Forsythe*, 31-179.

4. A written memorandum of a sale, made by an auctioneer, is a sufficient written contract to bind both parties: *Wingate v. Herschauer*, 42-506.

5. **Auctioneers:** A municipal corporation may be given authority to regulate and license sales by auctioneers, and may, under such authority, impose a license tax: *Deorah v. Dunstan*, 88-96.

6. A resident merchant, employing an auctioneer to sell part of his goods, is not himself subject to payment of a license tax as auctioneer: *Oskaloosa v. Tullis*, 25-440.

AWARD.

See **ARBITRATION**.

BAIL.

See **CRIMINAL LAW**, III, 12.

BAILMENT.

I. **WHEN ARISES; KINDS OF.**

II. **RIGHTS OF BAILEE.**

III. **COMPENSATION AND LIEN.**

IV. **LIABILITY OF BAILEE FOR NEGLIGENCE OR CONVERSION.**

I. **WHEN ARISES; KINDS OF.**

1. **Deposit; parol evidence:** A receipt for money "on deposit" does not show whether it is received on special or general deposit, and that fact may be shown by parol evidence: *Keen v. Beckman*, 66-672.

2. **Deposit payable in kind; custom:** Where wheat is delivered at a mill under a

custom known to the party delivering that it is to be thrown into a general bin and a receipt given entitling him to flour, bran, or wheat again, as he shall call for it, the title vests in the mill owner: *Wilson v. Cooper*, 10-565.

3. **Grain in warehouse:** Where grain was stored with a warehouseman with the understanding that when the depositor got ready to sell it the warehouseman would give the highest price, or would return the same quantity of like grain, the original grain to be shipped and sold by the warehouseman, *held*, that the transaction was a sale and not a bailment: *Johnston v. Browne*, 87-200.

4. Where the owner of grain deposited it in an elevator under a contract by which the warehouseman might mingle it in a common mass with other grain, and return grain of the same quality but not the identical grain, *held*, that the transaction was a bailment and not a sale, and that the warehouseman was not liable for its value if destroyed without fault or negligence on his part: *Nelson v. Brown*, 44-455.

5. So where grain was deposited with a warehouseman under a known usage and custom of trade by which it was to be mixed with other grain in store, and the proper number of bushels in the warehouse were to be regarded as the property of the depositor, *held*, that the transaction constituted a bailment: *Hughes v. Stanley*, 45-622.

6. Where the owner of grain deposits it with a warehouseman, consenting that it shall be mixed with other grain of like quality, belonging in part to the other depositors and in part to the warehouseman, he becomes with the other depositors and the warehouseman an owner in common of the grain in the warehouse, and the title to the grain deposited does not pass to the warehouseman: *Sexton v. Graham*, 53-181; *Nelson v. Brown*, 53-555.

7. In such a case the fact that the warehouseman has the right to, and does, withdraw his proportionate share, does not affect the ownership of the depositors, nor will subsequent additions or subtractions to and from the common mass affect the interest of the depositors, even though an entire change is effected in the identity of the mass

When arises; kinds of.— Rights of bailee.

stored. The receipt-holder remains at all times a tenant in common of the grain in store: *Ibid.*

8. All the grain in the elevator of the kind and grade of that deposited, and with which the grain deposited may be properly mixed, is to be treated as a common mass, although contained in separate compartments or bins: *Sexton v. Graham*, 53-181.

9. Although the warehouseman wrongfully abstracts and sells more than the proportion belonging to him, the balance is to be considered the property of the depositors in common: *Ibid.*

10. Where the person in charge of the warehouse delivered all the remaining grain to the holder of a portion of the outstanding receipts on demand thereunder, *held*, that this was not a new transaction, but was in pursuance of the existing claim, and all receipt-holders had a right to share in the property so delivered: *Ibid.*

11. Where wheat was received under an agreement that it was to be at owner's risk as to fire, and was kept in a separate bin and burned with the elevator, *held*, that the transaction was a bailment and defendant was not liable for the loss: *Irons v. Kentner*, 51-88.

12. Railroad as warehouseman: The liability of a railroad is only that of warehouseman after delivery of goods at its depot, at the end of the transportation: *Francis v. Dubuque & S. C. R. Co.*, 25-60; *Mohr v. Chicago & N. W. R. Co.*, 40-579.

13. Warehouse receipt; parol evidence; usage or custom: A warehouse receipt which expresses a contract of bailment cannot be varied by parol evidence of a custom or usage or understanding for the purpose of showing that the intention of the parties was that the transaction should be regarded as a sale: *Marks v. Cass County Mill, etc., Co.*, 43-146; *Sexton v. Graham*, 53-181.

14. Collateral security: Under the statutory provisions (Code, §§ 2171 and 2172) that no warehouseman shall issue any receipt for any personal property to any person unless such property is in store, and that all warehouse receipts or other evidences of the deposit of property shall be, in the hands of the holder thereof, presumptive evidence of title to said property, *held*, that a warehouse re-

ceipt for grain issued merely as collateral security for a loan of money was in contravention of the statute and invalid: *Sexton v. Graham*, 53-181.

15. Whether a warehouse receipt will be valid if the intention in executing it is to create a mere lien, *quære*: *Lowe v. Young*, 59-364.

16. Transfer: Where a depositor received only scale tickets, showing the amount of grain weighed, but did not receive any warehouse receipt, and the warehouseman shipped away the grain deposited until there was no grain remaining to answer for the claim of the depositor, *held*, that such scale tickets were not warehouse receipts, and that a person taking an assignment of the depositor's claim would be subject to the warehouseman's right to set off against the depositor's claim an indebtedness due from such depositor, which he could not have done under Code, §§ 2171-2176, if receipts had been issued and transferred: *Cathcart v. Snow*, 64-584.

17. Authority to sell: The fact that bailee is authorized to sell the property and make a disposition of the proceeds does not render the transaction other than a bailment until the sale is made: *Goodenow v. Snyder*, 8 G. Gr., 599.

18. Possession after disaffirmance of sale: Where possession of property is acquired under a conditional sale, the vendee, upon disaffirming the sale, holds the property as bailee and is liable for any loss resulting from gross negligence: *Neally v. Wilhelm*, 4 G. Gr., 240.

19. Use of horse: Where the owner of a horse, for the purpose of avoiding the expense of keeping it during the winter, lends it to another under the agreement that the latter shall take care of it in consideration of the expense of keeping, the transaction is a bailment for mutual benefit, and the bailee is only required to use ordinary care: *Chamberlin v. Cobb*, 32-161.

II. RIGHTS OF BAILEE.

20. Special property: The bailee has a special property in the thing which is the subject of the bailment: *Bruley v. Rose*, 57-651.

21. Cannot convey title; innocent purchaser: A bailee cannot convey a title which

Compensation and lien.—Liability of bailee.

will prevail against the rightful owner. The mere fact that the owner has left the property in the possession of the bailee will not constitute such fraud as to defeat such owner's right as against an innocent purchaser from such bailee: *Robinson v. Chapline*, 9-91.

22. Thus where a principal places in the hands of his agent property for sale without transferring the title to such agent, a purchaser from the latter without knowledge of the agency is not protected: *Conable v. Lynch*, 45-84.

III. COMPENSATION AND LIEN.

23. **Compensation presumed:** In the absence of an agreement to the contrary, the law implies a contract to pay the reasonable value of the use of the thing loaned: *Cullen v. Lord*, 39-302.

24. **Gratuitous; burden of proof:** The law does not presume without proof that a bailment is gratuitous, and if any exemption from liability is claimed from that fact, the burden of establishing such fact is upon the person claiming the exemption: *Winne v. Illinois Cent. R. Co.*, 31-583.

25. **Lien; exempt property:** A bailee's lien attaches to property which is exempt as well as to that not exempt: *Munson v. Porter*, 63-453.

26. **Use of bailed property:** A bailee may always use the thing bailed so far as is necessary for its preservation, and the fact that bailee uses a horse held by him under a lien will not amount to a conversion, defeating his right to his lien: *Ibid.*

27. **Lien specific:** A bailee in possession under a lien for services performed cannot detain the property for the payment of other debts without a specific agreement to that effect: *Nevan v. Roup*, 8-207.

28. **Possession necessary:** The bailee's lien for services does not arise unless the article has been delivered into his possession for the purpose of having services performed thereon; and if he parts with possession before receiving compensation, his lien is lost and is not reinstated by his coming into possession of the property without the consent of the owner: *Ibid.*

29. An agister of cattle may have a lien thereon under special contract for his

charges, and *held* that under a contract in which the charges for the keeping of cattle were to be paid before moving the cattle, the agister had the right of possession until payment was made: *McCoy v. Hock*, 37-436.

30. **Livery-stable keeper:** At common law a livery-stable keeper has no lien for the care and feeding of horses left with him, and no such lien is given by Code, § 2177, which confers a lien upon personal property left with a depositary for the just and lawful charges thereon. (Such a lien is now, however, given by express statute. See 18 G. A., ch. 25): *McDonald v. Bennett*, 45-456.

31. Where services in keeping a horse at a livery-stable commenced before the enactment of the statute just referred to, and continued afterward, *held*, that there being no express contract, the livery-stable keeper might assert his lien for charges after the statute took effect, but not for charges previously incurred: *Munson v. Porter*, 63-453.

32. **Forfeiture of lien:** If under any circumstances the lien should be deemed forfeited by the assertion of a claim for a lien for too large an amount, the assertion should be clear and distinct, and operate to interfere in the present with a claimed right on the part of the owner: *Ibid.*

IV. LIABILITY OF BAILEE FOR NEGLIGENCE OR CONVERSION.

33. **For wrongful acts of others:** In an action for damages resulting from neglect and ill-treatment of animals by a bailee thereof, under a contract requiring him to keep them in the best possible manner, *held*, that it was error to instruct the jury that bailee would only be liable for neglect or ill-treatment of which he himself was guilty, or which was known to and tolerated by him: *Rohrabacher v. Ware*, 37-85.

34. **Contributory negligence; burden of proof:** In an action against a livery-stable keeper for the loss of a horse caused by his negligence, it is not incumbent upon plaintiff to prove that he was not himself guilty of any neglect contributing to the injury: *McPherrin v. Jennings*, 66-622.

35. **Gratuitous bailment:** In case of gratuitous bailment for the bailor's sole benefit, the bailee is only liable for gross negligence

Liability of bailee.—Jurisdiction.

or breach of good faith: *Jourdan v. Reed*, 1-135.

36. Lost money: Only slight diligence is required of the finder of lost money in taking care thereof, and he will only be answerable for gross negligence: *Dougherty v. Posegate*, 3-88.

37. Conversion; approximate injury: In the case of hiring for use, the mere fact that instructions as to the use of the thing loaned given by the bailor to the bailee are not followed, will not render the bailee liable for any loss which accrues, without regard to whether the injury results from failure to obey instructions or from some other cause: *Cullen v. Lord*, 39-302.

38. Conversion; implied contract: Where property has been converted by a bailee, the owner may waive the tort and sue in *assumpsit* on the implied contract: *Goodenow v. Snyder*, 3 G. Gr., 599.

39. Wrongful sale by commission merchant; damages: In an action against a commission merchant for selling for a less amount than authorized by the consignor, the damages recoverable are not to be limited to the market value of the goods sold at the time of such unauthorized sale: *Hallowell v. Fawcett*, 30-491.

40. If the consignee has made advances, fair dealing requires that he shall give the consignor reasonable notice and opportunity to pay such advances, before a sale of the consigned property contrary to instructions will be warranted in order to secure reimbursement: *Ibid.*

41. Conversion; liability for: If a warehouseman who has received grain under special contract to be delivered to the depositor upon demand, sells it, and fails to deliver according to the contract, and the warehouse is afterward burned, the warehouseman having been guilty of conversion is liable for the value of the property: *McGinn v. Butler*, 31-160.

42. Warehouseman; confusion of goods: Where grain is deposited in an elevator, and other grain of the same grade and quality is mingled therewith, the ownership of the depositor is not divested, even though no notice of a custom to mingle such property by the warehouseman is shown. Such facts simply constitute a confusion of goods honestly

made, under such circumstances that the depositor should recover the same amount of grain of the same grade and quality as that deposited. In such a case there is no conversion, and the warehouseman is not liable for the value of the grain, if destroyed without his negligence: *Arthur v. Chicago, R. I. & P. R. Co.*, 61-668.

43. The mere fact that grain is shipped from a common mass until the identical kernels are gone, enough being left, however, in the common mass to satisfy the claims of depositors, will not constitute a conversion: *Cathcart v. Snow*, 64-584.

44. Where property which is bailed by weight is mingled by the bailee with other property of the same character, such act does not terminate the bailment: *Goodenow v. Snyder*, 3 G. Gr., 599.

45. Where grain was delivered to a warehouseman for storage and mingled with the common mass and shipped away for sale, other grain being retained in store sufficient in amount to cover the receipts issued, and the warehouse and grain were thereupon destroyed by fire, *held*, that whether the transaction was a sale or a bailment, the warehouseman was liable for the value to the owner of the grain, in the one case for its purchase price, and the other for conversion: *Dierksen v. Cass County Mill, etc., Co.*, 42-88. (But *contra*, see later cases, *supra*, §§ 3-15.)

BANKRUPTCY.

I. JURISDICTION.

II. SUITS BY OR AGAINST ASSIGNEE.

III. EFFECT ON EXISTING LIENS, PRIOR CONVEYANCES, ETC.

IV. DISCHARGE.

I. JURISDICTION.

1. Service upon a partner in a proceeding in bankruptcy by the other partners may be made outside of the district upon the person of such partner, and may also be made by a party to the proceeding: *Stuart v. Hines*, 33-60.

2. Lien: After the filing of the petition in bankruptcy, no valid lien upon the property at that time owned by the bankrupt can be acquired in a state court: *Ibid.*

Suits by or against assignee.—Effect on existing liens, etc.

3. State courts have no jurisdiction to inquire into the existence of fraudulent preferences under the bankrupt law: *Putnam v. Swinney*, 63-383.

4. A state court has no jurisdiction to set aside for fraud a sale made by the assignee in a bankruptcy proceeding, even after final disposition of such proceedings, and the discharge of the assignee: *Akins v. Stradley*, 51-414.

5. Where action was brought in a state court in which the validity of title to land acquired by a purchaser from an assignee in bankruptcy was brought in question, *held*, that the validity of such title should have been determined in the court in bankruptcy and that the state court had no jurisdiction to pass upon it: *Smith v. Price*, 60-89.

6. A state court has not jurisdiction to declare a conveyance void because in violation of the provisions of the United States bankrupt law: *Brewster v. Dryden*, 53-657.

7. Nor to declare a judgment void as in contravention of such bankrupt law, when it is valid under state laws: *Hecht v. Springfield*, 51-502.

II. SUITS BY OR AGAINST ASSIGNEE.

8. Suit in state court: An assignee in bankruptcy may maintain an action in a state court to recover the assets of a bankrupt, or to set aside a conveyance of the property of the bankrupt made in bar of the rights of creditors. The exercise of original jurisdiction by the state court in such case is in no proper case an exercise of jurisdiction in bankruptcy, such as, by the bankrupt law, is exclusively vested in the federal courts: *Wetmore v. McMillan*, 57-344.

9. An assignee in bankruptcy is not required to go into court to defend an action commenced against the bankrupt prior to the date of the filing of the petition in bankruptcy: *Stuart v. Hines*, 33-60.

10. Limitation of action: The section of the bankrupt law (R. S., § 5067) providing that any one claiming an adverse interest, attaching any property or rights of property vested in the assignee in bankruptcy, must prosecute his action within two years, is applicable to a person seeking to enforce against such assignee a lien held by him

upon the property of the bankrupt prior to the assignment: *Goodnow v. Oakley*, 66-658.

11. In this respect a grantee of the assignee stands in his shoes and is entitled to the protection of the statute: *Ibid*.

12. The federal statute limiting the time within which action may be brought by the assignee does not apply to an action by the bankrupt to enforce a claim covered by the assignment after the assignee has abandoned it by failing to bring action until his right to do so is barred: *Coleman v. Riggs*, 61-548.

13. In such a case, the right of action on such claim becomes revested in the bankrupt after the settlement of the estate and his discharge, although the assignee has not been formally discharged: *Ibid*.

III. EFFECT ON EXISTING LIENS, PRIOR CONVEYANCES, ETC.

14. Fraudulent conveyance: Under the provisions of the bankrupt law making conveyances and transfers of property by the insolvent within a specified time before bankruptcy void, it is necessary, in order to defeat a sale, not only to show that the seller was insolvent or contemplated insolvency, but also that the purchaser had cause to know such fact, and that the sale was for the purpose of preferring him as a creditor and defeating the provisions of the law. The rights of such a purchaser cannot be defeated on account of fraudulent representations of the bankrupt when the purchaser had no reason to suspect a fraudulent intention: *Rice v. Melendy*, 41-395.

15. Attachment lien: A bankruptcy proceeding, commenced within four months after the levy of an attachment, extinguishes the debt and dissolves the attachment, although in the proceeding there is a composition by the creditors, and therefore no assignee is appointed to represent the debtor in the attachment proceeding and claim the property: *Smith v. Engle*, 44-265.

16. An attachment made more than four months preceding the commencement of the bankruptcy proceedings is not dissolved thereby, and the lien of such attachment may be enforced, although a judgment *in personam* cannot be recovered against the bankrupt after his discharge: *Hatch v. Seeley*, 37-493.

Effect on existing liens, etc.— Discharge.

17. **Assignments:** Although assignments made within four months prior to the bankruptcy are declared void, yet an assignment made merely to carry out an implied obligation previously existing will not be affected by the bankruptcy: *First Nat. Bank v. Haire*, 36-443.

18. **Lien; preferred creditor:** While a preferred creditor is deemed to waive his lien if he files and proves up his claim as a general creditor without disclosing the fact of such lien, yet if it does not appear that in doing so he failed to disclose his lien or released it to the assignee, it will not be presumed that he was guilty of fraud so as to extinguish his lien, or that he made such release: *Hatch v. Seeley*, 37-493.

19. **Mortgage:** If the creditor holding a mortgage as security for his debt does not become party to the proceedings by filing his claim, he must confine himself to the security which he holds, and if he does so, his rights are not affected nor can the lien be taken away, and the bankrupt court can acquire no jurisdiction over the mortgaged property with reference to such lien. In such case, the right to foreclose such lien can properly be prosecuted in a state court: *McKay v. Funk*, 37-661.

20. But in such action a personal judgment cannot be rendered against the bankrupt; and when the defendant moves to stay proceedings for such personal judgment on account of pendency of the proceedings in bankruptcy, the court should do nothing further as to that matter until the final determination of the question of the bankrupt's discharge. A rendition of a personal judgment, with an order staying execution until the final termination of the bankruptcy proceedings, is erroneous: *Ibid.*

21. **Setting aside payment:** Where a payment is set aside as having been made in fraud of other creditors, the creditor to whom the payment was made may recover the amount which he is compelled to refund from sureties on the indebtedness, although such sureties have, prior to the setting aside of the payment, paid the balance of the indebtedness and taken up the evidence of such indebtedness: *Watson v. Poague*, 42-532.

22. **An indorsement of a promissory note before maturity by a payee against whom**

bankruptcy proceedings have been commenced will not pass title. The indorsee will not be regarded as an innocent purchaser, and the note will pass to the assignee in bankruptcy, when appointed: *Seaton v. Hinneman*, 50-395.

IV. DISCHARGE.

23. **Not collaterally attacked:** A decree in bankruptcy is conclusive of the discharge except in cases of fraud or concealment, and the omission of the bankrupt to state the name of a creditor or the fact of a debt due, or a failure on his part to notify a creditor of his application for a discharge, will not avoid the effect of the discharge. When jurisdiction of the court to award a discharge is shown, the regularity of the proceedings cannot be collaterally assailed: *Magoon v. Warfield*, 3 G. Gr., 293.

24. **Certificate as evidence:** Although the certificate of discharge is evidence thereof, the same fact may also be proven by the decree awarding the discharge: *Ibid.*

25. **Decree conclusive:** A decree of discharge is sufficient evidence of the fact of discharge without the presentation of the certificate: *Viele v. Blanchard*, 4 G. Gr., 299.

26. Where the proceedings show that the bankrupt court had jurisdiction, the decree is conclusive of the discharge: *Ibid.*

27. The record of proceedings in bankruptcy held sufficient in a particular case to show that the court had jurisdiction to enter a discharge which would be a binding adjudication until reversed on appeal, even though erroneous: *Smith v. Engle*, 44-265.

28. Also, held, that the signatures of the bankrupts and certain of their creditors to a paper referring to a resolution accepting composition of debts was as binding as though signed to the resolution itself, and that as to whether the requisite creditors in number and value signed such paper, and as to whether the offer of composition was sufficient to support necessary proceedings thereon, was within the jurisdiction of the court in bankruptcy to decide: *Ibid.*

29. **Effect of discharge:** A discharge in bankruptcy duly and properly attested will be presumed to operate as a discharge from all debts, at least in the absence of proof that

Discharge.—Creation of.

the creditor had no notice of the bankruptcy proceedings: *Thornburgh v. Madren*, 33-380.

30. A discharge under state insolvent laws does not discharge a debt due to a citizen of another state, no matter where the debt was contracted or made payable, unless the creditor has appeared and submitted to the jurisdiction of the court by becoming a party or claiming a dividend: *Hawley v. Hunt*, 27-303.

31. Contingent debt: A contingent right to contribution between joint debtors is a claim provable under the bankrupt act, and in an action for such contribution, a discharge in bankruptcy, while the contract is in existence, may be shown in bar: *Frentress v. Markle*, 2 G. Gr., 553.

32. Liability on warranty: Where the bankrupt had, before bankruptcy, conveyed by general warranty deed premises covered by a mortgage, without excepting such mortgage from the covenants of the deed against incumbrances, *held*, that the claim of the grantee against the grantor for breach of such covenants was so far a contingent liability that it might have been proved up in the bankruptcy proceeding, but, not having been so proved, the discharge in bankruptcy relieved the bankrupt from any further liability thereon: *Parker v. Bradford*, 45-311.

33. Debts in fiduciary capacity: A debt incurred while acting in a fiduciary capacity is not discharged by a discharge in bankruptcy, even though it had been reduced to judgment before the bankruptcy proceedings: *Wade v. Clark*, 52-158.

34. It seems that a claim for wrongful conversion by a bailee of bailed property is barred by a discharge, and is not a debt owing in a fiduciary capacity so as to be excepted from such discharge: *Sumner v. Richie*, 54-554.

35. Subsequent promise: A promise by a bankrupt, made after the adjudication, but before he has obtained his certificate of discharge by which he agrees to pay the debt, is binding upon him: *Kuapp v. Hoyt*, 57-591.

36. Where the bankrupt said to his creditor that if he got his discharge "he would be in shape to pay and was going to pay," *held*, that this was sufficient to constitute an express promise: *Ibid*.

37. In such cases, if the debt is already in judgment, the creditor is entitled to equitable relief removing the apparent discharge from such judgment arising from the bankruptcy proceeding: *Ibid*.

38. Under the provision of the bankrupt law, that any contract by a bankrupt with a creditor for securing the payment of any money as consideration for forbearance to oppose discharge shall be void, and that the creditor may apply within two years to have the discharge set aside for fraud, etc., *held*, that a promissory note given for a debt existing prior to the adjudication, to a creditor, upon the condition that such creditor should dismiss a proceeding to set aside the discharge, was void: *Fell v. Cook*, 44-485.

BANKS.

1. Creation of: The constitutional restrictions upon the legislative authority to pass or amend acts authorizing or creating corporations or associations with banking powers (Const., art. 8, § 9) is not intended to forbid the repeal by the legislature of acts organizing banks, it being required, however, by § 8 of the same article, that such repeal be by a two-thirds vote: *Morseman v. Yountkin*, 27-350.

2. Liability of stockholders: The provision of the same article of the constitution rendering stockholders in a banking corporation or institution individually liable to an amount equal to their respective shares, applies only to banks of issue and not to banks merely of discount and deposit: *Allen v. Clayton*, 63-11.

As to taxation of stock, capital and deposits of banks, see TAXATION, §§ 146-157.

3. Deposits; bailment: Where United States bonds were deposited with a bank for the purpose of having them converted into similar bonds of another denomination, *held*, that the transaction was not to be deemed a gratuitous one, but for a compensation, and that the bank was liable as a bailee for hire: *Leach v. Hale*, 31-69.

4. A special deposit is one where the depositor is to receive back the identical thing deposited. In such case the right of property remains in the depositor: *Lowry v. Polk County*, 51-50.

Protest; negligence.

5. A receipt by a bank for money received "on deposit" does not show whether such deposit is special or general, and the bank may introduce parol evidence to show that the transaction was in fact a special deposit: *Keen v. Beckman*, 66-672.

6. Indorsement of a check by payee is not necessary, when payment is made to him: *Huber v. Bossart*, 70—.

7. Protest; negligence: It is the duty of a bank with which a note is left for protest to exercise ordinary and reasonable diligence in giving notice. Where a note was left with a bank for protest without direction as to where notice to the indorser should be sent, and it was sent by mistake to a person of the same name as that of the indorser, and living in the neighborhood, *held*, that the bank was not liable for negligence: *Mount v. First Nat. Bank*, 37-457.

Collecting agent: Liability of bank as, see AGENCY, § 48.

8. Payment to: While an agent having a money demand for collection cannot discharge the obligation by receiving anything but money unless specially authorized so to do, yet where a bank received a note for collection with direction that it should receive payment thereof in New York exchange, it being a bank of exchange as well as of deposit, *held*, that the acceptance in payment by the bank of its own certificate of deposit payable on demand was a discharge of the indebtedness, although it failed to remit the amount to the creditor, and afterward became insolvent, it appearing that on the day payment was thus made, it was paying its obligations and had money on hand with which the certificate could have been paid in cash if demanded, although it was actually insolvent, that fact not being known to the holder of the certificate: *British & Am. M'ge Co. v. Tibballs*, 63-468.

And see BILLS AND NOTES, § 433.

9. Liability for bills issued; partnership: Where a bank of issue was established by different banking firms, the notes thus issued being put into circulation by the different firms with an announcement that each was individually responsible for the bills issued, and that such bills would be redeemed in coin at the bank of issue, and at the places of business of the several partnership banks,

held, that while the several banking houses might have been separate institutions in some operations, yet each became a member of the new firm to carry on the bank of issue, and the bills issued might be presented for payment to either of such banking houses, or, in the case of their suspension, to individual members thereof: *Taylor v. Cook*, 14-501.

10. A stockholder of a bank which is illegally organized, and has issued, given currency to, and received value for, bills, is personally bound to redeem them, and may make a valid contract with another to redeem them for him: *Allen v. Pegram*, 16-163.

11. Sale of stock: Bank stock is personal property, and when sold, if there is nothing in the contract or circumstances to repel the presumption, the vendor will be considered as warranting the title, and that the stock is legally what it purports to be in fact; but not its quality or value: *Ibid*.

12. Where a note was made to a bank payable in its stock, *held*, that if the president, with whom the contract was made, afterward received the stock, he would hold it for the bank and as its property: *Markley v. Rhodes*, 59-57.

13. National banks; powers: The act of a national bank receiving United States bonds of one denomination from its own customers to be converted into bonds of similar denominations is within the powers conferred upon such banks by act of congress: *Leach v. Hale*, 31-69.

14. Although the national banking act prohibits the taking of real property security for loans, yet where security is given to one who becomes personally liable upon such loan, the bank may avail itself of such security: *First Nat. Bank v. Haire*, 36-443.

15. A national bank may take, hold and enforce a chattel mortgage for a previously contracted debt: *Spafford v. First Nat. Bank*, 37-181.

16. Under the act of congress, power is expressly given to national banks to discount and negotiate promissory notes: *Merchants', etc., Bank v. Moninger*, 49-249.

17. A mortgage upon real property, taken by a national bank as security, will not be void. The punishment for such act, if any, is a judgment of ouster, and dissolution in a

 Lists of stockholders.— Nature of proceeding; costs.

proper proceeding. A private person cannot usurp this function of government and question the validity of the act: *First Nat. Bank v. Elmore*, 52-541; *Streeter v. First Nat. Bank*, 33-177.

18. **Lists of stockholders:** Failure on the part of an officer of a national bank to comply with the provisions of the national banking act requiring a list of the stockholders to be kept, accessible to all, will not relieve from liability the person who is not thus shown to be a shareholder, but who is chargeable as such: *Hale v. Walker*, 31-344.

19. **Jurisdiction in actions against; change of venue:** The provision of the national banking act, giving jurisdiction in actions against such banks to state courts "in the county or city in which said association is located," does not limit jurisdiction absolutely to the state courts of that county; but the action being properly there brought, a change of venue may be had to the court of another county as in other cases: *Kinser v. Farmers' Nat. Bank*, 58-728.

20. **Receiver; payment of claims:** Under a provision of the national banking act, the assets of the association in the receiver's hands, or when reduced to money and placed subject to the order of the comptroller, are to be ratably divided, and appropriated to the payment of the legal liabilities of the association, whether they be technically so called, or result from fraud, or the nonfeasance or malfeasance of the association in respect to its legal obligations: *Turner v. First Nat. Bank*, 26-562.

BASTARDY.

1. **Nature of proceeding; costs:** An action under the bastardy act is a civil and not a criminal action, and the county is not liable for costs in case the judgment is in favor of defendant: *McAndrew v. Madison County*, 67-54.

2. **Dismissal:** And *held*, that the mother might dismiss the prosecution and release defendant, if she chose, or receipt in full for the judgment: *Holmes v. State*, 2 G. Gr., 501.

3. **Whether she might settle and receipt in full, so as to preclude the county from the right to resort to this proceeding to com-**

pel the putative father to execute a bond, with surety, to indemnify the county, *quære*; but she may thus preclude herself and the county from the right to maintain the proceeding to secure to her the maintenance of the child: *Black Hawk County v. Cotter*, 32-125; *State v. Noble*, 70—.

4. **Object of the proceeding:** The proceeding is a civil action of a summary nature, intended to secure the maintenance of the bastard, to the end that in no event shall the public become chargeable therewith. Therefore, where another person was chargeable for the maintenance of the bastard, by virtue of having married the mother while *enciente*, knowing the fact, and therefore standing to the child *in loco parentis*, *held*, that the proceeding could not be maintained: *State v. Shoemaker*, 62-343.

5. If the child is not born alive, an action, if already commenced, abates, and no judgment can be rendered for maintenance, nor for costs. In no event can the defendant be liable for lying-in expenses and medical attendance upon the mother: *State v. Beatty*, 61-307.

6. It is not improper, in a bastardy proceeding, to inform the jury that the object of the proceeding is to protect the county from the expense of keeping an illegitimate child: *State v. Pratt*, 40-631.

7. **Jurisdiction:** The action cannot be maintained outside of the jurisdiction within which it arose, but a judgment therein is entitled to full faith and credit in any other state. (So *held*, in relation to such proceeding, under the statutes of Indiana): *State of Indiana v. Helmer*, 21-370.

8. Under prior statutes it was *held* that the jurisdiction of such cases was in the circuit court instead of the district court, as at present: *State v. Cook*, 31-519; *Montgomery County v. Gorman*, 34-442.

9. **Procedure** under prior statutes discussed: *Mills County v. Hamaker*, 11-206.

10. **Evidence:** The statutory provisions requiring corroboration of the testimony of an accomplice, or of that of the prosecutrix in case of rape, seduction, etc., to warrant a conviction in a criminal prosecution, are not applicable in this proceeding. Neither need the case against defendant be made out beyond a reasonable doubt; a preponderance

Evidence.

of evidence is sufficient: *State v. McGlothlen*, 56-544.

11. But this rule applies to the question of guilt or innocence upon the whole case and does not dispense with the force and effect to be given to presumptions arising from facts disclosed in evidence; and where it appeared that the child was born three months after the marriage of prosecutrix, *held*, that the presumption would arise that the child was begotten by the person to whom prosecutrix was married, and that unless this presumption was rebutted by clear, satisfactory and conclusive evidence, there would not be a preponderance of evidence such as to warrant conviction of defendant: *State v. Romaine*, 58-46.

12. Where the prosecutrix, after cohabiting with defendant, returned to his house, *held*, that proof that defendant had knowledge of declarations by her that she did so for the purpose of becoming the mother of a child and holding him for its support was not pertinent in his behalf: *State v. Pratt*, 40-631.

13. The fact that the jury find that prosecutrix had connection with other men will not preclude them from finding defendant to be the father of the child: *Ibid*.

14. In such a proceeding it is always allowable to show unchaste conduct with a man other than the defendant, and especially if the circumstances are such as not to preclude the possibility that the other was the father of the child: *State v. Karver*, 65-58.

15. Where the complainant has been guilty of illicit intercourse with a man other than the defendant, it is competent to show such fact as a circumstance to be used in corroboration of the defendant in denying the paternity of the child; and this circumstance may become very important if it is shown who the other man was, and that his intimacies and opportunities continued until after the child in question was begotten: *State v. Woodworth*, 85-141.

16. Evidence of the fact that complainant was accustomed, before and after the time the child was conceived, to occupy the same bed with a person who might have been the father of the child is admissible as tending to affect the credibility of her testimony

charging defendant with the child's paternity: *State v. Read*, 45-469.

17. Evidence that prosecutrix was pregnant at the time of the alleged intercourse not only tends to corroborate defendant in testifying that he did not have connection with prosecutrix, but shows that he was not the father of the child, even if he did have connection with prosecutrix as alleged: *State v. Smith*, 61-538.

18. Also *held*, that evidence that the child was prematurely born did not corroborate the testimony of prosecutrix that defendant had connection with her at a time which was too near the birth of the child to allow full period of gestation: *Ibid*.

19. Evidence in a particular case *held* sufficient to support a verdict against the defendant: *State v. Quinton*, 59-362.

20. In a particular case, *held*, that under the evidence the instructions were not as favorable to the defendant as they should have been: *State v. Smith*, 61-538.

As to the resemblance of child to defendant, see EVIDENCE, §§ 818-815.

BILL OF EXCEPTIONS.

See EXCEPTIONS.

BILL OF LADING.

See CARRIERS.

BILL OF PARTICULARS.

See PLEADINGS, I, c.

BILLS AND NOTES.

I. FORM; REQUISITES; CONSTRUCTION; NEGOTIABILITY.

a. Negotiability of different classes of instruments.

Form, etc.—Negotiability.

I. FORM, ETC.—continued.

b. *Certainty.*

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As to liability of administrator or executor upon, see ESTATES OF DECEDENTS, §§ 79-82.

As to power of partner to bind firm by note, see PARTNERSHIP, §§ 68-69.

c. *Execution and delivery.*d. *Construction.*e. *Illegality.*

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VIII. DEFENSES AS BETWEEN THE ORIGINAL PARTIES.

a. *Forgery, fraud, want of consideration, illegality, etc.*b. *Payment, etc.*

IX. ACTION UPON.

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As to effect of alteration, see ALTERATION OF INSTRUMENTS.

I. FORM; REQUISITES; CONSTRUCTION; NEGOTIABILITY.

a. *Negotiability of different classes of instruments.*

1. **Foreign bill of exchange:** A bill drawn in one state upon a person residing in another is a foreign bill of exchange: *Bernard v. Barry*, 1 G. Gr., 388.

2. **Draft:** It appears that a draft, drawn by a banker in favor of a third party as payee, against funds on deposit with a banker in another state, is not a foreign bill of exchange, but a banker's check: *Roberts v. Corbin*, 26-315.

3. A draft drawn by one banker upon another and purporting to be drawn upon funds deposited, and payable upon demand, is a banker's check: *Northwestern Coal Co. v. Bourman*, 69-150.

4. A certificate of deposit payable at a certain date to the order of the payee is a negotiable instrument: *Bean v. Briggs*, 1-488.

5. But such a certificate of deposit is not an equivalent of money; so held under a statute providing that, in making redemption from execution, the amount required might be paid in money or its equivalent: *Dougherty v. Hughes*, 3 G. Gr., 92.

6. **Municipal bonds:** Bonds of a municipal corporation, made in form and method of issue negotiable by delivery, to be bought and sold in the money and stock markets, are a class of negotiable sureties: *Callanan v. Brown*, 31-333.

7. The holder of such bonds for value before maturity takes free from any defense not affecting the authority of the municipality to issue them, and is not required to go behind the records to determine whether

Negotiability.

authority to issue them existed: *Clapp v. Cedar County*, 5-15.

8. If the power to issue bonds never existed, no subsequent transfer thereof can give them the effect of legal liabilities in the hands of any one. But if the power has been delegated, as, for instance, by a vote, authorizing a loan, then any irregularity in conducting the vote, or other imperfection in the exercise of the power, will not vitiate them in the hands of a *bona fide* holder, either in a direct or collateral proceeding: *Hull v. Marshall County*, 12-142.

9. Municipal bonds are not only negotiable instruments, the holders of which are protected to the same extent as holders of negotiable paper, but they are, like bank bills and national currency, chattels, in so far as that character tends to relieve them from the incidents and burdens incident to choses in action and gives to them a merchantable and vendible quality. The right and title of the first purchaser from the corporation is as fully protected as are those of a subsequent purchaser: *Griffith v. Burden*, 35-138.

Further as to municipal bonds, warrants, etc., see MUNICIPAL CORPORATIONS, I, d.

10. Warrants or orders of school districts, cities, etc.: An order upon the treasurer of a school district, although payable to bearer and negotiable in form, does not possess the characteristics of negotiable paper: *National State Bank v. Independent Dist.*, 39-490.

11. The indorsee thereof, before maturity, for value, in good faith, does not take free from equities: *Shepherd v. District T'p*, 22-595.

12. The fact that such warrants are in excess of indebtedness to be paid can be urged against a *bona fide* holder: *Eastman v. District T'p*, 40-493.

13. Such orders are not bills of exchange, but the mere promissory notes of the municipal corporation, and although they may run to order or bearer, and suit thereon be brought by the holder in his own name, it does not follow that the paper is invested

with all the qualities of negotiability: *Clark v. Des Moines*, 19-199.

14. Railroad bonds; issue: Bonds are said to be "issued" only after they have passed into the hands of purchasers: *Dunham v. Isett*, 15-284.

15. A land warrant is a mere chattel, not assignable by delivery, or blank indorsement: *Fort v. Wilson*, 8-153.

16. A note payable in property is not negotiable: *McCartney v. Smalley's Adm'rs*, 11-85.

17. Such an instrument becomes a cash note if the payor fails to make payment at the time and in the manner specified: *Hall v. Hunter*, 4 G. Gr., 539.

18. Under a statutory provision¹ that notes payable in property may be made negotiable, *held*, that the use of the words, "without defalcation," was sufficient to evidence that intent: *Council Bluffs Iron Works v. Cuppey*, 41-104.

19. But the use of the words "or bearer" *held* not sufficient to make such an instrument negotiable: *Peddicord v. Whittam*, 9-471.

20. And so *held*, also, in regard to the use of the words "or order" in a receipt for corn: *Merchants', etc., Bank v. Hewitt*, 3-93.

21. A note payable "in currency" or "in current funds" is not *prima facie* a negotiable instrument either by commercial law or under the statutory provision last above referred to, even though made payable at a banking house: *Rindskoff v. Barrett*, 11-172; *Huse v. Hamblin*, 29-501.

22. But evidence of the general and customary meaning of those expressions at the place where the instrument is payable is admissible to show what the parties meant by such words: *Pilmer v. Branch of State Bank*, 16-321.

23. And if it appears by parol evidence that by the use of such terms the parties meant and understood that the instrument was payable in money, the attributes of negotiability are thereby imparted to it:

¹ Code, § 2085. Instruments by which the maker promises to pay a sum of money in property or labor, or to pay or deliver property or labor, or acknowledges property or labor or money to be due to another, are negotiable instruments, with all the incidents of negotiability, whenever it is manifest from their terms that such was the intent of the maker; but the use of the technical words "order" or "bearer" alone will not manifest such intent.

Certainty.

Haddock v. Woods, 46-433. And see *Haddock v. Citizens' Nat. Bank*, 53-542.

24. A note payable to bearer, naming him, is, in legal effect, payable to the person named therein, the same as if the word bearer were omitted, and is non-negotiable: *Warren v. Scott*, 32-22.

25. Negotiable and payable at particular place: The provision in a note, that it is negotiable and payable at a particular place, has no effect on its negotiability and does not restrain its being negotiated elsewhere: *Schoharie County Nat. Bank v. Bevard*, 51-257.

26. Coupled with chattel mortgage: Where an instrument contained all the elements of a negotiable note, but in connection therewith provisions giving the payee of the note security in the nature of a chattel mortgage, *held*, that the negotiability of the instrument was not thereby affected: *Bank of Carroll v. Taylor*, 67-572.

27. Notes under seal: Under a statute declaring that promissory notes, bonds, due bills, etc., should be assignable by indorsement in the same manner as inland bills of exchange, *held*, that the fact that a note of such description was under seal would not prevent the application of the statute to it: *Temple v. Hays*, Mor., 9.

b. Certainty.

28. Certainty as to amount: The figures in the margin of a note are no part of the instrument. They constitute a mere memorandum, and cannot supply the omission in the body of the instrument to state the amount, where the blank left for the insertion of the amount is not filled up: *Hollen v. Davis*, 59-444.

29. Where a note provided for the payment of a certain amount, with the further provision that the payee might at any time be deemed himself insecure, even before the maturity of the instrument, take possession of the property in consideration of which the note was executed, and sell it on notice, *held*, that such provision rendered uncertain the amount which was to become due at maturity, and, therefore, that the instrument was not negotiable: *Smith v. Marland*, 59-645.

30. A note containing the stipulation that the amount is subject to diminution or reduction by showing overcharges, is a promissory note, and the maker, being sued thereon, has the burden of showing the existence of overcharges, if any such are claimed: *Green v. Austin*, 7-521.

31. Attorneys' fees: A provision in a note for the allowance of collection and attorneys' fees, if not paid when due and suit is brought thereon, will not affect the negotiability of the note. Such provision relates rather to the remedy than to the sum which the maker is bound to pay: *Sperry v. Horr*, 32-184.

As to attorney's fee, in general, see ATTORNEYS, IV.

32. Certainty as to time of payment: An instrument, which by its terms is not to become due any time except at the option of the maker, is uncertain as to the time of payment and not a negotiable instrument: *Woodbury v. Roberts*, 59-848.

33. A note payable upon demand, *held* not rendered uncertain as to time of payment by the insertion of the provision, "payable at Cincinnati, when convenient," for the reason that such clause could not be construed as qualifying the other words of the instrument: *Works v. Hershey*, 85-340.

34. Payable out of particular fund: A note payable "twelve months after date or before, if made out of the sale of Drake's hayfork and hay-carrier," is sufficiently certain as to time of payment, to be negotiable: *Charlton v. Reed*, 61-166.

35. So, where an instrument, in addition to the ordinary terms of a note, contained certain provisions relating to the sale of collateral securities by the payee and the application of the proceeds on the note, *held*, that under the peculiar language of the provisions, there being nothing stipulated for by way of condition precedent to the action on the note, the instrument was not rendered non-negotiable: *Knipper v. Chase*, 7-145.

36. But where a note contained the following stipulation, "if this agent [the maker] does not sell enough in one year, one more is granted," *held*, that payment at the end of the year was provided for out of a particular fund, and as the note was therefore payable only on the happening of a condition, it was not sufficiently certain as to the time, to

Execution and delivery.—Construction.

be negotiable during that period, and although it was payable absolutely at the expiration of two years, yet not having been negotiable from the first, it was not negotiable at all: *Miller v. Poage*, 56-96.

c. *Execution and delivery.*

37. Execution: The fact that a note is written on the back of a paper containing a written contract does not alter its character: *Dunning v. Rumbaugh*, 86-566.

38. Signature: Statements by one of the makers of a promissory note, made at the time of its delivery, as to the fact of signature by a co-maker, are not admissible as against the latter: *Smith v. Wagaman*, 58-11.

As to authority of agent to sign, see AGENCY, § 75.

39. Delivery is more than the mere manual act of passing over the instrument. It requires the assent of the mind as well: *Marsh v. Griffin*, 42-403.

40. Delivery without authority: Under particular facts, *held*, that delivery of a note in suit made by an agent of the maker was without authority, and that therefore the maker did not become liable: *Ware v. Smith*, 63-159.

41. Where one person delivers to another his negotiable promissory note under an agreement that it is not to be put in circulation until the happening of some event, or that in a certain contingency the note is not to be considered as delivered, and the person to whom it is delivered puts it in circulation, an innocent indorsee for value, before maturity, may maintain an action thereon, notwithstanding the violation of the agreement: *Graff v. Logue*, 61-704.

42. The principle that sureties who sign a negotiable instrument and leave it in the hands of the principal, who delivers it, cannot be heard to say that they signed it upon conditions which were not fulfilled, is not applicable to instruments not negotiable: *Daniels v. Gower*, 54-319.

43. Therefore, where the instrument was signed by sureties and left with a third person to be delivered when signed by an additional surety, and such person delivered it to the principal without the condition being performed, and the principal delivered

it to the payee, *held*, that the sureties were not bound thereby: *Ibid*.

44. Delivery in blank: One who places his signature to a blank instrument and intrusts it to another for some purpose will be liable if such person fraudulently fills it up as a promissory note, and it is negotiated before maturity to an innocent purchaser for value: *McDonald v. Muscatine Nat. Bank*, 27-319.

45. Reissue: If a promissory note be paid by the maker and again put by him into circulation, he is liable thereon as maker to any indorsee into whose hands it may fall after its reissue: *Wilkerson v. Daniels*, 1 G. Gr., 179.

46. Accommodation paper: The fact that accommodation paper has been once discounted and afterward taken up by the party accommodated does not render it void in his hands, but he may again use it, and it will be good in the hands of one who takes it for a proper purpose with knowledge of these facts, but without knowledge of any agreement between the parties as to the purpose for which it was to be used: *Washington Bank v. Krum*, 15-58.

d. *Construction.*

47. Lex loci: The law of the place of delivery of a note, and not that of the place where dated, is the *lex loci contractus*: *Hart v. Wills*, 52-56.

48. The indorsement on a note constitutes a distinct contract and is governed by the law of the state where made: *National Bank v. Green*, 83-140; *Huse v. Hamblin*, 29-501; *Chatham Bank v. Allison*, 15-357.

49. The law of the place where a draft is made payable governs in respect to the allowance of days of grace: *Thorp v. Craig*, 10-461.

50. As to the extent and nature of the liability of the drawer of a draft, the *lex loci contractus* governs: *Ibid*.

51. Protest for the purpose of holding a drawer should be in accordance with the law of the place where the draft is drawn: *Ibid*.

52. But apparently *contra*, holding that protest and notice must be in accordance with the law of the place of payment, see *Allen v. Harrah*, 30-303.

Construction.—Illegality.

53. Place of payment: The fact that the note is dated at one place will not fix that as the place of payment, if it is, in fact, delivered elsewhere: *Hart v. Wills*, 52-56.

54. Payable at particular place: Where a note was made payable to "the Equitable Life Insurance Co. of Iowa, at its office," and upon the note, preceding the date, were the words "Office of the Equitable Life Insurance Co., Des Moines, Iowa," held, that it sufficiently appeared that the office of the company was at Des Moines, and that the court would take judicial notice as to what county Des Moines was situated in: *Equitable L. Ins. Co. v. Gleason*, 56-47.

55. Interest: The language, "with interest annually," means that interest is payable annually: *Failing v. Clemmer*, 49-104.

56. Where the note contained the provision, "with ten per cent. after due," the word interest not appearing, held, that the question of construction of the instrument was a matter of law for the court, and that it should be construed as providing for ten per cent. interest after due: *Higley v. Newell*, 29-516.

57. Where a note provided for interest at a certain rate, and a mortgage given to secure it provided for the payment of money with the same rate of interest, with the additional provision that it should be "payable annually according to the terms of" the note, held, that the two instruments were not inconsistent, but that the mortgage specifically provided for something as to which the note was silent, and was to be regarded as incorporating such provision into the note: *Dobbins v. Parker*, 46-357.

58. Where the provision of a note as to interest was, "if not paid when due to bear twenty-five per cent. interest," held, that upon failure to pay at maturity the maker became liable for interest from date: *Horn v. Nash*, 1-204.

59. A promissory note, with "interest from date," draws the same rate of interest after maturity as before: *Lucas v. Pickel*, 20-490.

c. *Illegality.*

60. Gambling contracts: The effect of a statute which makes an instrument based upon a gambling transaction void and of no

effect is to render such instrument void in the hands of innocent holders: *Traders' Bank v. Alsop*, 64-97; *Craig v. Andrews*, 7-17.

61. Action cannot be maintained upon an instrument of that character: *Sipe v. Finarty*, 6-394.

62. Even if the note is given upon an apparent consideration, the agreement between the parties may be such as to make it void as a wagering contract: *Craig v. Andrews*, 7-17.

See, also, CONTRACTS, §§ 332-353.

63. Sunday contracts: A note executed upon Sunday is within the prohibition of the statute imposing a penalty upon any one engaged "in any labor" upon that day, and is void in the hands of the payee or his assignees: *Sayre v. Wheeler*, 81-112; *S. C.*, 32-559.

64. A note signed on Sunday, but not in fact delivered until Monday, is not subject to the objection that it is a Sunday contract: *Bell v. Mahin*, 69-408.

65. Where it appears that a note was in fact executed on Sunday, but on its face it bears another date, and there is nothing to suggest its invalidity, it will be valid in the hands of an innocent purchaser, without notice, before maturity: *Clinton Nat. Bank v. Graves*, 48-228.

66. One who takes such a note by transfer, even after maturity, without notice, may recover thereon. The defense is not an equity which may be set up against a purchaser after maturity: *Leightman v. Kadetska*, 58-676.

See, also, CONTRACTS, §§ 300-317.

67. Public policy: Notes to secure the location of a railway to a certain point, or to secure a change of location therein, are not in contravention of public policy and may be valid: *First Nat. Bank v. Hendrie*, 49-402.

68. Revenue stamp: The failure to affix a stamp will not invalidate the instrument unless its omission was with intent to defraud the government: *Works v. Hershely*, 35-340; *Ricord v. Jones*, 33-26.

69. If there is nothing on the face of the instrument to show that it was post-stamped, in violation of the provisions of the United States revenue laws, requiring the affixing of a stamp at the time of execution, it will

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be good in the hands of an indorsee or holder, for value, who receives it in ignorance of the fact that it was not stamped until after issue: *Blackwell v. Denie*, 28-63; *Lake v. Streeter*, 84-601.

70. Where the note is fraudulently left unstamped at the time of its execution, but afterwards and before maturity it gets into the hands of a *bona fide* purchaser properly stamped, the fact of fraud in stamping is no defense: *Anderson v. Starkweather*, 28-409.

71. Where the instrument bears the proper stamp at the time it is transferred to an innocent holder, for value, the presumption that the stamp was affixed at the proper time and by the proper party is conclusive in his favor: *Robinson v. Lair*, 31-9.

72. But an indorsee of a note improperly stamped, who takes it with knowledge of such defect, is in no better condition than the payee: *First Nat. Bank v. Dougherty*, 29-260.

73. The fact that a note is not properly stamped when intrusted to another person for negotiation will not affect the rights of a *bona fide* holder thereof: *Gage v. Sharp*, 24-15.

74. The mode of cancellation of the revenue stamp is not essential to the validity of the note: *Robinson v. Lair*, 31-9.

75. Where a note was stamped by the payee in pursuance of authority given by the maker at the time of execution, *held*, that it was not, on that account, void: *Mitchell v. Smith*, 82-484.

As to the effect of failure to stamp, see also, CONTRACTS, §§ 288-290.

II. CONSIDERATION.

76. Presumed: A promissory note imports that it was made upon sufficient consideration: *First Nat. Bank v. Hurford*, 29-579.

77. The presumption is that the consideration was sufficient, and it is for the maker relying upon want of consideration to rebut such presumption: *Trustees of Iowa College v. Hill*, 12-462.

78. The act of giving a note is *prima facie* evidence of consideration: *Thompson v. Maugh*, 3 G. Gr., 342.

79. Joint note: Where a note is executed by joint makers, one cannot avoid payment

by showing that the other received the consideration. It is presumed that it was entered into on the credit of the names attached to the note: *Myers v. Sunderland*, 4 G. Gr., 567.

80. Parol evidence to vary: Where the maker of a note executes the same at the time of receiving the amount of money therein specified, the presumption is that the money received constitutes the consideration of the note, and this presumption cannot be rebutted by parol proof of a contemporaneous agreement, showing the transaction to have been altogether different, and transforming the note into a mere memorandum of an agreement which would show the note to be without consideration: *Dickson v. Harris*, 60-727.

81. Illegality: A particular form of illegality in the consideration declared by statute may be insufficient to constitute a defense to instruments already in existence: *Hill v. Smith*, Mor., 70.

82. Given for intoxicating liquors: Where the consideration is in part intoxicating liquors, it is by statute (Code, § 1550) made utterly null and void: *Taylor v. Pickett*, 52-467.

83. Where defendant, having purchased intoxicating liquors of one B., which were unlawfully sold, in payment therefor, assumed to pay an amount which B. owed plaintiff, plaintiff being a party to the novation, and accepting defendant as his debtor instead of B., *held*, that defendant could not defeat plaintiff's recovery on the ground that the contract for the purchase of liquors from B. was void by the statute: *Bower v. Webber*, 69-286.

84. To secure location of public buildings: Where a note was given to one of the trustees of the state reform school as a subscription for the purpose of procuring a site therefor and thus securing the location thereof at a certain place, *held*, that, the school being located at the place designated, the maker of the note was liable: *Wisner v. McBride*, 49-220.

85. Failure of consideration: Where a note was executed as a subscription to an endowment fund, and, as alleged, in consideration of an agreement by the payee that the principal of the fund should remain un-

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diminished, *held* (by a divided court), that the diminution of the fund would not operate as a failure of consideration: *Simpson Centenary College v. Bryan*, 50-293.

86. **Partial failure:** Where a note is given under an entire contract for the purchase of two pieces of real property, a failure of title to one will not defeat the note, but the title to the other tract will be a sufficient consideration: *Wadsworth v. Nevin*, 64-64.

87. **Waiver; renewal note:** A party executing a note as a renewal of a former note, cannot, as against the payee, set up partial failure of consideration, of which he had knowledge at the time of the renewal. The surrender of the original note will be deemed the consideration for the renewed one: *Keyes v. Mann*, 68-560.

88. **Want of consideration** may be shown as bearing upon an issue as to whether the instrument is a forgery: *Donahue v. Wagner*, 68-358.

89. **Parol condition:** While partial failure of consideration may be shown as between the parties, it is not competent to prove by parol testimony that, on certain contingencies, the note should be valid only for a portion of the amount stated on the face thereof: *Ather-ton v. Dearmond*, 33-353.

90. **Rescission not necessary:** Where the consideration of a note has failed, recovery thereon may be defeated although payee has not rescinded or offered to rescind the contract under which the note was given: *Moore v. Moore*, 39-461.

91. **Patent-right:** Where the consideration of a promissory note was the assignment of a patent-right, *held*, that the question was not whether the payee had intended or attempted to make such assignment, but whether the assignment vested the maker of the note with the right contracted for: *Snyder v. Kurtz*, 61-593.

92. **Stock in railway company:** Where a county voted to issue negotiable bonds in aid of a railway in exchange for stock, but the transaction was, after the sale of a part of the bonds, *held* illegal, and the balance not issued, the county being compelled to pay those bonds issued, because in the hands of innocent holders, *held*, that such bonds were not without consideration, although no stock was ever issued, the contract on the part

of the county not being fully performed so as to entitle it to the stock agreed upon: *Jefferson County v. Burlington & M. R. R. Co.*, 66-385.

93. **Support of child:** Agreement of the natural parent of a child for his support by adopting parents with whom an agreement for retransfer of the child to the natural parent had been made, but not yet consummated, *held*, sufficient to support a note and mortgage: *Clayton v. Whitaker*, 68-412.

94. **Compromise of claim; burden of proof:** In an action on a note, the consideration for which was the settlement of a claim before suit, *held*, not necessary for the payee to show that he had a probable cause of action in the claim settled, but that the burden of proof was upon defendant to show the contrary, in order to impeach the consideration: *Sullivan v. Collins*, 18-228.

95. It is not necessary, in order to support a note given in settlement of a disputed claim, that the claim compromised be shown to be valid. If it was doubtful, it would be a sufficient consideration: *Keefe v. Vogle*, 36-87.

96. The compromise or settlement of a claim which is wholly illegal and unfounded, and upon which no suit has been brought, is not a sufficient consideration: *Tucker v. Ronk*, 43-80.

97. The compromise of a claim before suit brought will not be a sufficient consideration to support a note unless the claim be sustainable at law or in equity, or at least doubtful, either in its right or amount: *Sullivan v. Collins*, 18-228.

98. **Extension of time upon new security:** Giving a new note with security in part payment of an unsecured note is a sufficient consideration for the extension of time of payment: *Gates v. Hamilton*, 12-50.

99. **Extension of a debt due from a third person** is a good consideration for a note; and when a note is executed upon an agreement between the parties thereto, that time on the original debt shall be extended, the consideration is sufficient even though the note is executed at the request of the original debtor: *Atherton v. Marcy*, 59-650.

100. **Extension of time or release of indorser** is not sufficient consideration for a new indorsement by an accommodation

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indorser if the holder has not good reason to suppose that the new indorser understood that he was incurring a new liability thereby, and proof by the new indorser that he did not know of the release or extension might be sufficient to prove want of consideration: *Larned v. Ogilby*, 20-410.

Further as to consideration, see CONTRACTS, VIII.

III. NEGOTIATION AND TRANSFER; ACCEPTANCE.

a. Method of transfer.

101. By delivery: A promissory note made payable to bearer is negotiable and transferable by mere delivery, and needs no indorsement. Any person bearing or presenting the note is, in that case, the party to whom the maker of the note promises to pay it: *Elliott v. Corbin*, 4-564.

102. Such a transfer is a parol assignment: *Creighton v. Gordon*, Mor., 41.

103. A note not payable to bearer cannot be transferred by mere delivery: *Dawson v. Jewett*, 4 G. Gr., 157; *Mainer v. Reynolds*, 4 G. Gr., 187.

104. If a note payable to bearer is transferred by delivery, the holder may sue thereon in his own name: *Shelton v. Sherfey*, 8 G. Gr., 108.

105. Assignment without indorsement: A note payable to payee or order may be assigned without indorsement so that (under Code, §§ 2543, 2546) the assignee may sue in his own name, but subject to any defense or set-off existing in behalf of the maker against the assignor, before notice of assignment: *Younker v. Martin*, 18-148; *Pearson v. Cummings*, 28-344.

106. A transfer by a separate instrument is an assignment and not an indorsement: *Franklin v. Twogood*, 18-515.

107. An assignment by the payee in writing on the note constitutes an indorsement: *Sears v. Lantz*, 47-658.

108. Indorsement to bearer: After an indorsement of a note to a certain person, or bearer, it becomes payable to any person, as indorsee, who may be in possession: *Shelton v. Sherfey*, 8 G. Gr., 108.

109. Indorsement in blank: The writing on the back of a note of the words "I hereby

indorse within note," held to be a blank indorsement: *Conger v. Babbet*, 67-18.

110. The indorsement of a guaranty and waiver of demand and notice of non-payment is a sufficient indorsement to transfer title: *Robinson v. Lair*, 81-9.

The indorsement of a non-negotiable note is equivalent to the making of a new note by the indorser: See *infra*, § 274.

111. Indorsement and guaranty; validity; stamp: A writing on the back of a note by the payee in the form of an indorsement, but also containing words of guaranty, may be considered either as an indorsement or as a guaranty, and although, considered as a guaranty, it may be void because not stamped as formerly required by the United States revenue laws, it may still be recovered on as an indorsement: *Muscatine Nat. Bank v. Smalley*, 30-564.

112. Unauthorized indorsement: An indorsement of the name of the owner by a person having no authority to make such indorsement confers no title upon the indorsee: *Thorpe v. Dickey*, 51-676.

113. A power of attorney which gives authority "to sell, convey and dispose of any and all property, real and personal, give bill of sale of personal property, and do and perform every act and thing whatsoever required in the premises," etc., confers upon the agent power to transfer a promissory note of the principal by indorsement: *Gould v. Bowen*, 26-77.

114. An indorsee for collection cannot transfer the note to another who is aware of the facts: *Clafin v. Wilson*, 51-15.

115. Indorsement for collateral security: When the payee of a note indorses it and delivers it to the bank as collateral security, he thereby vests the bank with title thereto, and unless its rights with reference to the instrument are expressly limited, it has power to make such disposition of it as it may elect, being answerable for its value, and a transferee thereof acquires good title thereto: *Rand v. Barrett*, 66-731.

116. Where a note and mortgage are given to another for the purpose of enabling him to borrow money thereon, he has authority to pledge them as collateral security for his own note for money borrowed: *Tomblin v. Callen*, 69-229.

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117. One partner without the consent of his copartner cannot indorse a partnership note in payment of an individual debt: *Fletcher v. Anderson*, 11-228.

118. But this rule does not apply after the note has ceased to belong to the firm and become property of the individual partner: *Ibid.*

119. Where, after the dissolution of the firm, a note payable to the firm is found in the possession of one of the members, regularly indorsed in the firm name, the law presumes that he came rightfully in possession of it, either in the regular course of business or at the dissolution of the firm, and will regard him as the lawful owner until circumstances of suspicion are shown: *Ibid.*

120. Indorsement of a note by a member of the firm not assuming to bind the firm will not constitute a warranty of the genuineness of the signature of the firm's name to the note binding upon the firm: *Miller v. House*, 67-737.

121. Assignment by foreign executor: The holder of a note acquiring it by assignment from an executor may maintain action thereon in the courts of a state other than that in which the executor was appointed: *Campbell v. Brown*, 64-425.

122. Conversion: One who purchases a note with notice of the right of another party thereto acquires no title, and is liable for conversion in taking possession of and collecting such note: *Allison v. King*, 25-56.

123. An agreement not to transfer, while it may be an independent covenant, upon breach of which the obligor may be liable, will not destroy the negotiability of the note. The fact of such agreement without more will not be sufficient to charge the holder with notice of defenses: *Leland v. Parriott*, 35-454.

124. Striking out subsequent indorsement: The payee in possession is presumed to have a beneficial interest in the note notwithstanding any indorsement thereon, and may bring an action in his own name: *Gordon v. Pitt*, 3-385.

125. In such case, an indorsement on the back which appears to be stricken off, will be presumed to have been erased on due authority: *Goddard v. Cunningham*, 6-400.

126. The real owner and holder has the right to erase a special indorsement on the note, and need not explain such erasure in offering the note in evidence: *Jones v. Berryhill*, 25-289.

127. So, in a suit upon a draft, payable to plaintiff, bearing several unerased indorsements, held, that testimony by the plaintiff that he had, on the draft being protested, taken it up and was now the owner thereof, was admissible, but superfluous, for being in possession he had *prima facie* the right to erase the prior indorsements and recover as payee: *Pulmer v. Branch of State Bank*, 19-112.

128. Where the payee, after indorsement by him, lifts the note by payment to the indorsee, he does not acquire title under a new contract, but the note becomes again fully and exclusively his property, and he is authorized to strike out his indorsement. The indorsee's interest, while it continues, is not of such exclusive character as to deprive the indorser of all interest and title in the note. He still has a conditional title, which becomes absolute upon payment by him after dishonor, and may then enforce a mechanic's or landlord's lien for the indebtedness for which the note was given, although, as to the indorsee, the transfer of the note extinguished such lien: *Farwell v. Grier*, 38-83; *German Bank v. Schloth*, 59-816.

129. Upon the note after indorsement coming again into the legal possession of the payee, he may erase all indorsements, and sue in the same manner as though he had never parted with possession: *Sater v. Hendershott*, Mor., 118.

130. Transfer of distinct shares: The owner may sell distinct shares of a note to different persons, who thus become co-owners, and one of such co-owners may protect his interest by an action and may maintain trover if a co-owner be guilty of conversion: *Conover v. Earl*, 26-167.

131. Indorsement may be made for a portion of the amount included in the note and the indorser will be liable to that extent, as though the indorsement had been to the entire amount of the instrument: *Cochran v. Glover*, Mor., 151.

132. If a party becomes entitled to a part interest, he may have a transfer of such

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part with the security. belonging thereto: *Vogel v. Wadsworth*, 48-28.

133. Transfer of a note carries with it security: The assignment of a note given for the purchase-price of real property carries with it a vendor's lien and any and all other equities and rights attaching to the debt: *Bills v. Mason*, 42-329.

134. So, if a note be secured by a mortgage, the indorsement of the note before maturity to a good faith holder transfers the mortgage free from equities between the original parties in the same manner as the note: *Updegraff v. Edwards*, 45-513.

135. Transfer in separate instrument: A transfer in a separate instrument, executed for an independent purpose to which the transfer is merely incident, is an assignment and not an indorsement, and the holder thereunder is subject to defenses: *Franklin v. Twogood*, 18-515.

136. A land-warrant is a mere chattel not assignable by delivery or blank indorsement, and transfer of the same should be made by a full assignment: *Fort v. Wilson*, 8-153.

137. The verbal transfer of a note with notice thereof to the maker imposes upon him an equitable obligation to make payment to the assignee, and though not sufficient to support implied *assumpsit*, it is a good consideration for an express promise to pay to the assignee: *Allison v. Barrett*, 16-278.

138. Where a note was verbally assigned by the payee, who retained possession, and the maker promised to pay it to the assignee, and the note was subsequently sued upon by the creditors of the payee, while in his possession, and sold under such levy, *held*, that the levy only reached the interest of the payee, and the sale did not convey any rights to the purchaser, and that the payment of such purchaser by the maker would not release his obligation to pay to the assignee: *Ibid*.

b. Time of transfer.

139. Presumption: The assignment being without date, the presumption is that it was made on the day the instrument was executed: *Hayward v. Munger*, 14-516.

140. In an action by the indorser, it is presumed that the note was transferred to him

for a valuable consideration before maturity: *Rea v. Owen*, 37-262.

141. Proof that the payee received payments after maturity, on a statement at the time to the maker that the note was in his trunk at another place, *held*, not sufficient to overcome such presumption: *Ibid*.

142. Indorsement being *prima facie* evidence of transfer before maturity, proof of payment to the payee is unavailing in an action by the indorser, unless the maker can show that the payment was made before the transfer, or that the indorsement was made after maturity: *Wilkinson v. Sargent*, 9-521.

143. The presumption as to the time of making the indorsement is that it was made at the date of the making of the note, or at least before its maturity: *Fletcher v. Anderson*, 11-228.

144. Relation back: An indorsement may, as between the parties, relate back to the time of the making of the agreement to indorse: *Berryhill v. Jones*, 35-335.

145. Transfer after maturity has the same force and effect as if made before the note fell due, except that the transfer is subject to the equities of the maker: *Wyatt v. Bailey*, Mor., 896.

As to what equities such transferee is subject to, see *infra*, VII.

c. Pleading and evidence.

146. Allegation of ownership: Where a note is payable to bearer, an averment in an action thereon that it is the property of and the amount claimed is due to the plaintiff, is equivalent to a direct allegation of title. The method in which it became the property of plaintiff need not be averred: *Dabney v. Reed*, 12-315.

147. Pleading title: Where an instrument is not made payable to bearer or transferable by delivery alone, the plaintiff suing thereon not being payee or indorsee does not, by merely averring ownership, without showing by what right he claims the same, present such facts as will enable him to maintain the action in his own name: *Montague v. Reineger*, 11-503.

148. Mere denial of plaintiff's property in the note sued on, if it be payable to bearer, is not sufficient to cast upon him the burden

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of proving his right: *Breckbill v. Stutyman*, 3 G. Gr., 572.

149. **Presumption from possession:** If a note is payable to bearer, the law presumes that the person in possession thereof is the owner: *Allensworth v. Moore*, 8 G. Gr., 273; *Stoddard v. Burton*, 41-582.

150. Possession of a note payable to bearer is *prima facie* evidence of ownership: *Shelton v. Sherfey*, 8 G. Gr., 108; *Creighton v. Gordon*, Mor., 41.

151. Possession of a note is such *prima facie* evidence of ownership as to entitle the person in possession to recover thereon, in the absence of evidence rebutting such presumption: *Rubey v. Culbertson*, 35-264.

152. And this is so, even though the note is payable to another person, or order, and no assignment is shown: *King v. Gottschalk*, 21-512.

153. But the presumption of ownership arising from possession may be overcome by direct and positive testimony that the person in possession has no interest in it or authority to collect it: *Hesser v. Doran*, 41-463.

154. While possession of a note is *prima facie* evidence of ownership as between the holder and the maker, yet, in a contest between the payee and a stranger, the presumption is that the payee is the owner as against the stranger having possession: *Tuttle v. Becker*, 47-486.

155. If a note is payable to payee or bearer, a subsequent indorsement by the payee, or by a holder not connected by indorsement with the payee, will not render proof of a transfer by indorsement necessary: *Breckbill v. Stutyman*, 3 G. Gr., 572.

156. The holder of a note payable to bearer may rely upon his possession acquired by delivery although the instrument is indorsed by the payee, and is not bound to rely upon having acquired title by or through the indorsement: *Lane v. Krekle*, 22-399.

157. The party claiming to be the owner of a note payable to bearer, seeking to recover its value from a third person having possession thereof, which is alleged to be wrongful, must prove his title. It is not necessary for defendant in possession to set up and prove title as against plaintiff: *Gaskell v. Patton*, 58-163.

158. **Blank indorsement** of a note by the payee and its possession by plaintiff are sufficient to create a legal presumption of plaintiff's right to recover thereon: *Hickok v. Labussier*, Mor., 115.

159. **Possession of a note by the maker** is at least some evidence that he has paid it, the possession being presumed lawful: *Dougherty v. Deeney*, 41-19.

Parol evidence: How far admissible to vary liability of blank indorser or drawer, see *infra*, §§ 281-286.

IV. MATURITY.

a. Days of grace.

160. **Usage recognized:** The law merchant having generally been recognized by courts of this country, will be considered as existing until it is shown not to prevail. The courts will take notice of the usage of allowing three days of grace, and in the absence of proof to the contrary will presume that such was the understanding of the parties: *Hudson v. Matthews*, Mor., 94.

161. **Statutory provision:** Where exemption from liability on a bill of exchange was asserted under a statute of another state which changed the rule of the law merchant as to days of grace, *held*, that defendants must show themselves within such statute to obtain its exemption: *Mt. Pleasant Branch, etc., Bank v. McLeran*, 26-306.

162. **Where no time of payment is mentioned:** Under a statute allowing days of grace (16 G. A., ch. 81) except in case of paper drawn payable on demand, *held*, that a draft or bill in which no time for payment is mentioned is payable on demand, and therefore not entitled to grace: *First Nat. Bank v. Price*, 52-570.

163. **Non-negotiable instruments** are not entitled to days of grace: *Peddicord v. Whitlam*, 9-471.

164. **Notes payable in property** are not entitled to days of grace, unless they are negotiable within the provisions of the statute (Code, § 2065) allowing such notes to be made negotiable in terms: *McCartney v. Smalley's Adm'rs*, 11-85.

165. **Overdue:** A note is not overdue until days of grace are passed. Therefore, *held*, that a transfer on the second day of grace

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was before maturity: *Goodpaster v. Voris*, 8-334.

166. A note payable in current funds is not *prima facie* negotiable; but evidence of custom or an understanding among the parties that by such term is meant money may be received to impart to it the attributes of negotiability. (See *supra*, §§ 21-23 of this article.) And thereby it will become subject to days of grace: *Haddock v. Woods*, 46-483.

b. When payable.

167. Where no time of payment is mentioned in a note it is in contemplation of law payable on demand: *Green v. Drebbis*, 1 G. Gr., 553.

168. So a draft in which no time of payment is mentioned is payable on demand and not at sight, notwithstanding it provides for interest "after maturity:" *First Nat. Bank v. Price*, 52-570.

169. Accommodation paper: The contract between the parties to an accommodation paper is that the one receiving the accommodation will negotiate the paper and will place the proceeds to his own use, and will either pay it at its maturity or reimburse the accommodation party in case he is compelled to pay it; and a cause of action on such a note in favor of the accommodation party accrues only on the failure of the other party to the contract to perform his undertaking: *Jefferson County v. Burlington & M. R. R. Co.*, 66-385.

170. Change of time of payment: The fact that one of the makers of a note, in the presence and with the consent of the other makers, indorsed thereon an agreement signed by himself, changing the time of payment to an earlier date, *held* not to bind such other makers to such agreement so as to cause the statute of limitations to run as to them from such earlier date: *Mitchell v. McHenry*, 62-352.

171. Part payment as evidence of maturity: While the payment of a part of a note may be competent evidence to be considered in determining the time of maturity, no presumption of law arises from the simple fact of payment that the note was then due: *Hughes v. Monty*, 24-499.

172. Extension of time; consideration: An extension of time given after maturity upon payment of interest due is without consideration: *Van Dusen v. Parley*, 40-70.

173. Renewal; release: Where an agreement as follows was indorsed on the note, "Renewed for an indefinite time at, ten dollars interest per month, and the whole amount then to pay when both parties may agree," *held* that it was a stipulation not to sue for a limited time, and not a release or covenant not to sue at all, and that therefore the note was due and payable at the date of such renewal, or at least within a reasonable time: *Ramot v. Schotenfels*, 15-457.

174. Indorsement on a note of permission to the maker to use the principal after due, by paying the interest annually, does not change the effect of the note so as to release the obligation to pay the principal. In such case, failure to pay interest annually as stipulated renders the principal due, and a subsequent acceptance of interest by the payee will not be a waiver of the breach of the condition, but simply an acceptance of part payment: *Oskaloosa College v. Hickok*, 46-287.

175. Interest after maturity: Provision in a note for interest at ten per cent. after due does not operate to extend the time of maturity: *Watrous v. Mississippi Valley Ins. Co.*, 85-582.

176. Demand; interest: Although interest on a demand note will commence to run from date of commencement of suit, and not from date of execution, if no demand is proven, yet where it was shown that, within a few days after execution and delivery, the maker paid a portion of the amount due, *held*, that such act constituted an acknowledgment that the note was due at the time and was equivalent to demand, so that interest would commence to run from that time: *Baylis v. Pearson*, 15-279.

177. Note payable in property; demand: Where the instrument provided for the payment of a certain sum in cabinet furniture at the maker's shop, no date for the payment being specified, *held* that, under Code, § 2097, action thereon could not be maintained without demand being shown: *Frederick v. Remking*, 4 G. Gr., 56.

178. If the time of payment of a note

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payable in property is fixed, no demand of the property is necessary to convert it into a money demand. The property¹ should, in such case, be tendered. (See Code, § 2098): *Barker v. Brink*, 4 G. Gr., 59.

And see *infra*, §§ 183, 184.

179. Due before maturity; interest: Where a note drawn to include interest to the time of maturity becomes due prior to that time upon the happening of a contingency, the maker may defend against the note to the extent of the unearned interest included therein: *Roberts v. Waters*, 9-434.

180. Due for default in interest: Where the mortgage given to secure a note contained a stipulation that, if interest should remain unpaid for six months after due, the whole amount of the indebtedness should become due and payable, although the note contained no such stipulation, *held*, sufficient to authorize the bringing of an action upon the note before the date of maturity thereof, there being such failure to pay interest as was stipulated for in the mortgage: *Clayton v. Whitaker*, 68-412.

As to alteration with respect to date, see ALTERATION OF INSTRUMENTS.

V. PRESENTMENT FOR ACCEPTANCE OR PAYMENT; DEMAND; NOTICE OF NON-ACCEPTANCE OR NON-PAYMENT; PROTEST.

181. Presentment not necessary to charge maker: Even where the place of payment is agreed upon, failure of the holder to demand payment there will not stop the running of interest unless the maker had the money at the place of payment: *Myers v. Byington*, 34-205.

182. Demand of payment is not necessary in such cases in order to enable the holder to recover: *Games v. Manning*, 2 G. Gr., 251.

183. Notes payable in property: The same rule holds true as to notes payable in property: *Ibid*.

184. Even where no place is designated, if the note is payable in property at a particular time, no demand need be shown: *Ibid*.

And see *supra*, §§ 177, 178.

185. Presentment of order for property: There is no fixed rule as to the time of presentment of an order for property in which

no date is fixed. It is sufficient if it be presented within a reasonable time, to be determined by the circumstances of each particular case. Presentment at any time before commencement of suit would be sufficient to enable the holder to recover against the drawer unless it should appear that the drawer had been injured by the delay: *Tryon v. Oxley*, 3 G. Gr., 289.

186. Necessary to charge indorsers: An indorser cannot be charged in the absence of evidence of presentation and demand of payment and of proof of the notice required by law: *Bank of Red Oak v. Orvis*, 40-383.

187. The holder of a check payable at a different place than that at which it is negotiated can recover against the indorser only upon using due diligence in forwarding such check for presentment. The general rule is that it must be deposited in the mail on the day on which it is received or on the next succeeding day: *Northwestern Coal Co. v. Bowman*, 69-150.

188. So held in case of a check or draft drawn by one banker upon another, purporting to be drawn upon funds deposited and payable on demand: *Ibid*.

189. While the rule as to time of presentment may be varied by particular circumstances of the case, the presentment must be made in every case with all the dispatch and diligence consistent with the transaction of other commercial concerns: *Ibid*.

190. Institution of suit against the maker will not render the indorser liable in the absence of notice to him: *Keater v. Hock*, 11-536.

191. The fact that at the time a note comes due action is pending thereon does not release the holder from the necessity of making proper presentment and demand to hold the indorser: *Graul v. Strutzel*, 58-712.

192. Notes transferred after maturity: A note transferred after maturity is, as respects the obligations of the parties, equivalent to a note payable on demand, and there is the same necessity for presentment and notice as in case of a demand note: *Ibid*.; *Jones v. Middleton*, 29-188; *McKewer v. Kirtland*, 33-348; *Pryor v. Bowman*, 38-92.

193. The time within which notice must be given in such cases is the same as in a case

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where a note is indorsed before maturity: *McKewer v. Kirtland*, 83-848; *Pryor v. Bowman*, 88-92.

194. Not necessary to hold indorser of non-negotiable note: The indorsement of a non-negotiable note is equivalent to the making of a new note and is a direct and positive undertaking on the part of the indorser to pay the note to the indorsee, and such indorser is liable without demand and notice: *Wilson v. Ralph*, 8-450; *Long v. Smyser*, 3-286; *Hall v. Monohan*, 6-216; *Billingham v. Bryan*, 10-317; *Huse v. Hamblin*, 29-501.

195. The holder of such an instrument indorsed in blank may fill up the indorsement with an absolute promise to pay, or a waiver of demand and notice: *Long v. Smyser*, 3-286.

196. Necessary to hold drawer: If the drawer has reason to expect the bill to be honored, he is entitled to a regular presentment and notice of a refusal to pay; but if, under the circumstances, he has no right to draw upon the payee and expect that his draft will be paid, he cannot complain either of delay or entire failure in presenting and giving notice of non-acceptance or non-payment: *Kimball v. Bryan*, 56-632.

197. County orders or warrants: Presentment of a county order or warrant drawn by the proper officers upon a county treasurer and notice of such presentment are not necessary in order to sustain an action against the county. The order is to be considered as in effect drawn by a party upon himself: *Steel v. Davis County*, 2 G. Gr., 469.

198. Not necessary to hold guarantor: A guarantor cannot escape liability on account of failure to give him notice unless notice has been so long delayed as to raise a presumption of payment or waiver, or unless he can show that by the delay he has lost opportunities for reimbursement or indemnity which the notice, or an earlier notice, would have secured him: *Second Nat. Bank v. Gaylord*, 34-246.

See, also, GUARANTY, II, b.

199. Liability of agent for negligence in making demand or giving notice: Failure of the broker, to whom a bill of exchange is sent for collection, to present the same for acceptance and payment at maturity at the

place at which it is made payable, will render him liable for the amount thereof if it appears that the drawee had funds deposited for payment, though they were subsequently withdrawn and the drawee became insolvent. An allegation of insolvency of the drawee at the maturity of the bill would not in such case be necessary: *Laughlin v. Greene*, 14-92.

200. Where a note was left with a bank for protest, and notice was served upon a person of the same name as the indorser living in the vicinity, but the real indorser living in an adjoining county was not notified. *held*, that the bank was not liable for negligence, no directions as to the place to which notice should be sent having been given by the owner of the note: *Mount v. First Nat. Bank*, 87-457.

201. Evidence of a custom among bankers to make presentment on certificates of deposit on the day they fall due instead of on a day of grace may be received to rebut negligence in presenting on that day, although the indorser is thereby discharged: *Haddock v. Citizens' Nat. Bank*, 53-542.

202. Where the act of an agent in improperly presenting for acceptance instead of for payment, whereby the indorser was released, was ratified by the holder by ordering a protest and paying the expenses thereof, *held*, that he could not recover from the agent for negligence in making presentment: *First Nat. Bank v. Price*, 52-570.

203. Protest; when necessary: Protest is not necessary on notes and inland bills of exchange in order to charge the indorser. It is sufficient that they should be presented for payment and notice of non-payment duly given: *Smith v. Ralston*, Mor., 87.

204. Certificate of protest as evidence: Protest of a promissory note is not necessary, even where the indorser resides in one state and the indorsee in another, and the certificate of protest is not in such cases of itself evidence of the fact of demand, as it would be in the case of a foreign bill of exchange: yet it may be admitted as part of the testimony of the officer making demand, and will be entitled to the same credit as any memorandum of a witness made on the occurrence of an event, and form a part of the *res gestæ*: *Bernard v. Barry*, 1 G. Gr., 388.

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205. **Lex loci:** The law of the place of contract must govern the liability of an indorser and notice of dishonor must be given accordingly: *Huse v. Hamblin*, 29-501; *Thorp v. Craig*, 10-461; *Chatham Bank v. Allison*, 15-357.

206. Protest and notice should be according to the law of the place of payment: *Allen v. Harrah*, 30-363.

Further as to *lex loci*, see *supra*, §§ 47-52.

207. Written notice to the maker will not take the place of a presentment for payment, nor hold the indorser: *Graul v. Strutzel*, 53-712; *Hartford Bank v. Green*, 11-476.

208. **Place of presentment:** There must be presentment to the maker personally at his place of residence or business: *Graul v. Strutzel*, 53-712.

209. Although the presumption is that the maker resides where the note is dated, and that he contemplated payment at that place, yet this is a presumption only, and if he resides elsewhere in the state when the note falls due, and that fact is known to the holder, demand must be made at the place of the maker's residence; and allegation of diligence in making presentment at the place where the instrument bears date is not sufficient to show due diligence: *Hartford Bank v. Green*, 11-476.

210. Demand made at the house of the maker who has no place of business is sufficient though he is not at home at the time: *Bank of Red Oak v. Orvis*, 42-691.

211. **Where maker has removed from the state:** The holder is not required to follow the maker who has removed from the state subsequent to the execution of the note, and make demand upon him in another state; nor will failure to make demand at the last place of residence or of business of such maker within the state release the indorser, if it appears that the maker left behind no one to represent or answer for him in any capacity: *Whitely v. Allen*, 56-224.

212. **Payable at particular place:** When a bill is made and accepted payable at a particular place, the officer making protest should go the place specified and present the bill for payment to the person having charge of the office at that place and demand payment of him. If the place of payment is

shut up during the hours of business upon the day of maturity, the holder may treat the bill as dishonored by refusal of payment, but the fact that it is so closed must be stated in the protest: *Gage v. Dubuque & P. R. Co.*, 11-810.

213. Where the indorser of a note payable at a banking house, in writing waived notice of protest, and before the maturity of the note all the books and papers of the bank were removed to another banking house in the same city, of which fact the public and the maker had notice, and it did not appear that the banking house where the note was made payable was still open, or that said bankers continued their business unless at the place to which their books had been transferred, *held*, not error to find that the presentment at the place to which the books and papers were removed was sufficient: *Gelpecke v. Lovell*, 18-17.

214. It is not necessary that a certificate of protest of a note made payable at a particular place shall show that demand was made at that place. A general statement of demand made will be sufficient: *Fuller v. Dingman*, 41-506.

215. **Demand on corporation:** The note of a corporation may be presented for payment at its usual place of business although such place of business is not the place where by its charter it is required to keep its office: *Merrick v. Burlington, etc., Plank Road Co.*, 11-74.

216. **Presentment to joint makers:** Presentment must be made to all the makers of the note: *Graul v. Strutzel*, 53-712.

217. Presentment to one of two joint makers will not be sufficient to hold the indorser, in the absence of a showing of some excuse for failure to make presentment to the other maker: *Blake v. McMillen*, 22-358; *Bank of Red Oak v. Orvis*, 40-832.

218. But this question was left an open one, after some consideration, in *Allen v. Harrah*, 80-863.

219. Where one of the joint makers dies before maturity, presentment must be made to his legal representatives if possible: *Blake v. McMillen*, 38-150.

220. **Presentment of a partnership bill** to one of the partners is sufficient: *Mt. Pleasant Branch, etc., Bank v. McLeran*, 26-806.

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221. At maturity: Demand and notice on the day after the last day of grace are not sufficient to hold the indorser: *Barker v. Webster*, 10-593.

222. If a note payable in current funds is shown to have been, by usage and understanding of the parties, payable in money and therefore negotiable, presentment on the last day without days of grace would not hold the indorser: *Haddock v. Woods*, 46-433.

223. But evidence is admissible to prove a custom among banks that certificates of deposit shall be presented on the day they fall due and not on a day of grace, for the purpose of showing that in making such presentment the bank acted with reasonable prudence, and is not liable to the holder for presenting on that day although the indorser was thereby discharged: *Haddock v. Citizens' Nat. Bank*, 53-542.

224. Presentment for payment before the last day of grace is premature. Decided under provisions of Code of '51, differing from those of the present Code, § 2093: *Edgar v. Greer*, 8-394.

225. Parol authority will be sufficient to authorize an agent to make demand of payment for the holder. Such authority may be created by merely handing over the bill with instructions to demand payment: *Mt. Pleasant Branch, etc., Bank v. McLeran*, 26-306.

226. The drawee may act as agent in procuring presentment and protest in order to secure a holder's rights as against parties to the paper; and the fact that the certificate of protest shows that presentment was made at the request of the drawee does not preclude proof that in making such request the drawee acted merely as agent of the holder: *Ibid.*

227. It appearing that protest was made at the request of a bank, it will be presumed that the bank had the right to authorize protest in the absence of proof to the contrary: *Bank of Red Oak v. Orvis*, 42-691.

228. Assuming that a bank holding paper payable at its counter is bound to make presentment, a presentment by the cashier for the bank to the paying teller after business hours is sufficient: *First Nat. Bank v. Owen*, 23-185.

229. Verbal notice to the indorser of demand and non-payment is sufficient: *Merritt v. Woodbury*, 14-299; *First Nat. Bank v. Ryerson*, 23-508.

230. Notice by mail: Where notices of protest were sent by the notary public by mail to one indorser, who deposited them properly directed to other indorsers in the postoffice of the town where they resided, held, that this was sufficient: *Van Brunt v. Vaughn*, 47-145.

231. Transmission of notices of protest through a party who re-deposits them in the postoffices of the persons to whom they are addressed is not improper: *Ibid.*

232. Where notice of dishonor was sent to a postoffice which was once the address of the drawer, but had been discontinued, the mail for such office being sent to another office about as near the drawer, and which in the particular case was the drawer's proper postoffice, held, that the notice was sufficient: *First Nat. Bank v. Owen*, 23-185.

233. The notice to an indorser is as essential to his liability as are due presentment and demand of payment; and where it appeared that notice to an indorser was directed to him at a place other than his postoffice, held, that he was thereby discharged: *Northwestern Coal Co. v. Bowman*, 69-150.

234. Notice to parties in same town: If the parties live in the same town, notice should not be sent by mail but should be given either at the place of business or residence of the party to be notified; but if put into the postoffice and in fact received by the party to be notified on the day he is entitled to notice, such a notice will be sufficient: *Grinman v. Walker*, 9-426.

235. But an agreement between parties that notice through the mails should be deemed sufficient may be shown by proving usage to that effect known to the party to whom notice is to be given: *Ibid.*

236. There is now, however, a statutory provision (Code, § 2095) authorizing notice to the party to be charged, if in the same town or township, to be made by depositing the notice in the nearest postoffice to such party on the day of demand; but such provision does not essentially differ from the rule established under the law merchant on

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this subject except to add one other method of giving notice when the party to be affected resides in the same place where the note is payable and the demand is made, namely, that of leaving the notice in the post office nearest to such party: *Fahnestock v. Smith*, 14-561.

237. Where a notary, after making demand, instead of notifying an indorser residing in the same place, either personally or by notice deposited in the postoffice there, returned to a neighboring town and from there mailed a notice to the indorser, *held*, that the notice was not sufficient under this section: *Ibid*.

238. A certificate of protest stating that the notary notified the indorsers is sufficient although it does not show that the residences of the several parties are at the places to which the notices were addressed: *Fuller v. Dingman*, 41-506.

239. Under the statutory provision making the certificate evidence as to what it recites as to the dishonor and notice, the certificate of the officer that he notified a party in a particular manner raises the presumption that the mode adopted accomplished the result referred to; but if the certificate states only the steps taken and the mode adopted, and not the fact that notice was given, then unless it further appears that such method would effect notice, the certificate does not make out a *prima facie* case of notice: *Wamsley v. Rivers*, 34-463.

240. It is not necessary to annex to, or set out in, the notary's certificate, the notice referred to therein; nor need the certificate, in words, formally refer to the seal: *Jones v. Berryhill*, 25-289.

241. When in the same town: Where the parties reside in the same town, notice to the indorser must be given within a reasonable time, which means, at farthest, the next day after default: *McKewer v. Kirtland*, 33-348; *Graul v. Strutzel*, 53-712.

242. Successive indorsers: The holder of a note which has passed through the hands and received the indorsements of several parties may elect to hold either one or all of them. If he elects to hold all, he must give all notice; if to hold but one, notice to that one only is necessary. If an indorser thus notified desires to hold prior indorsers, he

must give them notice; but where an indorser receives notice either from the holder or any other subsequent indorser, it inures to the benefit of all: *Hamilton v. Veach*, 19-419.

243. A judgment in favor of the last indorsee against the maker and indorsers of the note raises the presumption that all parties who are entitled to notice received the same; and in an action by an indorsee against his immediate indorser to recover money paid on such judgment, he need not allege the fact of notice: *Ibid*.

244. Waiver; absence of detriment immaterial: A party relying upon waiver of protest and notice need not aver that the defendant sustained no detriment by reason of such want of notice: *Star Wagon Co. v. Swezy*, 63-520.

245. Must be pleaded: Waiver of demand and notice must be pleaded as such, and cannot be proved under an allegation that demand was made and notice given: *Lumbert v. Palmer*, 29-104; *Peck v. Schick*, 50-281.

246. Waiver of notice does not waive demand: An agreement to waive notice will not extend beyond the plain import of the terms, and will not constitute an excuse for want of presentment for payment: *Voorhies v. Ailee*, 29-49; *Whitely v. Allen*, 56-224.

247. New promise: A promise to pay made by the indorser after knowledge of want of due demand and notice waives the want of such demand and notice, and renders the indorser liable: *Allen v. Harrah*, 30-363; *Lomax v. Smyth*, 50-223.

248. But it is necessary that such new promise be unqualified: *Campbell v. Varney*, 12-43.

249. To constitute a waiver the agreement after maturity to pay must be clearly established and deliberately made after a full knowledge of the facts, which knowledge will not be inferred, but must be alleged and proved: *Freeman v. O'Brien*, 38-406.

250. The burden of proof is upon the person seeking to show the indorser's liability notwithstanding want of notice, to show that he not only waived such notice and promised to pay, but also to show that such new promise was made with the full knowledge of the fact that he was released from his legal obligation to pay: *Ballin v. Betcke*, 11-204.

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251. Ignorance of legal rights; consideration: Direct acknowledgment of liability by the indorser with promise to pay and an arrangement for delay of suit are sufficient to operate as a waiver of all advantages from the laches of the holder in making demand or giving notice, if made with a knowledge of such laches, although the indorser may have been ignorant of his legal rights and there was no consideration: *Creshire v. Taylor*, 29-492.

252. To establish such knowledge on the part of the indorser as to make a new promise to pay, after failure of demand and notice, binding upon him, it is not necessary to show that he knew, as a matter of law, that he was discharged, nor that he had a clear, distinct, and full knowledge of all that had been done or omitted with reference to such demand and notice. Knowledge may be inferred from a variety of circumstances without requiring clear and affirmative proof; and the inquiry is not whether the indorser knew that demand and notice were necessary in order to bind him, but whether he had knowledge of all the facts which in law operate to discharge him. He is presumed to know the law if he knows the facts: *Hughes v. Bowen*, 15-446.

253. New promise not a contract but waiver: The indorser in such a case is not held by his promise as a matter of contract but upon the ground that the promise amounts to a waiver of the objection that proper steps have not been taken to discharge him. The question of want of consideration for the promise does not therefore arise: *Ibid.*

254. Renewal as waiver: Where the indorser was verbally notified by the maker on the last day of grace that the note was not paid, and thereupon requested a renewal, which was consented to by the payee, held, that such request and acceptance operated as a waiver of notice, which could not be avoided by a subsequent refusal of the indorser to execute the renewal note: *First Nat. Bank v. Ryerson*, 23-508.

255. Waiver by reason of possession of indorser: Where the indorser has the note or bill in his possession at the time of maturity, he will be considered as waiving demand and notice: *Lomax v. Smyth*, 50-228.

256. A mere promise to pay the note at maturity will not of itself constitute a waiver by the indorser of demand and notice: *Isham v. McClure*, 58-515.

257. An agreement or assurance on the part of the indorser that he will stand good for the payment of the note if made prior to maturity is not to be deemed a waiver of demand and notice: *Freeman v. O'Brien*, 38-406.

258. Acts of the indorser prior to the final maturity of the note, by way of assisting the holder in obtaining payment from the maker, held not sufficient to constitute a waiver of demand and notice, for the reason that such acts might well have been done with a view of preventing contingent liability: *Isham v. McClure*, 58-515.

259. Request not to sue: Verbal request by the indorser that the holder will not sue the maker until requested will not constitute a waiver of demand and notice: *Freeman v. O'Brien*, 38-406.

260. Certain statements of the drawer of a draft, held not sufficient to show that demand and notice had been waived: *First Nat. Bank v. Day*, 52-680.

261. Evidence: An admission by an indorser of his liability, and a promise to pay, would be competent evidence to show either the fact of notice or a waiver; therefore, held, that a denial by a partner of liability of the firm was competent evidence: *First Nat. Bank v. Carpenter*, 34-433.

VI. LIABILITY OF THE PARTIES.

a. *Maker.*

262. Accommodation paper; misappropriation: The holder of accommodation paper which is without restriction as to the mode of using it may transfer it either in payment or as collateral security for an antecedent debt, and the maker will have no defense: *Washington Bank v. Krum*, 15-53.

263. Where such paper is given for a particular purpose, and this is known to the indorsee, a misappropriation of the paper will release the party giving it from all responsibility; but if the indorsee does not know of the particular purpose for which the paper is given, he may recover thereon.

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although it is used for an unauthorized purpose: *Ibid.*

264. The fact that such paper has been once discounted and afterwards taken up by the party accommodated does not render it void in his hands, but it may be again used and will be good in the hands of one who takes it for a proper purpose, with knowledge that it is accommodation paper and has been thus once used, but without knowledge of any agreement between the original parties as to the purpose for which it was to be used: *Ibid.*

265. Accommodation paper defined: An accommodation bill or note is one to which the accommodating party has put his name without consideration for the purpose of accommodating another party who is to use it and is expected to pay it: *Jefferson County v. Burlington & M. R. R. Co.*, 66-385.

266. Where, at a time when it was considered legal to do so, a county voted to issue bonds in aid of a railway for the purchase of stock, but after the issue of a portion thereof it was held that it had no such authority and the balance was not issued, nor any stock given to the county, but it was compelled to pay the bonds issued because in the hands of innocent holders, *held*, that such bonds were not accommodation paper, and that the county could not recover of the railway the amount paid by it: *Ibid.*

267. Joint and several obligation; satisfaction; judgment: Under a joint and several note both parties are separately liable, and an unsatisfied judgment against one will not bar an action against the other: *Harlan v. Berry*, 4 G. Gr., 212.

268. Signing after maturity: The fact that a party to a note signs it after maturity does not make his liability collateral, but he may be joined as defendant with the other maker: *Jones v. Wilson*, 11-160.

269. Joint principals: One who takes a note signed by several may hold them all as principals in the absence of any knowledge that some of them were sureties as between themselves: *Murray v. Graham*, 29-520.

270. Discharge of indorser does not affect maker's liability: Although the maker and indorser are jointly and severally bound, the release of the indorser does not operate to discharge the maker. Perhaps the release

of the maker will discharge the indorser for the reason that it would be equivalent to payment: *Foster v. Russ*, 14-61.

271. Taking security from or giving time to the indorser does not discharge the maker: *Whiting v. Western Stage Co.*, 20-554.

b. Indorser.

272. Guaranty of genuineness of the instrument: The indorser guaranties the genuineness of the instrument, although not negotiable: *McCormack v. Reece*, 3 G. Gr., 591.

273. Indorsement of note by member of firm individually will not bind the firm as a warranty of the genuineness of its signature to the note: *Miller v. House*, 67-737.

274. The indorsement of a non-negotiable note is equivalent to the making of a new note, and is a direct and positive undertaking on the part of the indorser to pay the note to the indorsee, and not a conditional one to pay, if the maker does not upon demand after due notice: *Long v. Smyser*, 8-266; *Wilson v. Ralph*, 3-450; *Billingham v. Bryan*, 10-317; *Hall v. Monohan*, 6-216; *Huse v. Hamblin*, 29-501.

275. A blank indorsement creates the same liability from the indorser to the indorsee as if it were full: *Bean v. Briggs*, 1-488.

276. But it does not make the indorser liable as guarantor: *Twoood v. Coopers*, 9-415.

277. Filling up blank indorsement: The holder of a note indorsed in blank may fill up the blank indorsement to himself and thus recover as indorsee thereunder: *Leland v. Parriott*, 35-454.

278. When the holder has thus filled up the blank indorsement, it becomes a contract duly signed by the indorser, upon which he is answerable to the holder: *Bernard v. Barry*, 1 G. Gr., 388.

279. The holder of a non-negotiable note indorsed in blank may fill up the indorsement with an absolute promise to pay the note to the indorsee, or a waiver of demand and notice: *Long v. Smyser*, 3-266.

280. The indorser of a note by blank indorsement cannot be bound by a contract of guaranty written over his indorsement: *Belden v. Hann*, 61-42.

Liability.—Indorser.

281. Parol evidence to vary indorser's liability: As between the parties parol evidence is receivable to show the agreement pursuant to which a blank indorsement was made, for the purpose of determining the extent of the indorser's liability thereunder: *Harrison v. McKim*, 18-485 *James v. Smith*, 30-55.

282. But as against a subsequent *bona fide* holder parol evidence is not admissible to show that the prior blank indorsement was made under an agreement by which the blank indorser was relieved from liability: *Skinner v. Church*, 36-91.

283. The fact that such holder declares upon the blank indorsement as made to himself will not estop him from denying notice of the agreement under which it was made and recovering as a holder by delivery: *Ibid*.

284. It is not permissible to show by such evidence that no contract of any description was entered into or intended by a blank indorsement. The indorsement being in writing clearly imports some kind of contract, and in the absence of any other showing it must be the contract conclusively implied by law, and oral evidence is not admissible to obliterate such contract: *Geneser v. Wissner*, 69-119.

285. Parol evidence is not admissible to show that an indorsement in full was made under an agreement that the indorser should not be liable: *Sands v. Wood*, 1-263; *Sherman v. Elder*, 12-433; *Harrison v. McKim*, 18-485.

286. Drawer: Parol evidence is not admissible to vary the liability of the drawer of a bill or check: *American Emigrant Co. v. Clark*, 47-671.

287. By blank indorsement of a person not a party to the instrument as payee, indorsee or assignee, written on the back of a negotiable instrument, he is presumed to render himself liable as a commercial indorser. In case of a non-negotiable instrument such indorsement imports no liability whatever. In either case, however, such indorser is to be held only to such liability as is actually agreed upon, and the blank indorsement may be filled up accordingly: *Fear v. Dunlap*, 1 G. Gr., 381.

By statute (Code, § 2089) an indorsement in blank by a person not a party renders such

indorser liable as guarantor: See *GUARANTY*, §§ 4-7.

What constitutes blank indorsement, see *supra*, § 109.

288. Successive blank indorsements may, by parol, be shown to have been made simultaneously for the accommodation of the maker so as to render such indorsers co-sureties, between whom the right of contribution may arise: *Preston v. Gould*, 64-44.

289. Terms of assignment of mortgage: The liability of an indorser cannot be varied by proof of the terms of the assignment of a mortgage given to secure the note: *Bank of Red Oak v. Orvis*, 42-691.

290. Without authority: Where a person without authority undertakes to transfer a note by indorsing it in the name of the owner, neither the one whose name is wrongfully used nor the person actually making the indorsement will become liable to the transferee upon the note: *Thorpe v. Dickey*, 51-676.

291. So if the note is transferable without indorsement, and an agent, authorized to make a transfer in that manner only, should indorse the name of his principal without authority, the principal would not be bound, and the agent would not be liable in an action upon the note, because the indorsement would not make him a party to it: *Ibid*.

And further as to unauthorized indorsements, see *supra*, § 112.

292. Without recourse: No privity exists between indorsees of a note, unless by the contract of indorsement, and an action *ex contractu* cannot be maintained upon an indorsement without recourse, for such indorsement on its face rebuts any personal liability on the part of the indorser: *Watson v. Cheshire*, 18-202.

293. One who transfers negotiable paper by indorsement without recourse ceases to be a party thereto, and his only liability is upon the facts of the transaction to be asserted in an action for the original consideration or its value or for fraud practiced. Unless otherwise agreed, he warrants that the paper is genuine, that the parties thereto are *sui juris*, and that the instrument has not been paid: *Ibid*.

294. The obligations of one who indorses without recourse are the same as those of one

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who transfers by delivery (see *infra*, §§ 301-308): *Miller v. Dugan*, 36-483; *Dayton v. Tillotson*, 39-404.

295. An assignment in writing on the note by the payee constitutes an indorsement and renders him liable as indorsee: *Scars v. Lantz*, 47-658.

296. The release of an indorser by extension of time to the maker on one note will not affect his liability on another note secured by the same mortgage: *Hopkins v. Gray*, 51-340.

297. Negligence in enforcing collection against maker: Under the provisions of R. S. (of 1843), ch. 106, § 2, by which the indorser of a note was liable only in case of failure of holder, after using due diligence, to collect from the maker, *held*, that a parol agreement between the holder and the indorser, by which the enforcement of the note against the maker was to be delayed after maturity, might be shown to excuse such delay: *Friend v. Beebe*, 3 G. Gr., 279.

298. The joining in a new note as joint maker with the maker and the indorsee of the original note will render the indorser liable on the new note as principal, while the indorsee of the old note joining in the new one will be liable only as surety; but any agreement between the parties as to their respective liabilities may be shown: *White v. Van Horn*, 19-189.

299. Accommodation indorsement: Where a note is executed payable to the order of the maker, and indorsed by the accommodation party at the time of execution, such indorsee becomes liable to any one obtaining the note in due course of trade, the consideration for the indorsement being implied by the writing, or arising from the consideration of the original debt, no new consideration being necessary: *Brenner v. Gundershiemer*, 14-82.

300. Consideration presumed: The indorsement imports a consideration in the absence of testimony showing a want thereof: *Veach v. Thompson*, 15-880.

c. One who transfers without indorsement.

301. Implied warranties: Upon the transfer of a negotiable note, there is an implied

warranty on the part of the transferor, that the signature of the maker is genuine, and also that there is no defect in the instrument by reason of a material alteration: *Snyder v. Reno*, 38-329.

302. One who assigns or transfers an instrument without becoming liable thereon as indorser is still bound by an implied warranty that the paper transferred is genuine; that it is of the kind and description which it purports to be; that the assignor has done nothing and will do nothing to prevent the assignee from collecting the claim assigned, and that the parties to the instrument are *sui juris* and capable of contracting, and that it has not been paid: *Miller v. Dugan*, 36-433.

303. The obligations of a transferor of paper without recourse are substantially the same as those of a transferor of paper payable to bearer by delivery: *Ibid*.

304. Where an assignor by mere delivery or by indorsement without recourse of a negotiable note transfers it knowing it to be of no value, and the assignee receives it in good faith without knowledge of the fact, paying a valuable consideration for it, the assignee may recover from the assignor the consideration paid, or its value: *Dayton v. Tillotson*, 39-404.

305. Rescission of sale not necessary: Where negotiable notes are transferred and afterwards found to be forgeries, it is not necessary, in order to entitle the transferee to recover from the transferor on breach of implied warranty of genuineness, that the notes should have been returned to the transferor: *Snyder v. Reno*, 33-329.

306. Representations; discount: The fact that more than the ordinary discount is deducted, upon the transfer of negotiable paper, would tend to indicate that it was taken by the transferee at his own risk, and not on the faith of representations as to its character by the person transferring: *Johnson v. Barney*, 1-531.

307. Expense of litigation; burden of proof: To enable the transferee of a negotiable instrument to recover from the transferor costs of litigation, in which the former is defeated by reason of the instrument not being genuine, it must appear that such litigation was reasonably necessary and conducted in

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good faith. If notice of the litigation is given to the transferor, the burden of proof is upon him to show that the expense was needlessly incurred, but in the absence of such notice the transferee must prove the propriety of the litigation: *Snyder v. Reno*, 38-329.

308. The record in the suit by the transferee upon the instrument is admissible in evidence as a basis for the recovery of the costs incurred, but such record is not admissible against the transferor, to establish the fact of the defect in the instrument, if the transferor had no notice of the suit: *Ibid*.

d. Acceptor.

309. What constitutes acceptance: While the rule is that if a drawee does anything with or to the bill, or writes thereon anything which does not clearly negative his intention to accept, then he becomes chargeable as an acceptor, yet where the drawee wrote upon the bill, "Kiss my foot," and signed his name thereto, *held*, that such language clearly negated the intention to accept the bill and he did not become liable: *Norton v. Knapp*, 64-112.

310. Acceptance implied: An acceptance may be implied from the acts or the conduct of the drawee, although no express acceptance can be shown: *Smith v. Clark*, 12-32.

311. Verbal acceptance; statute of frauds: An acceptor by verbal acceptance does not become a party to the paper in such sense as he does by a written acceptance. If he has funds in his hands for the payment of the demand, or there are other circumstances such as will render the payment of the acceptance a payment of his own debt, he will be bound. Otherwise his verbal acceptance will be within the statute of frauds: *Walton v. Mandeville*, 56-597.

312. An acceptance payable in instalments, while it may have the effect of discharging the drawers and prior indorsers, will be binding as to the acceptor and subsequent indorsers: *Bridge v. Livingston*, 11-57.

313. Acceptance for larger amount than is due drawee from drawer: Where A. accepted B.'s draft in favor of C. for the purpose of securing C. in past and prospective indebtedness of B., agreeing that the amount of the

draft should be deducted from money to become due B. under his contract with A., and B. absconded without performing the contract with A., *held*, that A. was liable to C. on his acceptance in the full amount thereof, although B.'s indebtedness to C. was for a less amount; the reason being that the excess of the draft over B.'s indebtedness to C. was a debt from C. to B., which might be enforced against C. by B. or his creditors: *First Nat. Bank v. Snell*, 32-167.

314. The identity of plaintiff and the drawee is for the jury, and a technical variance between the name of drawee and plaintiff will not defeat the acceptor's liability: *Fletcher v. Conly*, 2 G. Gr., 88.

315. *Idem sonans*: In such case, *held*, that the names "Conolly" and "Conly" were sufficiently similar to be within the principle of *idem sonans*: *Ibid*.

316. Identity of payee: By accepting the bill, when presented by a person claiming to be the payee, the acceptor recognizes him as payee and cannot afterwards object on the ground of variance between the name appearing on the note as that of payee, and that of the person in whose favor acceptance was made: *Ibid*.

e. Drawer.

317. Agreement not to sue, release: An agreement with the acceptor not to sue on the bill has the effect of releasing the drawer: *First Nat. Bank v. Day*, 64-118.

318. Failure of holder to enforce payment from acceptor: Where the holder of an accepted bill being a bank, had funds on which the acceptor had a check, and sought to have the acceptor consent to an application of such funds to the payment of the bill, which he refused to do, *held*, that it was not incumbent upon the holder to compel the application of such funds to the payment of the bill, and its failure to do so would not release the drawer: *First Nat. Bank v. Owen*, 23-185.

319. Parol evidence is not admissible to show an agreement between the drawer and payee of a check that the drawer was not to be held liable; nor to show that the check was given in exchange for property with such condition; nor can the knowledge of the parties of the suspension of the bank

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upon which the check was drawn, of the fact that the drawer had funds therein, etc., be shown to relieve the drawer from liability. Nor can fraud in refusing to enter into a written agreement that the payee should have no recourse against the drawer be set up for the purpose of enabling drawer to show by parol a change in the contract implied from the drawing of the check, although such fraud might be made a ground of defeating recovery by the drawee or one not a *bona fide* holder: *American Emigrant Co. v. Clark*, 47-671.

VII. RIGHTS OF TRANSFEREE.

a. Under what circumstances protected against equities and defenses.

320. The payee of a note cannot be protected against equities as a *bona fide* holder; therefore, *held*, that where a member of a firm signed the firm name to a note as surety, the transaction not being connected with the business of the firm, the payee was affected with notice of the fact that the partner had not authority to thus bind the firm: *Whitmore v. Adams*, 17-567.

321. A party who holds a note for and in the right of the payee, and not as the real owner, is not to be protected as a *bona fide* holder: *Merchants' Nat. Bank v. McNulty*, 36-229.

322. An assignee in insolvency takes subject to all the equities in favor of third parties, and neither he nor the creditors whom he represents are purchasers for a valuable consideration without notice as against prior equitable liens; therefore, *held*, that the payees of checks drawn before the assignment for a consideration were entitled to recover from the drawee money in his hands for such payment as against the assignee in an assignment made after the drawing of the checks but before their payment: *Roberts v. Corbin*, 26-315.

323. The transferee without indorsement, although he may bring action in his own name, is subject to equities existing against his assignor: *Yunker v. Martin*, 18-143; *Franklin v. Twogood*, 18-515.

324. So, also, where he brings action in the name of the payee: *Temple v. Hays, Mor.*, 6; *Long v. Long, Mor.*, 43.

325. One who takes under a transfer in a separate instrument to which the transfer is only incidental takes by assignment and not as indorsee: *Franklin v. Twogood*, 18-515.

326. Purchaser at judicial sale: Under a statutory provision (Code, § 3046) authorizing an officer to levy upon and sell under execution things in action, and giving the assignment thereof by the officer the same effect as if made by defendant, *held*, that a purchaser of a note thus levied on and sold, with the officer's indorsement, taking before maturity and without notice, was not subject to equities: *Earhart v. Gant*, 32-481.

327. Without reference to statutory provision, *held*, that a *bona fide* purchaser of a note levied on and sold under execution was protected against a prior purchaser of the note by verbal transfer from the judgment debtor, where the note was found in the hands of payee's agent, and without any marks of assignment to the purchaser: *Allison v. King*, 21-302.

328. A purchaser of a note at a sale under execution against one with whom it had been left after maturity for collection, and who had wrongfully converted it to his own use, acquires no title and cannot maintain action thereon: *McCormick v. Williams*, 54-50.

329. Non-negotiable instruments: The doctrine of innocent holder has no application except to holders of commercial paper. It does not extend to a mortgage, and the assignee thereof is not protected against defenses between the original parties: *Tabor v. Foy*, 56-539.

330. Presumption in favor of transferee; payment: The holder of a promissory note will be presumed, in the absence of evidence to the contrary, to have obtained it in good faith, before maturity and for a valuable consideration, and proof of payment to the payee after maturity will constitute no defense: *Lathrop v. Donaldson*, 22-234.

331. For valuable consideration; collateral security: An indorsee to whom a note is transferred as collateral security for a pre-existing debt without any other consideration, the transfer being a mere voluntary act on the part of the debtor, and the note being received by the creditor without incurring any new responsibility, and without parting

Protection against equities and defenses.

with anything, or subjecting himself to any loss or delay, the subsisting debt being left precisely in the same condition as it was before the transfer, is not entitled to be considered as having taken the note for value, nor in the usual course of business: *Trustees of Iowa College v. Hill*, 12-463; *Ryan v. Chew*, 13-589; *Ruddick v. Lloyd*, 15-441; *Union Nat. Bank v. Barber*, 56-559; *Bone v. Tharp*, 63-223.

332. The fact that the creditor had ground for attachment, and in fact refrained from proceeding by attachment on account of the transfer of the note to him as security, although not entering into any obligation not to proceed by attachment, will not constitute him a holder for value of the note so as to be relieved from equities: *Bone v. Tharp*, 63-223.

333. If the note is accepted in payment of a pre-existing indebtedness, the transferee has the same rights as if it had been transferred for an indebtedness then arising: *Johnson v. Barney*, 1-531.

334. An extension of time by the creditor is sufficient consideration for the transfer of the note to him as collateral security to constitute him a holder for value, although it does not appear that any loss resulted to him on account of such extension: *Wormer v. Waterloo Ag'l Works*, 50-262.

335. One who takes a note before maturity, without notice, as collateral security for his liability in becoming surety for the transferrer on a debt which he afterward pays, is a holder in good faith for valuable consideration in the ordinary course of business, and takes free from equities between antecedent parties: *Stotts v. Byers*, 17-303.

336. For collection: The indorsee, under an indorsement for collection merely, does not become a *bona fide* holder: *Johnson v. Barney*, 1-531.

337. For less than face value: The fact that a purchaser pays less than the apparent value of the instrument will not prevent his recovery as a purchaser for value: *Sully v. Goldsmith*, 32-397.

338. Recovery not limited to consideration paid: A *bona fide* holder for value is not limited in his recovery against the maker, upon proof of want of consideration, to the amount paid by him to his transferrer, but

may recover the entire amount of the note: *Lay v. Wisman*, 86-305; *National Bank v. Green*, 33-140.

339. The payee having acquired the legal right to sue the maker, may dispose of the note at any rate of discount from its face which he sees fit, and the purchaser will have the right to enforce it against the maker for its face: *Dickerman v. Day*, 31-444.

340. In an action against a bank upon a bank bill issued by it, evidence tending to show that plaintiff purchased the bill at a discount is not admissible: *Taylor v. Cook*, 14-501.

341. Usual course of business: If a note is taken out of the usual course of business under circumstances calculated to impart notice of its infirmities, the holder receives it at his peril, although taken before due and without notice of fraud: *Moore v. Moore*, 39-461.

342. By due course of business is meant according to the customs and usages of commercial transactions: If the paper is purchased before maturity, it is such a transaction; if purchased after maturity, it is not in accordance with commercial transactions: *Wood v. McKean*, 64-16.

343. Before maturity: The holder of a note acquiring title, even for value, after due, is subject to all the equities which attach thereto between the antecedent or immediate parties: *Barlow v. Scott's Adm'rs*, 12-63.

344. Evidence as to the transfer of a note before maturity held sufficient in a particular case: *Markley v. Hull*, 51-109.

345. Check; diligence in presentment; payment: While a check is not technically due before presentment, yet a party may take it under such circumstances as to make it a stale demand on account of lack of diligence in presenting it for payment, and he will thereby acquire no higher title than that of a payee, and be subject to like equities. Under such circumstances evidence of payment to a prior party is admissible. What amounts to due diligence must be determined from the circumstances of each case: *First Nat. Bank v. Needham*, 29-249.

346. Fictitious payee: A *bona fide* holder for value and without notice of the fact that the note is made payable to a fictitious payee

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is not subject to defenses, and the maker is estopped, as against such holder, from setting up that fact. By his act in making it payable to such person, the maker affirms his existence, and in respect to such a holder is bound to know that the payee is a real person: *Lane v. Krekle*, 22-399.

347. Not negotiated to payee: The fact that a note payable to payee or bearer is negotiated to another person than the payee is not of itself sufficient to charge the taker thereof with notice and subject him to defenses: *Gage v. Sharp*, 24-15.

348. One who takes a note payable to another person or bearer knowing that it has not been delivered to the payee named, but that it is delivered to him to effect the same purpose as it was originally intended to effect, is not thereby subjected to equities of which he had no knowledge: *Laub v. Rudd*, 37-617.

349. Negotiation of accommodation paper by maker instead of indorser: The fact that a note bearing the blank indorsement of the payee is negotiated by the maker does not affect a *bona fide* holder for value with notice of defenses. Such negotiation is the usual course of business as to accommodation paper: *Winters v. Home Ins. Co.*, 30-172.

350. Negotiation of bill before acceptance: The fact that a purchaser takes a bill before acceptance does not affect him with knowledge of a defense thereto on the part of the drawer: *Adae v. Zangs*, 41-596.

351. Transfer before maturity; delivery after: Where a note is deposited as collateral security, and while so held, and before maturity, is sold to a third person who does not get possession until after maturity, such third person is nevertheless protected as a *bona fide* holder: *Grimm v. Warner*, 45-106.

352. Special acceptance: An indorsee taking a bill before maturity under the terms of a special acceptance acquires the rights of a *bona fide* holder as to the acceptor, although the terms of the acceptance may be such as to discharge drawer and prior indorsers: *Bridge v. Livingston*, 11-57.

353. Acts of officers of corporation: Certain facts as to the negotiation of promissory notes by the treasurer of a corporation, held

not sufficient to constitute notice to the holder as to infirmities therein: *Pond v. Waterloo Ag'l Works*, 50-596.

354. Where the note of a corporation indorsed in blank by the payee was negotiated by the secretary of the company as his own, held, that the purchaser took as a holder in good faith, although it appeared on the face of the note that the person from whom he acquired title was such secretary: *Wormer v. Waterloo Ag'l Works*, 50-262.

355. Want of consideration: The fact that a company selling machines has sold some which are defective does not show that a particular machine sold by it, for which a note was given in part payment, was defective, and knowledge of the former fact would not affect the purchaser of the note with notice of want of consideration therein: *McDonald M'f'g Co. v. Thomas*, 53-558.

356. Accommodation paper: The fact that a note is accommodation paper is no defense thereto by the accommodation maker as against the *bona fide* holder acquiring it in the usual course of business for value before maturity without notice of any fraud in obtaining the signature of such maker. Accommodation paper is an exception to the rule that one taking paper with knowledge that it is open to the defense of want of consideration against the original payee takes subject to such defense: *Winters v. Home Ins. Co.*, 30-172.

357. Negligence of transferee; failure to make inquiry: The weight of authority seems to be that negligence of a purchaser to take notice of circumstances which would put a prudent man on inquiry, even where it amounts to gross negligence, will not necessarily subject him to equities or defenses. It will have that effect only where it evinces actual bad faith: *Cook v. Weirman*, 51-561; *Pond v. Waterloo Ag'l Works*, 50-596; *Lake v. Reed*, 29-258.

358. Mere want of diligence in ascertaining the facts will not subject the holder to the defense of fraud or want of consideration, even though he was in a situation where such facts might have been ascertained by inquiry: *Kelly v. Ford*, 4-140.

359. A purchaser will not be put upon inquiry and charged with notice or fraud merely by circumstances sufficient to arouse

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suspicion and put a reasonable man upon inquiry: *Lane v. Evans*, 49-156.

360. Facts constituting notice of infirmities: But if from the circumstances attending the transfer the purchaser must have known that the person offering the note had no right to transfer it, then he is bound to make inquiry, and if he does not he takes it at his peril: *Trustees of Iowa College v. Hill*, 12-462.

361. To affect a purchaser with notice of a defense to the note it is not essential that his knowledge be established by direct testimony; it may be shown by circumstances and inference therefrom. The fact that the purchaser was an employee of the payee of the note, and might have known that the maker had on several occasions purchased intoxicating liquors of the payee, with other facts, *held*, to have a tendency to show that the purchaser was not without notice: *Hoffman v. Leibfarth*, 51-711.

362. Knowledge of defenses: Where a holder of a draft, after it was due, and after the acceptor had notified the agent of such holder that it was a swindle and would not be paid, advanced money thereon, *held*, that as to such advances the holder was subject to any defenses the acceptor might have: *Delaware County Bank v. Duncombe*, 48-488.

363. Where the purchaser of a note before maturity had notice that it was given for the purchase price of land which the payee had agreed to convey, and in which conveyance the wife of the payee, who was still living, did not join, held, that such purchaser was subject to the defense which the maker of the note might interpose upon failure of his grantor to make a perfect title by reason of the failure of his wife to release dower: *Zebley v. Sears*, 38-507.

364. Transfer by purchaser without notice to purchaser with notice: If the transferrer of a note is a *bona fide* holder for value before maturity, his transferee, also for value and before maturity, will acquire title free from equities, although such transferee himself had notice of such equities. The transferee in such case acquires the same title possessed by the holder from whom he purchases: *Mornyser v. Cooper*, 35-257; *Whitaker v. Johnson County*, 10-161; *Peabody v. Rees*, 18-571; *Simon v. Merritt*, 38-537;

Brewer v. Holborn, 34-478; *Denham v. Sankey*, 38-269.

365. Purchaser without notice from holder with notice: A purchaser without notice for value, etc., from a holder who has taken the paper with knowledge that the transfer to him was fraudulent, is nevertheless protected: *Stutzman v. Payne*, 23-17.

366. Rights under a mortgage: The innocent purchaser before maturity, etc., of a note secured by mortgage, holds the mortgage as well as the note free from equities between the parties: *Updegraff v. Edwards*, 45-518.

And see MORTGAGES, §§ 230-234.

367. Burden of proof; presumptions: Proof of fraud or want of consideration between the original parties will not authorize the inference that the note was transferred after maturity or without consideration. If defendant claims there was fraud or want of consideration in the inception of the note, he must prove that the holder took with notice thereof: *Kelly v. Ford*, 4-140.

368. The law will presume, in the absence of rebutting proofs, that the holder acquiring the paper before maturity is a *bona fide* holder for a valuable consideration without notice. It is incumbent upon the defendant to overcome such *prima facie* title by satisfactory proof: *Trustees of Iowa College v. Hill*, 12-462.

369. The maker, relying upon fraud as a defense in an action by an indorsee taking before maturity, must prove that such purchaser took with notice of the fraud: *Stein v. Keeler*, 4 G. Gr., 86.

370. As against a subsequent holder, an allegation of fraud in the execution of the instrument is not enough to throw upon such holder the burden of proving himself to be an innocent holder, but defendant must also allege and prove that the holder took the paper after due, and that he had notice, and that he gave no value. The mere want or failure of consideration is not sufficient to overcome the presumption in favor of the holder and throw the burden of proof upon him: *Clapp v. Cedar County*, 5-15.

371. If the note has been obtained by fraud, the burden of proof is upon the holder suing thereon to show that he is the *bona fide* holder. This is the rule relating to the evi-

Protection against equities.—If innocent purchaser.

dence but not to the pleadings where the action is by a person not the payee. In such case it is necessary to allege notice on the part of the holder of the facts pleaded in defense, and that the holder gave no value: *Lane v. Krekle*, 22-399.

372. An indorsee seeking to enforce payment of a note which is tainted with fraud in its inception has the burden of proof thrown on him to show that he is a *bona fide* holder: *Bank of Monroe v. Anderson Bros. Mining, etc., Co.*, 65-692.

373. Where fraud or illegality in the inception of a note is pleaded as a defense in an action thereon and supported by evidence, the burden of proof is cast upon plaintiff to show that he gave full value, and that he is a *bona fide* purchaser before maturity: *Woodward v. Rodgers*, 31-342; *Rock Island Nat. Bank v. Nelson*, 41-563.

374. Where a partnership sought to recover on a promissory note fraudulently issued, claiming to be a *bona fide* purchaser thereof before maturity without notice, held, that it was not sufficient for plaintiff to show that the partner making the purchase for the firm had no notice of the defect in the note, but it must be made to appear that no member of the firm was affected with such notice: *Frank v. Blake*, 58-750.

375. In an action on a note against the maker who sets up fraud in the inception of the note as a defense, the burden of proof is upon him to establish such fraud, and evidence thereof is admissible, although plaintiff alleges that he is an innocent holder: *Terry v. Taylor*, 64-35.

376. While possession is *prima facie* evidence that the holder obtained the note for value, yet where it appears that the rightful owner never legally parted with the note, but it was wrongfully delivered to the holder by one without authority, the burden of proving the payment of value is upon the holder: *Union Nat. Bank v. Barber*, 56-559.

b. Against what equities and defenses protected.

aa. If innocent purchaser.

377. Protected against fraud: As against an innocent holder of a negotiable instru-

ment, fraud in its inception cannot be set up: *Temple v. Hays*, Mor., 9.

378. Before fraud can be made available against the holder of a note it must be shown either that he took the same after maturity or that he took it with notice of the fraud: *Loomis v. Metcalf*, 30-382.

379. A sharp distinction is made between a case where a person supposes he is executing an instrument not a note, and by fraud is induced to execute a negotiable note, and a case where a person intends to execute a negotiable note. Whether in the latter case the maker is absolutely precluded from setting up fraud as a defense against the innocent indorsee for value before maturity, *quære*; but certainly he is precluded from doing so unless he can show himself free from negligence: *Fayette County Savings Bank v. Steffes*, 54-214.

380. A fraud perpetrated by the payee or his agent in procuring the note is not available as against a holder for value taking the note before maturity in the ordinary course of business, until it be shown that such holder had notice of the fraud: *Lake v. Reed*, 29-258.

381. Negligence of maker: The negligence of the maker in failing to read the note at the time of signing it, by reason of which he executes a different note from that intended, will preclude him from setting that fact up as a defense against a *bona fide* holder: *Wright v. Flinn*, 33-159.

382. Fraudulent representations: The maker of a promissory note in an action by the *bona fide* holder for value, taking before maturity, cannot set up the defense of fraudulent misrepresentations by the payee when such fraud does not amount to forgery: *Douglass v. Matting*, 29-498.

383. Failure to stamp: When there was nothing on the face of the instrument to show that the stamp required by the United States revenue laws was affixed after its delivery to the payee, held, that it would be good in the hands of an indorsee or holder for value who received it without notice of such fact: *Blackwell v. Denie*, 23-63.

As to the protection of a *bona fide* holder against the defense that the instrument was not stamped, see *supra*, §§ 69-73.

Protection against equities.—If innocent purchaser.

384. Defenses to insurance notes: To render a note given for insurance void in the hands of an innocent holder under the statutory provision (Code, § 1146) that notes taken for policies of insurance in any company doing business in the state shall show upon their face that they have been taken for insurance and not be collectible unless the company or its agents have fully complied with the laws of the state relative to insurance, it is necessary that the fact that the note was given for a policy of insurance be made to appear upon its face: *Cook v. Weirman*, 51-561.

385. Duress: A *bona fide* holder for value before maturity is protected against the defense of duress in obtaining the note. Such fact renders the note voidable but not void: *Veach v. Thompson*, 15-380.

386. Negotiated without authority: The fact that one who signs a promissory note intrusts it to another to be negotiated after the performance of certain conditions, or with blanks to be filled, and the note is negotiated contrary to such agreement and beyond the authority given, will not be a defense against a *bona fide* holder: *Gage v. Sharp*, 24-15.

387. One who indorses a note in blank for collection cannot recover in an action against one who bought the note from such indorsee in good faith for value, although there was fraud on the part of the indorsee in transferring the note to such purchaser. Protection would also be afforded a purchaser without notice from one who purchased from the indorsee with notice of the fraud: *Stutzman v. Payne*, 23-17.

388. Garnishment of maker: A good faith purchaser is not affected by a subsequent garnishment of the maker: *Fowler v. Doyle*, 16-534.

By statute the maker cannot be held liable as garnishee on a negotiable note unless the paper is delivered, or the garnishee exonerated or indemnified: See GARNISHMENT, §§ 64-71.

389. Payment of the note at maturity by depositing the money for its payment at the bank where it is in terms made payable, although the holder has not left it there for collection, is a defense against an indorsee, even though the bank afterward fails and

the money is thus lost to the holder: *Lazier v. Horan*, 55-75.

Further as to payment as a defense, see *infra*, §§ 431-443.

390. Forgery: A purchaser before maturity does not thereby acquire any claim upon forged paper as against the apparent maker who is without fault as to the forgery and the transfer to the holder: *Caulkins v. Whisler*, 29-495.

391. Material alteration: If the note is materially altered it is not valid in the hands of the innocent purchaser for value before maturity, and if there is a memorandum or a contract written upon the same paper qualifying the terms of the note, and such memorandum or contract is severed, the note is thereby materially altered so as to be void even in the hands of such holder: *Scofield v. Ford*, 56-370.

392. Negligence of maker: If, however, the maker is guilty of gross carelessness in executing such an instrument, he may be precluded from setting up the invalidity of the note as against a *bona fide* holder for value: *Ibid.*

393. Burden of proof in such cases: Therefore in an action to enforce such a contract against a maker, it is incumbent upon the plaintiff to show facts which would take the case out of the general rule, and without proof of carelessness on the part of the maker, the holder of what purports to be a promissory note, but which has been made such by cutting it out of a larger piece of paper containing language not importing an obligation to pay, cannot recover thereon, even though he be a *bona fide* holder: *Ibid.*

394. Negligence in leaving blank: Where a note was executed leaving a blank in which the payee without authority inserted a provision for interest, afterwards transferring the note to a *bona fide* holder for value, held, that the fact of alteration could not be set up to defeat the note in the hands of such purchaser: *Rainbolt v. Eddy*, 34-440.

395. Want of power to issue: Negotiation will not validate obligations which are not binding because of a want of power to issue them: *Clark v. Des Moines*, 19-199.

396. Municipal bonds; without authority: The purchaser of municipal bonds issued in excess of the constitutional limitation of

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indebtedness is bound to know such limitation, and the fact as to whether the indebtedness exceeds such limit or not: *McPherson v. Foster*, 43-48.

397. Transfer after bankruptcy: Indorsement by the payee after the commencement of bankruptcy proceedings against him, although before the maturity of the note, will not pass the title nor render the indorsee an innocent purchaser. The title will pass to the assignee in bankruptcy when appointed: *Seaton v. Hinneman*, 50-395.

bb. If not innocent purchaser.

398. Equities arising after execution: It is not necessary that the equity to which the purchaser after maturity is subjected be one attaching to the note at the time of its execution: *Bates v. Kemp*, 12-99.

399. Release: Therefore, *held*, that the transferee after maturity was subject to a defense arising out of a release of the payee by the holder of the note after maturity but before the transfer: *Ibid*.

400. Payment: Where it appeared that plaintiff was not a *bona fide* purchaser, *held*, that evidence of payment of the note to the payee before the transfer should have been admitted: *Tuttle v. Bonar*, 49-696.

401. Where payment was made to a person claiming to act as agent for the payee, and afterwards such agent claimed to acquire title to the note and transferred it to a third person, *held*, that the transferee, taking subject to equities existing against the agent, was affected with the payment, whether the agent had authority at the time of the receipt of the payment to accept it for the payee or not: *Hayward v. Munger*, 14-516.

Further as to payment as a defense, see *infra*, § 431-443.

402. Garnishment: Payment by the maker under process of garnishment in an action against the payee will defeat recovery by a holder who has obtained the note from the payee with intent to defraud payee's creditors: *Gillam v. Huber*, 4 G. Gr., 155.

403. Set-off: While the transferee after maturity takes subject to equities attaching

to the instrument itself, and such as between the parties to it would control, qualify or extinguish any rights arising between them, he is not (in the absence of statutory provisions) subject to equities between the parties to the note arising from other and independent transactions between them, and is, therefore, not subject to a set-off arising out of an independent transaction, even though existing at the time of the transfer: *Shipman v. Robbins*, 10-203; *Bates v. Kemp*, 13-223; *Ryan v. Chew*, 13-589; *Way v. Lamb*, 15-79; *Stannus v. Stannus*, 30-448.

404. And this rule was held applicable, notwithstanding Rev., § 2760, which provided that an action by an assignee of a chose in action should be without prejudice to any set-off or other defense existing before notice of the assignment; it being considered that the fact that the paper was transferred after maturity, if in the usual mode of transferring negotiable paper, would not render it a mere non-negotiable chose in action: *Richards v. Daily*, 34-427.

405. But under Code, § 2546,¹ very similar to the section of the Revision above referred to, it is held that the transferee after maturity of a negotiable note, takes subject to any counter-claim, though it be an independent cause of action, in favor of the maker and against the transferor, existing before notice of the transfer: *Downing v. Gibson*, 53-517.

406. And the same rule is applied to an indorsee of negotiable paper before maturity, if the indorsement is not in good faith and for a valuable consideration: *Bone v. Tharp*, 63-223.

407. Under the section of the Code just referred to, *held*, also, that the indorsee after maturity takes subject to the defense of payment made by maker to payee before notice of the transfer: *Haywood v. Seeber*, 61-574.

408. Equities or defenses arising after transfer: The *bona fide* holder for value after maturity is not subject to any equity or defense arising after the transfer: *Campbell v. Rusch*, 9-337; *Bates v. Kemp*, 13-223.

409. Therefore, *held*, that a defense or set-off in favor of the maker of a note given

¹ Code, § 2546. In case of the assignment of a thing in action, the action by the assignee shall be without prejudice to any counter-claim, defense, or cause of action, whether matured or not, if matured when plead, existing in favor of the defendant and against the assignor before notice of the assignment; but this section shall not apply to negotiable instruments transferred in good faith and upon valuable consideration before due.

Protection against equities.—Defenses.

for the purchase price of real property growing out of the failure of consideration, by reason of the failure or inability of the seller to convey a good title at the time stipulated in the contract, could not be set up as against an indorsee of the note after maturity but before the defense had arisen: *Bates v. Kemp*, 13-223; *Zebley v. Sears*, 36-507.

410. An equity arising after the transfer of an overdue note cannot affect the holder. He takes with the transfer all the rights of the indorser. Where a corporation took defendant's note in payment for an instalment on his stock, and, after transferring the same after maturity to a purchaser for value, declared his stock forfeited for failure to pay subsequent instalments, *held*, that such action on the part of the corporation would not affect the rights of the holder of the note to recover against the maker: *Whittaker v. Kuhn*, 52-815.

411. Under invalid assignment: Although, where there is a valid and *bona fide* assignment, the defense by the maker is limited to such matters as existed at the time of notice to him of the assignment, yet if for any reason the assignment was invalid, the holder will be subject to any defense of the maker which he may have up to the trial: *Pearson v. Cummings*, 28-844.

412. Equities between assignor and person not a party: An assignee after maturity takes subject only to such equities as exist between the parties to the instrument, and not subject to equities between the assignor and one not a party, not affecting the validity of the note: *Crosby v. Tanner*, 40-136.

413. Therefore, *held*, that the assignee of a note secured by mortgage, taking it after maturity, was not bound by the agreement between the assignor and a third person to release the mortgage, of which agreement the assignee had no notice: *Ibid*.

414. So an assignee by delivery without indorsement of an instrument not payable to bearer, though he takes subject to all equities between the original parties in the nature of defenses to the enforcement of the note, is not subject to equities not affecting the validity of the note but which only exist against the maker in favor of a stranger involving the lien of a security therefor: *Vandercook v. Baker*, 48-199.

415. Accommodation paper: Where an accommodation note was indorsed by the payee after maturity and used as collateral security, and such indorsee sold it to plaintiff, *held*, that plaintiff could only recover thereon the amount of the unpaid debt which such note was given to secure: *First Nat. Bank v. West*, 52-684.

416. Transfer without authority: The true owner of negotiable paper transferred after maturity as collateral security and wrongfully sold by the holder, may assert his title against the last holder although he has acquired it without notice and for a valuable consideration: *Wood v. McKean*, 64-16.

417. False representations: Where a note was executed by defendant, who was not liable for the indebtedness for which it was given, and upon the representation of the payee that he would procure the note of the person liable and surrender the one given by defendant, *held*, that such facts constituted a defense which might be set up as against the purchaser after maturity: *McNitt v. Helm*, 33-342.

418. Payment after notice of transfer: Payment made to the payee of a note after notice of its transfer to a third person will not extinguish the note and cannot be set up although the suit is in the name of the payee for the use of the holder: *Gregg v. McCulloch*, 1 G. Gr., 274.

VIII. DEFENSES AS BETWEEN THE ORIGINAL PARTIES.

a. Forgery, fraud, illegality, etc.

419. Denial of signature; forgery: Where defendant denies the execution of the instrument and assumes the burden of proving that the signature is not his, it is sufficient if he proves his case by a preponderance of evidence. Denial of the execution does not impute a crime so as to render proof thereof beyond a reasonable doubt necessary: *Ashworth v. Grubbs*, 47-353.

420. Where the signature of a note was, in a particular case, denied under oath, *held*, that the evidence was sufficient to support a verdict against defendant, notwithstanding such denial: *McDonald v. Noonan*, 50-83.

421. Upon an issue as to forgery, want of

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consideration is material: *Donahue v. Wagner*, 68-358.

422. Fraud; want of consideration: As between the payee and the administrator of the maker, the same defense can be set up against a promissory note as against any contract, written or parol, on account of fraud or want of consideration: *George v. Gillespie*, 1 G. Gr., 421.

423. Failure of consideration: Defendant may, in support of the defense of failure of consideration, show that the note was given in consideration of an agreement on the part of payee which was not performed, and such evidence will not be excluded as varying the terms of a written contract by parol: *Dicken v. Morgan*, 54-684.

424. Waiver of defense by renewal: A party cannot, after giving a new note for an indebtedness on a former note, set up partial failure of consideration of which he had knowledge at the time of renewal: *Keyes v. Mann*, 68-560.

425. Fraud in reading to maker: Where the maker of a note signs it without reading it, and afterwards seeks relief therefrom on the ground of mistake or fraud, in that as read to him it did not correspond with the written words, and alleges matter of excuse for not reading it, the question of fact as to whether, under the circumstances, he was guilty of negligence, is for the jury: *Hopkins v. Hawkeye Ins. Co.*, 57-208.

And see CONTRACTS, §§ 115-117.

426. Fraud of payee: The omission of the payee of a note given in settlement of a claim to state all the facts in regard to the claim to the maker will not defeat the note if the facts were known to the maker from other sources of information: *Sullivan v. Collins*, 18-228.

427. False representations as to the use to be made of the proceeds of an endowment note, given to a college, made without authority by the agent through whom the note was procured, may be shown as a defense thereto: *Bridges v. Yellow Springs College*, 19-572.

428. Condition precedent; endowment note: It is competent for the parties to an endowment note to agree that it shall not be enforced unless a stipulated amount of endowment is raised: *Ingham v. Dudley*, 60-16.

429. Destruction of note: There can be no recovery on a destroyed note unless it is clearly established that the destruction was through ignorance or by mistake: *McDonald v. Jackson*, 56-648.

430. Omission of stamp: The omission of a stamp will defeat the note only where it is fraudulently omitted, and in that case alone constitutes a defense, which defense must be pleaded or sustained by evidence at the trial in order to benefit the party relying thereon. The burden rests upon such party to show that the stamp was omitted to defraud the government: *Ricord v. Jones*, 33-26.

See, also, *supra*, §§ 63-75.

b. Payment.

431. Readiness to pay; presentment for payment: In an action against a maker of a note it is not necessary to aver presentment for payment. The defense of readiness to pay should come from defendant: *Tarbell v. Stevens*, 7-168.

432. Presentment at particular place: Where a note is payable at a given place the maker can exonerate himself from the payment of interest after maturity only by showing that he had funds at the place specified for the discharge of the note: *Robinson v. Lair*, 31-9.

433. Deposit of money at bank where payable: Where a note is made payable at a bank and the maker deposits there the amount necessary to fully discharge it, and the bank afterwards fails, such deposit is a full defense to an action by the payee or indorsee against the maker. It is presumed when a note is made payable at a bank that the parties expect collection to be made through the bank, and although the bank holding the money deposited is technically an agent of the depositor, yet the money is deposited for the holder of the note, and it requires no act of the depositor to authorize the bank to pay it: *Lazier v. Horan*, 55-75.

And see BANKS, § 8.

434. Payment in property at particular place; tender: Where a note is payable in property at a particular place the debt is not discharged unless the maker has property at that place set apart and designated as the property of the payee ready for delivery: *Games v. Manning*, 2 G. Gr., 251.

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435. To constitute payment in such case, it must appear that the maker either paid, tendered or designated, and set apart the property at the time and place stipulated in the note: *Spafford v. Stutsman*, 9-128.

436. Payment to the holder of a note payable to bearer will be considered as made in good faith, and as discharging the note, unless there are circumstances amounting to clear proof that he is a fraudulent holder. Mere suspicion that such holder is not the owner will not exonerate the maker from making payment: *Stoddard v. Burton*, 41-582.

437. Payment before maturity: While payment before due of a note that has been lost or stolen does not discharge the maker from liability to the real owner, because the payment is out of the ordinary course of business, yet where the note is, by its terms, payable at any time within a limited period at the option of the maker, payment made during that period cannot be deemed to be out of the ordinary course of business, and if such payment is made to the person appearing entitled thereto it will discharge the maker: *Ibid.*

438. Payment to payee will be no defense to a note as against a holder who has taken it before maturity as collateral security: *City Bank v. Taylor*, 60-66.

439. Payment of a negotiable note to the payee, by the maker, without notice of a transfer made after maturity, is a defense to an action by an indorsee who takes by such transfer after maturity: *Haywood v. Seeber*, 61-574.

440. Payment to trustee: The person making payment of a note executed to a trustee is not bound to see that the money paid is properly appropriated by the trustee: *Thomassen v. Van Wyngaarden*, 65-687.

441. Payment to agent: Where a party caused a note to be taken by his agent in his own name, inducing the maker to believe that the agent was the real party in interest, and allowed the agent to receive the interest from time to time, *held*, that he was bound by the payment made to such agent of the principal when the note became due, no notice to the maker that the payee was not authorized to receive payment being given: *Sax v. Drake*, 69-760.

442. Where a note was made payable at a particular place, and the maker, before the note became due, deposited at that place with another the amount necessary to pay the note, notifying the holder of that fact, and the holder residing at another place wrote to the person with whom the money was deposited to bring or send the money at the first opportunity, and before the money was thus sent, it was stolen from the person with whom it was deposited, *held*, that such deposit did not constitute a payment of the note, and that the person with whom the deposit was made had not been accepted as agent of the holder in such sense that the holder could not recover from the maker: *First Nat. Bank v. Free*, 67-11.

443. Payment must be in money: A promissory note in the hands of an agent for collection can only be paid in money or coin, and a payment in currency not legal tender is only a valid payment when the agent is specifically authorized to receive such currency: *Graydon v. Patterson*, 18-256.

444. Judgment on collateral security as a satisfaction: Where the maker of a note gave the note of a third person indorsed by himself as collateral security, and the holder recovered judgment on such collateral security against the maker thereof and indorser, *held*, that such judgment was no bar to a recovery on the principal note, though the satisfaction of such judgment would bar an action on the principal note to the extent of the amount thereof: *Burnheimer v. Hart*, 27-19.

445. Judgment against joint and several maker, remaining unsatisfied, will not discharge the note as to his co-maker: *Harlan v. Berry*, 4 G. Gr., 212.

446. Particular facts as showing payment: An instruction as to whether the facts in a particular case showed the payment of a note sued on, *held* proper: *Dougherty v. Deeney*, 45-443.

447. *Held*, that certain facts relied upon as showing payment, while not sufficient to raise a presumption to that effect, were proper to be taken into consideration in determining the question: *Williams v. Barrett*, 52-687.

448. Receipt; burden of proof: Where payment is pleaded as a defense, the produc-

Payment.—Action upon.

tion of a receipt is sufficient evidence of payment to throw upon plaintiff the burden of explaining or contradicting such receipt: *Williamson v. Reddish*, 45-550.

449. Indorsement of payment: It will be presumed that an indorsement of payment found on the back of the note was made with the knowledge and consent of the person in whose possession it was at the time such indorsement purports to have been made, even though it is not in the handwriting of such person: *Thomassen v. Van Wyngaarden*, 65-687.

450. Where a note for seventy-five dollars provided that it might be discharged by a payment of fifty dollars on or before a certain date, *held*, that an indorsement on the note of the payment of fifty dollars a few days after the date specified would not show payment: *Holland v. Vanard*, 8 G. Gr., 230.

451. Erased indorsement: Where a credit indorsed upon the back of a note appears to be erased, the presumption is in favor of the allowance of the erased credit, subject to be rebutted by testimony. The mere certificate of witnesses that such credit was made by mistake is not, *per se*, evidence of the fact: *Carson v. Duncan*, 1 G. Gr., 466.

452. Mistake in payment: Where the maker desiring to pay the note in full, by mistake in computation pays less than the full amount, such a payment is good only for the amount paid: *Easton v. Strother*, 57-56.

453. Burden of proving deduction: Where by contract appended to the note it was provided that if a certain tract of land for which the note was given in payment did not amount to a certain quantity, the amount due on the note was to be reduced proportionately, *held*, that the burden of proving that the land was not of the quantity specified rested upon the defendant: *Jewett v. Lyon*, 3 G. Gr., 577.

454. Parol evidence of payment: Under a plea of payment the maker may show that he sold land to the holder under a parol agreement in payment of the note and has performed his agreement with reference thereto, and this he may do notwithstanding the fact that the agreement was contemporaneous with the execution of the note: *Branner v. Piper*, 25-400.

455. Presumption of payment from lapse of time: The mere fact that a note is about five years overdue, without any other circumstance to justify the inference of payment or the non-existence of the note, will not give rise to a presumption of payment or that the note never had legal existence: *Nash v. Gibson*, 16-305.

456. Possession after payment: The maker has the right, after payment, to the possession of the note, and may maintain replevin to recover such possession: *Savery v. Hays*, 20-25.

457. Transfer to party bound to pay: Where a party under obligation to pay a note procures the transfer of the same to him by indorsement, such transfer operates, as between him and the person to whom he is obligated for such payment, as a discharge of the note and not as a purchase: *Lawson v. McKenzie*, 44-663.

IX. ACTION UPON.

458. By assignee: Under statutory provision, an assignee of a non-negotiable instrument may sue thereon in his own name, subject, however, to any defense or set-off which the maker had against the assignor before notice of the assignment (Code, § 2084): *Merchants', etc., Bank v. Hewitt*, 3-93.

459. By indorsee: An indorsee by special indorsement must sue in his own name and not in the name of payee for the holder's use: *Hickok v. Labussier*, Mor., 115.

460. By joint owners: Where a note is made payable to two or more persons jointly, the payees must join in an action thereon, unless one or more of them refuse to join, in which case those refusing may be made defendants. The fact that the note is payable to such payees or bearer, and is held by one of the payees, does not entitle him to sue thereon alone: *McNamee v. Carpenter*, 56-276.

461. Where payable in property; demand: Where a note is payable in property at a day certain and the property is not tendered, suit may be brought for the amount due in money, without making demand for the property: *Wiley v. Shcemak*, 2 G. Gr., 205.

462. Premature action: Judgment in an action upon a note commenced before its

Action upon.—Statute constitutional.

maturity, without any reason being averred for having commenced the action before maturity, is erroneous: *Whitney v. Bird*, 11-407.

463. Common counts: Recovery against the indorser may be had under the common counts: *Knight v. Fox*, Mor., 305.

464. A note payable in specific articles is admissible in evidence under the common or money counts: *Payne v. Couch*, 1 G. Gr., 64.

465. Money had and received: An action by the indorsee against the maker may be maintained for money had and received, the note being admissible in evidence in such action: *King v. Wall*, Mor., 187.

466. Joint action against the maker and guarantor may be maintained: *Marvin v. Adamson*, 11-371; *Mix v. Fairchild*, 12-351; *Veach v. Thompson*, 15-380.

467. Filing against estate entitles to attorney's fee: Where a note provided for attorney's fee for collection if action should be commenced thereon, *held*, that filing the note as a claim against the estate of the maker after his decease, the payment thereof being resisted by the administrator, was sufficient bringing of action to entitle plaintiff to the attorney's fee: *Davidson v. Vorse*, 52-384.

468. Destroyed note: A recovery may be had on a note that has been destroyed, only where it is clearly established that such destruction was through ignorance or by mistake. If a note is destroyed by the holder in pursuance of a fraudulent scheme, he cannot recover thereon: *McDonald v. Jackson*, 56-648.

469. Lost note: Equity cannot take cognizance of an action upon a note of which the defendant wrongfully and fraudulently procured and retains possession. Such a case does not fall within the reason of the rule allowing suit in equity upon a lost note: *Searcy v. Miller*, 57-613.

470. Lost note; indemnifying bond: Where a lost note was indorsed by special indorsement so that no one but the original owner could acquire any title thereto by transfer, the maker cannot demand indemnity as a condition of payment: *Dudman v. Earl*, 49-87.

471. Fraud in procuring; judgment on included indebtedness: Where a note was found void for fraud on account of having

been, by means of intoxication, procured for too great an amount, *held*, that it was error to render judgment for a less amount due and entering into the fraudulent note. In such case plaintiff should be left to seek his proper relief in an appropriate action: *Willcox v. Jackson*, 51-208.

472. Damages for non-payment: The statutory provision as to rate of damages to be allowed and paid upon the non-acceptance or non-payment of bills of exchange drawn or indorsed in this state, when damage is recoverable, relates to foreign and not to inland bills (Code, § 2096): *First Nat. Bank v. Owen*, 23-185.

BOARD OF HEALTH.

1. Statute constitutional: The statute (18 G. A., ch. 151; McClain's Ann. Stat., 451) providing for a state board of health, so far as it authorizes such board to require a physician to report information as to births and deaths, is not unconstitutional. Its objects are within the authority of the state, and may be attained in the exercise of its police power: *Robinson v. Hamilton*, 60-134.

2. Expenses of care of infected persons: The board of health may, under § 21 of that act, erect a temporary building to which infected persons may be removed for isolation, and the county will be liable for the expenses thereof in case of the inability of the infected person or persons to pay such charge. Whether the infected person would be liable for such expenses in any event, doubted: *Staples v. Plymouth County*, 62-364.

3. The sick person is properly chargeable with all expenses which may be incurred, as including expenses of removal, if that plan is adopted, or isolation, if that is adopted; and in the latter case the expense of food furnished to the entire family during the period of isolation may be included; also, the supplying of clothing in place of clothing worn by the family, which is burned. For all such expenses which the sick person or those liable for his support are unable to pay, the county is ultimately liable: *Clinton v. Clinton County*, 61-205.

4. It is the imperative duty of the local board of health to provide for a sick person,

Regulations.—Amendment of.

regardless of his settlement—as where the person is a foreigner, not yet having acquired a settlement. The sick or afflicted person must in such case be deemed to belong to the county where the relief becomes necessary: *Ibid.*

5. The county is liable for the care of sick persons under said statute only in case they or the persons liable for their support are not able to make compensation therefor. The liability of the county can be established only by showing that the facts exist which are contemplated by the statute as rendering the county liable, and the burden of proving these facts is therefore upon the party seeking to establish such liability: *Gill v. Appanoose County*, 68-20.

6. The board will not be bound by the actions of individual members in authorizing a physician to render services. Such action must be by the board as a body: *Young v. Blackhawk County*, 66-460.

7. Regulations: Where the mayor and aldermen of a city constituting a board of health made a regulation that no hog-pen nor inclosure wherein swine are kept and fed otherwise than for purpose of commerce, should be allowed within the city limits, *held*, that such regulations might be enforced by the city: *State v. Holcomb*, 68-107.

8. Jurisdiction: Exclusive jurisdiction to determine what constitutes a nuisance and to abate nuisances is not conferred upon the local board of health. A private action for damages may be maintained against a person maintaining a nuisance by one specially injured thereby without regard to the action of the board: *Baker v. Bohannon*, 69-60.

BOATS AND VESSELS.

ACTIONS IN REM AGAINST, see ACTIONS, V.

BONDS.

Liability of principal and sureties upon bond of officer, see OFFICERS.

Liability of sureties in general, see SURETSHIP.

For conveyance of real property, see VENDORS.

Breach of, how pleaded, see PLEADINGS, §§ 60-97.

Who may sue upon, see PARTIES, §§ 79-92.

Measure of damages in action upon, see DAMAGES, §§ 126-128.

As to bonds in particular proceedings, see the respective titles.

1. Amendment of: Under statutory provision (Code, § 248), no defective bond or other security shall prejudice the party giving it, provided it be so rectified within a reasonable time after the defect is discovered as not to cause essential injury to the other party. So *held* in case of appeal bond in an appeal from the county court: *Mitchell v. Goff*, 18-424.

2. So *held*, also, as to bond on appeal from a justice of the peace: *Brock v. Munatt*, 1-128.

3. Substitution: Courts of general jurisdiction have complete power over delivery bonds, and the sureties therein may be changed and others substituted: *Ramsey v. Coolbaugh*, 18-164.

4. Irregularity: A bond for the release of attached property is not rendered invalid as to sureties by a mistake in its recitals as to the court in which the attachment issued: *Ripley v. Gear*, 58-460.

5. It does not follow that a bond taken by an officer is entirely invalid though not in the form authorized by statute. It may be good as a common-law bond if it does not contravene public policy nor violate a statute, and it will be binding on the parties to it: *Sheppard v. Collins*, 12-570.

6. A substantial departure from the requirements of the statute may render the bond void as taken for matters not authorized by statute; not so with a mere verbal departure, even when by statute bonds taken in any other manner than therein prescribed are declared void. This does not reach those which are valid at common law, but only those which are taken by color of office or under pretense of authority: *Ibid.*

7. Justifying by sureties: A justice of the peace has the right to require a surety on an appeal bond to justify: *Lane v. Goldsmith*, 23-240.

8. Approval: Where a party's name is signed as surety to a bond and the approval thereon is in due form, it will be conclusively presumed that such approval was with refer-

Judgment against surety.

ence to such surety, even though the surety was such that he might have been refused by the officer: *Wright v. Schmidt*, 47-233.

9. Code, § 2931, providing that an attorney shall not be received as surety in any proceeding in court, while it would justify the officer in refusing to accept an attorney as surety, and would authorize the party for whose benefit the bond with an attorney as surety is given to move for additional security, does not relieve the attorney, who has without objection been received as surety, from liability on the bond: *Ibid*.

10. This statutory provision as to an attorney being surety applies not only to bonds for costs, under which heading it occurs, but to injunction, attachment, and other bonds: *Massie v. Mann*, 17-131.

As to liability of officer for approving insufficient bond, see OFFICERS, §§ 114-121.

11. Judgment against surety: In the absence of express statutory provision, judgment upon a bond against a surety thereon should not be summarily entered: *Smith v. Bissell*, 2 G. Gr., 379.

12. Where a statutory bond is given under which in a certain event judgment may be rendered against the principal and surety without a new action, the surety is so far a party to the proceeding that he may move for a correction of the judgment as against him, or may move for a new trial, or may apply for the correction of an error which affects him only, and does not affect the merits of the action: *Freeman v. Hart*, 61-525.

13. Insanity as a defense: Where suit is brought for the breach of a bond given in a proceeding for security to keep the peace, the fact of insanity at the time of committing the act constituting a breach of such bond is a defense in the same manner that it would be in a criminal prosecution for the same act: *State v. Geddis*, 42-264.

14. Conditions construed: Where one member of a partnership by agreement with his copartner was allowed to interpose a firm indebtedness as a counter-claim in an action against him individually, upon condition that he would account for the amount of such claim to the partnership, *held*, that he thereby bound himself and his surety to absolutely pay the amount of the claim, although

it was not then subsisting, but had already been paid to him: *Jones v. Fields*, 57-317.

15. Where a bond provided for the delivery of a land warrant, *held*, that on breach of the condition by failure to deliver the warrant, the obligor became liable for damages, and could not, after such liability attached, defeat it by a tender or delivery of the land warrant into court: *Bolster v. Post*, 57-698.

16. Right of action upon; parties: Where a contractor filed a bond to secure to laborers the amount that might be due to them from such contractor in the performance of the work, *held*, that the assignee or laborers performing such service thereunder might sue the contractor under such bond: *Wells v. Kavanagh*, 70—.

17. Where a bond was given by a contractor to secure to the laborers the payment which was due them at the time for services rendered in the performance of work under contract, *held*, that orders given to workmen or credits entered in their favor by the contractor were not binding upon the sureties: *Ibid*.

And see PARTIES, §§ 79-92.

18. Indemnity; when right of action accrues: A right of action on a bond of indemnity conditioned to save the obligee harmless from any damages, arises only after the payment of the debt, but such payment may be by note, and the right of action will exist although the maker may be insolvent. If the condition be to save from liability, the right of action would accrue without payment: *Wilson v. Smith*, 23-252.

19. Where the surety on a bond for costs was taking steps for his discharge, and thereupon the principal executed to him an indemnifying bond, whereupon such steps were discontinued, *held*, that there was a sufficient consideration for the indemnity: *Independent School Dist. v. McDonald*, 39-564.

20. Where a bond is given to indemnify a person for any liability to which he might be subjected as surety on an official bond, such surety may recover thereon the amount of the judgment rendered against him on such bond and satisfied by him, although such judgment is rendered by default, it not appearing that he had any defense that would have been available, and the record also showing that the claim against him was

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established upon proof: *Watson v. Van Meter*, 43-76.

As to breach of contract of indemnity, see *CONTRACTS*, § 576.

21. **Breach of bond:** Where one gave bond for the return of fixtures placed in a mill, which thereby became subject to a mortgage and were sold under foreclosure thereof, *held*, that defendant was excused from returning the property although he had covenanted to do so, by reason of the fact that the right of plaintiffs to its return had, by virtue of legal proceedings against them, expired and ended: *Daniels v. Bowe*, 25-403.

22. **Conditions:** A bond will be good though it contain no recital of terms or conditions upon which the particular act therein covenanted to be done is to be performed: *Huntington v. Fisher*, 27-276.

BOUNDARIES.

See *PUBLIC LANDS*.

BOUNTY.

1. Where a board of supervisors offered a bounty on one day, and on the next passed another resolution appointing a committee to carry it into effect, and limiting the offer by certain restrictions, *held*, that the two resolutions should be taken together as forming one promise, and that a person who had subsequently enlisted was subject to the restrictions: *Keough v. Scott County*, 25-567.

2. In an action to recover a bounty offered for the enlistment of soldiers, it is immaterial whether the plaintiff had made up his mind to enlist before he heard of the bounty offered, or whether he would have enlisted if he had not heard of it: *Keough v. Scott County*, 28-337.

3. Where a county offered a bounty to volunteers to fill up its quota of a call for troops, and certain persons were named as a committee, who should manage the matter, and who were to pay nothing until the persons volunteering were accepted, or after the quota under the call should have been filled, *held*, that if the committee did act, and volunteers were offered and accepted under the call, the county would be liable, though it should

afterwards appear there was no deficiency in the quota: *Ibid*.

4. Under a certain resolution of a board of supervisors in reference to enlistments, *held*, that the county would become liable to any volunteers who should enlist after such resolution was passed, whether under a call then made, or under subsequent calls: *Sowers v. Page County*, 32-530.

5. *Held*, also, that the county became liable to persons enlisting to the credit of a township in the county, although no definite quota was specifically assigned to the county as distinct from its townships: *Ibid*.

6. Where a person volunteered before the bounty which he sought to recover was offered, *held*, that he was not entitled thereto, although he supposed at the time of volunteering that the bounty had been offered: *Wells v. Scott County*, 36-141.

7. Where a person enlisted three days after the proclamation by the governor that the quota was full, *held*, that it was to be determined as a matter of fact whether such person had notice or knowledge of the proclamation at the time of enlisting, and that the fact of its having been published in a daily paper in the county would not necessarily affect him with such notice: *Mayweather v. Scott County*, 36-143.

BREACH OF PROMISE.

1. **What constitutes a contract to marry:** In an action for breach of promise, a reciprocal, mutual and obligatory contract must be shown, but an express promise is not necessary. The contract may be made out by proof of unequivocal conduct of the parties, and of a reciprocal understanding between them, their friends and relations, that a marriage was to take place: *Thurston v. Cavenor*, 8-155.

2. To warrant a recovery for breach of promise, it is not necessary that the plaintiff prove a separate and distinct promise to marry; but a promise may be inferred from the conduct of the parties, or their actions one toward the other: *Royal v. Smith*, 40-615.

3. **Renunciation;** when suit may be brought: If, before the time fixed for the marriage arrives, the one party renounces the contract, the other may treat this as a breach

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and sue at once: *Holloway v. Griffith*, 32-409.

4. A subsequent offer in such a case by defendant to execute the contract would not constitute a defense or mitigate the damages: *Ibid.*

5. Proof of change of feelings on the part of plaintiff after the breach is not admissible in defense or mitigation: *Miller v. Hayes*, 84-496.

6. Character of plaintiff: An instruction that immorality of plaintiff, not known to the defendant at the time of the promise of marriage, might be considered in mitigation of damages, held erroneous, as the fact, if true, constituted a complete defense: *Guptill v. Verback*, 58-98.

7. The fact that the plaintiff in an action for breach of promise had been the mother of an illegitimate child before the contract was made will not bar an action if defendant knew of such fact at the time of the contract, but the fact may be considered by the jury in estimating the damages: *Denslow v. Van Horn*, 16-476.

8. Damages: If defendant wantonly, and in bad faith, or for the purpose of injuring the plaintiff's character, and with no reasonable expectation that it can be established, sets up in his pleadings, as a defense, the bad character or unchastity of the plaintiff, and fails to prove it, such fact may be considered by the jury in aggravation of damages; but otherwise, if the defense is made in good faith, with probable cause, and a reasonable expectation that it can be established: *Ibid.*

9. In an action for breach of promise, it is not error to allow the jury to consider personal pain and mortification caused to plaintiff. There is no substantial distinction between such damages, and injury to the feelings and affections: *Royal v. Smith*, 40-615.

10. The jury may be allowed also to consider pecuniary advantages which the marriage would have secured to plaintiff: *Ibid.*

11. Evidence; subsequent character: Where the defendant does not seek to justify on the ground of subsequent improper conduct, evidence as to whether plaintiff subsequently kept company with men of improper character is not admissible: *Ibid.*

12. Declaration: Evidence of declarations of plaintiff made after the commencement of

the suit that she would not marry defendant except for his property, held not admissible: *Miller v. Hayes*, 84-496.

BRIDGES.

See that title in INDEX.

CARRIERS.

I. CARRIERS OF GOODS.

- a. *Contract; duty to receive and transport.*
- b. *Liability for loss or damage.*
- c. *Delivery.*
- d. *Compensation and lien.*

II. CARRIERS OF PASSENGERS.

- a. *Who are passengers; regulations; expulsion.*
- b. *Liability.*
- c. *Passenger's baggage.*

As to matters specially relating to RAILROADS, see that title.

I. CARRIERS OF GOODS.

- a. *Contract; duty to receive and transport.*

1. *Contract; authority of agent:* A station agent of a railroad company, having authority to contract for the transportation of property and to receive it for shipment, must be deemed to possess the authority to contract with reference to all the necessary and ordinary details of the business: *Wood v. Chicago, M. & St. P. R. Co.*, 68-491.

2. Therefore held; that such agent had authority to bind the company to furnish cars on a specified day, and that it was not competent for the company to show that the agent in such contract violated instructions of which the other party had no knowledge (overruling *Wood v. Chicago, M. & St. P. R. Co.*, 59-196): *Ibid.*

3. *Acceptance:* An undertaking by the carrier to transport the property may be implied from the circumstances under which it comes into its possession, although such obligation is not created by express agreement, and its liability will be the same in one case as it would have been in the other; and held,

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that the acts of the conductor of a freight train in receiving stock for transportation and the subsequent consent to such acts by the station agent of a railway company were sufficient to render the company liable as carriers for the stock received: *Aiken v. Chicago, B. & Q. R. Co.*, 68-363.

4. **Place of receiving:** A railway may, as a common carrier, by contract or under a course or custom of business, be bound to receive or deliver goods at a place other than the terminus of its road: *Cobb v. Illinois Cent. R. Co.*, 38-601.

5. **Tender for shipment:** A tender of freight to a common carrier may be made to its officers or agents authorized to receive such freight for transportation at a point other than that at which the goods to be transported are actually situated, provided the goods offered for transportation are ready at a place where the carrier may receive them for that purpose: *Ibid.*

6. In an action against a common carrier for refusing to receive goods tendered, it is not necessary to show that the goods referred to were tendered in one lot. The fact that different persons acting for the plaintiff at different dates offered separate lots of grain to make up the quantity which the petition charged was refused, *held*, not to show more than one cause of action: *Ibid.*

7. **Condition at time of acceptance by carrier; evidence; bill of lading:** A bill of lading signed by the common carrier is not conclusive evidence that the goods were in good condition when received by such carrier: *Carson v. Harris*, 4 G. Gr., 516.

8. So *held*, where goods were received by one carrier from a preceding carrier: *Ibid.*

9. **External appearance:** The external appearance of the boxes in which the goods are packed is not conclusive as to their internal condition: *Ibid.*

10. The good order which the carrier admits by his bill of lading that the goods are in when received, refers only to the external condition and not to the state of the goods as contained in packages not suitable to be examined: *West v. Steamboat Berlin*, 3-332.

11. **Burden of proof:** The fact that goods are accepted by the common carrier as apparently in good condition, or even that the

bill of lading recites that they are so received, is not conclusive evidence of such fact. The carrier may show that they were in improper condition for shipment, and the burden will then be upon the shipper to show that the damage might have been avoided by the exercise of reasonable skill and attention on the part of the carrier: *Mitchell v. United States Ex. Co.*, 46-214.

12. A public ferryman is liable in his capacity as a common carrier to an individual who suffers damage from a neglect of his duties, such as a failure to have his ferryboat in a proper condition to furnish transportation to those requiring it, without proper excuse, notwithstanding he may be also liable to a penalty under a city ordinance for such neglect: *Slimmer v. Merry*, 28-90.

13. **Duties to the public:** The business of a carrier is such that the general public has an interest therein which is properly the subject of regulation by law, and those engaged in such business are subject to restrictions and limitations which do not apply to persons engaged in other kinds of business: *Bowlin v. Lyon*, 67-536.

14. **Refusal to receive:** Refusal of a railway company to delay its train that stock might be loaded on cars of the company for shipment after the arrival of the train, *held*, no ground of action, it appearing that the stock might have been loaded before the train arrived, and that it had not been placed in the yards of the company or put under the control of the company's agent: *Frazier v. Kansas City, St. J. & C. B. R. Co.*, 48-571.

15. **Damages for refusal:** Where grain purchased by a contractor for delivery under a contract at a different point was refused by the common carrier to which it was tendered for transportation, *held*, that the measure of damage for such refusal was the difference between the price which the contractor was to receive for the grain under his contract and the value at the place where it was offered for transportation, less the charges of transportation: *Cobb v. Illinois Cent. R. Co.*, 38-601.

16. Where a common carrier having made a contract to carry grain from C. B. to St. L. afterwards failed or refused to receive such grain for transportation, the market by the

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proposed route being the only one open to shippers at C. B., and it not appearing that the violation of the contract by the carrier was wilful, and that the grain would not have reached St. L. in safety if it had been accepted by the carrier, *held*, that the measure of damages was the difference in the price of the grain at C. B. and St. L. at the time it should have reached its destination, less the agreed price of carriage: *Bridgman v. Steamboat Emily*, 18-509.

17. But, *held*, that if it were shown that by the exercise of ordinary care the shipper could have obtained other conveyance, then the damage would be limited to the advance in the price of transportation unless other damage was shown: *Ibid*.

18. **Insufficient facilities:** It is error to instruct the jury that a common carrier may refuse goods for transportation if there is such an accumulation that ordinary facilities are not equal to its protection and disposition, and that a carrier is not bound to procure additional tracks, warehouses, etc., to accommodate the unforeseen contingency. What means and exertions are within reasonable requirements under the circumstances is a question for the jury: *Cobb v. Illinois Cent. R. Co.*, 38-601.

19. It is for a carrier to know whether he has competent means for transportation and has them competently equipped, and he cannot excuse himself from performance by showing that his means are inadequate, even though that fact is known to the shipper at the time of contract: *West v. Steamboat Berlin*, 8-532.

20. **Diligence in transportation:** The carrier is bound to transport the goods accepted within a reasonable time. In the absence of any agreement, what is a reasonable time is to be determined by circumstances and matters connected with the business. The time for final delivery will not be extended by reason of the fact that the shipper is not under obligation to deliver the goods shipped to the consignee until the expiration of a further time: *Cobb v. Illinois Cent. R. Co.*, 38-601.

21. Where property is delivered to the carrier under a contract for transportation, he is entitled to notice of any particular circumstances requiring expedition in transporting if special damages are to be recovered, but

this rule has no application to the case of the refusal of the carrier to receive goods: *Ibid*.

22. In the absence of express undertaking by the carrier to transport property to its destination in a stated time, the law implies an undertaking by it to deliver it there within a reasonable time. But with reference to the time to be occupied in transporting the property, the carrier is not held to the extraordinary liability to which he is held for its safety while it is in his custody, and he may excuse delay in its delivery by proof of misfortune or accident, although not inevitable or produced by act of God: *Kinnick v. Chicago, R. I. & P. R. Co.*, 69-665.

23. **Perishable freight:** It is error to charge the jury that a common carrier accepting perishable freight for transportation with a knowledge of the fact is bound to transport it on the day of its receipt, even though other freight, not of a perishable nature, should be thereby delayed. The knowledge of the perishable nature of the freight may impose an obligation for the exercise of care and diligence of a high order to expedite its transportation, but cannot render the carrier absolutely and unconditionally liable to move the freight forward on the day of receipt without regard to its other obligations: *Dixon v. Chicago, R. I. & P. R. Co.*, 64-581.

24. **Damages from delay in transportation:** One of the undertakings of a common carrier is that it will not expose the property intrusted to its care to any improper hazards or extraordinary perils, and if by its omission the property is exposed to perils which ordinary foresight could have provided against, the carrier is accountable for such injury as may be occasioned by such exposure: *Hewett v. Chicago, B. & Q. R. Co.*, 68-611.

25. Where potatoes were shipped at a season of the year when severe weather was to be apprehended in the ordinary course of nature in such climate, *held*, that this fact imposed upon the carrier the duty of forwarding the property to the point of its destination with dispatch, and that if by negligence in failing thus to forward the property it was injured by freezing, which would not have occurred but for the delay in transportation, the carrier was liable: *Ibid*.

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26. Where a bill of lading provided for delivery of goods "without delay," also that the carrier was "not accountable for freezing," and the goods were damaged by freezing, resulting from failure to use reasonable diligence in shipping, *held*, that the carrier was liable: *Whicher v. Steamboat Ewing*, 21-240.

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27. General rule: A common carrier is bound to deliver the goods according to its undertaking, subject only to contingencies arising from the act of God or public enemies: *Angle v. Mississippi & M. R. Co.*, 18-555.

28. The carrier is held to be an insurer of the safety of the property while he has it in possession as a carrier. His undertaking for care and safety of the property arises by implication of law, out of the contract of carriage. The rule which holds him to be an insurer of the property is founded upon considerations of public policy, in that inasmuch as the carrier ordinarily has the absolute possession and control of the property while it is in course of shipment, he has the most tempting opportunity for embezzlement or fraudulent collusion with others. If, therefore, it is lost or destroyed while in his custody, the policy of the law will impose the loss upon him: *Hart v. Chicago & N. W. R. Co.*, 69-485.

29. Where the property is delivered in a damaged condition, the burden is on the carrier to establish facts to relieve it from liability for such damage, and the carrier is not released from liability by reason of an accident causing delay, for though such accident might offer an excuse for the delay, the carrier would, notwithstanding, be bound to use the highest degree of care during the delay for the safety of the property: *Kinnick v. Chicago, R. I. & P. R. Co.*, 69-665.

30. Therefore, *held*, that damages, to a carload of hogs, appearing to have been caused during a delay of the train, and which damage might have been obviated by proper care, rendered the carrier liable: *Ibid*.

31. Where plaintiff shipped a cow eight months with calf, and by reason of the negligence of the company an accident occurred, occasioning the loss of such calf, *held*, that

failure of plaintiff to notify the company of the condition of the cow was no defense under the circumstances: *McCune v. Burlington, C. R. & N. R. Co.*, 52-600.

32. There is no consideration of policy which demands that the carrier be held to account to the owner for an injury occasioned by the owner's own act, and it is immaterial whether such act of the owner amounts to negligence or not: *Hart v. Chicago & N. W. R. Co.*, 69-485.

33. Therefore, *held*, that loss of the goods by fire ignited by a lantern in the hands of the owner's servant, taken by him into the car in the service of the owner, was not a loss for which the carrier was liable: *Ibid*.

34. The question whether, in shipping property liable to injury by freezing, at a time when danger from freezing is imminent, the shipper was guilty of negligence, and whether the precautions taken by him to protect the property from injury from such cause were sufficient, are questions of fact for the jury: *Wood v. Chicago, M. & St. P. R. Co.*, 68-491.

35. Negligence of the shipper, in overloading cars of stock which are delivered to the carrier for transportation, will not relieve the carrier from liability: *Kinnick v. Chicago, R. I. & P. R. Co.*, 69-665.

36. A ferryman is a common carrier as to goods received for transportation, even though the property is accompanied by its owner: *Whitmore v. Bowman*, 4 Gr. 148.

37. Live stock: The common law rule of liability of the common carrier is applicable to the transportation of stock so far as the damage for which compensation is sought is unconnected with the conduct, character or propensity of the animals undertaken to be carried: *McCoy v. Keokuk & D. M. R. Co.*, 44-424.

38. There are dangers incident to the transportation of stock which are created entirely by the disposition and propensities of the animals, and against which it is often impossible for the carrier to make adequate provision. But the rule as to the liability of the carrier is modified only as far as is rendered necessary by the character of the property, and when the injury results from the natural propensities of the animals, which might have been foreseen by defendant, the car-

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rier is liable: *Kinnick v. Chicago, R. I. & P. R. Co.*, 69-665.

39. A railroad company, as a common carrier, is liable for injuries to stock in transit directly resulting from a defective car: *McDaniel v. Chicago & N. W. R. Co.*, 24-412.

40. The carrier would be liable for want of ordinary care in the transportation of such stock, even if the liability of common carrier did not attach with reference to such property: *German v. Chicago & N. W. R. Co.*, 38-127.

41. Therefore, *held*, that a railway company was liable for damages occasioned by taking cars of stock before they were ready for shipment, and without any one being in charge thereof, notwithstanding a stipulation in the contract of shipment relieving them from liability: *Ibid*.

42. Military control: If a railroad holds itself out as a common carrier, the mere fact that it is under control of the military authorities in time of war does not exonerate it from transporting goods offered for transportation if it has permission from the military authorities to receive and transport such goods: *Cobb v. Illinois Cent. R. Co.*, 38-601.

43. Misdirection: A common carrier receiving goods known to be misdirected, and transporting them from the place where received, cannot claim to have acted merely as warehouseman, and will be liable as common carrier for their loss. The original negligence of consignor in the misdirection will not excuse subsequent negligence of the company: *O'Rourke v. Chicago, B. & Q. R. Co.*, 44-526.

44. Violation of Sunday laws: The fact that a carrier had transported and unloaded its cars within the city of Chicago on Sunday in violation of the laws of the state of Illinois, *held*, not to be negligence rendering it liable for loss of goods by fire occurring after the unloading and storing of the goods: *Wilde v. Merchants' Despatch, etc., Co.*, 47-272.

45. Bill of lading: The bill of lading possesses the dual character of a receipt evidencing the delivery of goods to the carrier's possession, and a contract containing the stipulations under which the transportation

is to be undertaken: *Mulligan v. Illinois Cent. R. Co.*, 36-181.

46. The acceptance of the bill of lading without protest or objection on the part of the shipper gives rise to a conclusive presumption of assent to its terms, and if it does not appear that any fraud was practiced, or that any mistake intervened, he cannot be relieved from such contract by reason of the fact that he did not read the stipulations contained in the bill: *Ibid.*; *Robinson v. Merchants' Despatch, etc., Co.*, 45-470.

47. A bill of lading is both a receipt and a contract, and in its character as a contract it is no more open to explanation or alteration by parol than other written contracts. The fact that the name of the consignee is left blank in the bill of lading will not authorize the introduction of parol evidence to show the agreement of the parties in that respect. Such bill of lading shows on its face that it is an obligation to convey the property to its destination and deliver it to the consignor or his assignee: *Garden Grove Bank v. Hume-ston & S. R. Co.*, 67-526.

48. An assignment of a bill of lading operates as a transfer of the property therein described, and the carrier cannot, without requiring the return of the first bill, issue a second to another party, or deliver the property to any other person than the one named in the instrument. While the carrier may deliver the property without the surrender of the bill of lading, it does so at its peril: *Ibid*.

49. Although the bill of lading is not a negotiable instrument, it is assignable and represents the property, and it is not subject, in the hands of the assignee, to defenses or counter-claims which the maker had against the assignor before notice of the assignment: *Ibid*.

50. Where a bill of lading was, by the carrier, issued to the creditor of the person delivering the property for shipment, with the understanding, known to the agent of the carrier, that the bill of lading was to be used in raising money for the payment of the claim due such creditor, and the bill, accompanied with a draft, was negotiated to a bank, *held*, that the carrier was liable for delivering the property to another person than the holder of such bill of lading, al-

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though such delivery was made in accordance with the subsequent direction of the person delivering the property: *Ibid*.

51. A bill of lading which constitutes simply a memorandum of directions made by the employees of a railway company cannot be considered as a contract binding upon the parties: *State v. McEvoy*, 60-63.

52. Consignee bound by: The terms of a bill of lading accepted by the consignor at the time of shipment will be binding upon the consignee, whether he was aware of its contents or not: *Robinson v. Merchants' Despatch, etc., Co.*, 45-470.

53. Parol evidence to vary: A bill of lading embodies a contract between the parties, and is not to be varied by parol evidence as to its terms: *Hewett v. Chicago, B. & Q. R. Co.*, 63-611.

54. Binding in another state: If the contract contained in the bill of lading limiting the carrier's liability is valid in the state where made, it will be binding upon the consignee in another state, even though in the latter such a contract is not valid: *Robinson v. Merchants' Despatch, etc., Co.*, 45-470.

55. Shipping receipt; delivery of bill of lading after shipment: Where consignor delivered to the carrier certain goods, receiving a shipping receipt therefor, specifying that the goods were "to be forwarded subject to the conditions contained in the bill of lading of this company," and notifying consignor where the bill of lading might be obtained, and the bill of lading was issued to the consignor after the goods were forwarded, and contained an exemption of the carrier from liability for loss by fire, *held*, that the bill of lading being in the same form which the carrier had been for some time in the habit of employing, and there being no evidence of bad faith, consignor and consignee were bound by the terms thereof: *Wilde v. Merchants' Despatch, etc., Co.*, 47-272.

56. But in such case, *held*, that if the property was destroyed by fire before the bill of lading was actually issued, and the carrier knew of that fact, which was not known to the shipper, the provisions in the bill of lading exempting the carrier from liability for destruction by fire would not be binding in the absence of any showing of uniform custom or usage known to and acquiesced in

by both parties, by virtue of which the shipment was to be under such stipulations for exemption: *Wilde v. Merchants' Despatch, etc., Co.*, 47-247.

57. Liability for negligence, notwithstanding the terms of bill of lading: The stipulation of a bill of lading cannot relieve the common carrier from loss where it occurs through failure to perform the very conditions and stipulations of the contract, unless it is shown by the carrier that even if such stipulations had been performed the loss must nevertheless have certainly occurred from the same cause: *Robinson v. Merchants' Despatch, etc., Co.*, 45-470.

58. Therefore, *held*, that a bill of lading by a fast freight line containing in its heading the words "through without transfer in cars owned and controlled by the company," amounted to a contract that the goods should be transported in that manner, and the fact that at an intermediate point they were taken from the cars, stored in a warehouse to be reloaded, and were there burned, would defeat the exemption of loss by fire contained in the bill of lading: *Ibid*.

59. So *held*, also, where under similar circumstances goods being transported under such a contract were burned during an unauthorized transfer to other cars: *Stewart v. Merchants' Despatch, etc., Co.*, 47-229.

60. Connecting line: Where a carrier receives goods for transportation under a contract limiting its liability to the extent of its own line only, and exempting it from liability for loss by fire, and the connecting carrier accepts the goods from such first carrier, the connecting carrier takes subject to the common law liability and not under the contract of the first carrier stipulating for exemption: *Bancroft v. Merchants' Despatch, etc., Co.*, 47-262.

61. In the absence of any arrangement between connecting carriers the latter is not liable for any damage the goods may have sustained before coming into his charge: *Carson v. Harris*, 4 G. Gr., 516.

62. Presumption as to through transportation: When goods are delivered to a carrier marked to a particular place beyond the end of his route, but without any particular directions as to transportation and delivery except as may be inferred from the marks

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themselves, the transaction constitutes an agreement to deliver at the place designated, but parol evidence is admissible to show the facts concerning the route and the usage of the business, and knowledge of the consignor thereof, for the purpose of showing that the contract was to carry to the end of the line only: *Angle v. Mississippi & M. R. Co.*, 9-487; *Mulligan v. Illinois Cent. R. Co.*, 36-181.

63. But by contract or stipulation in the bill of lading the carrier may limit its liability for transportation to the terminus of its own line: *Mulligan v. Illinois Cent. R. Co.*, 36-181.

64. **Delivery to connecting carrier:** Where property is delivered to a common carrier consigned to a point beyond the terminus of its line, he is bound to deliver it at that point within a reasonable time, or to some other carrier to be forwarded to its destination; and this duty to deliver to the connecting carrier can be performed only by placing the property in the possession or under the control of the other carrier, so that the latter will thereby be rendered responsible for its care and obliged to forward it to its destination: *Hewett v. Chicago, B. & Q. R. Co.*, 63-611.

65. Where a car containing goods consigned to a point on the line of a connecting railroad was placed in the yard from which cars were usually taken by such connecting road, but the connecting road refused to receive the car on the ground that it was out of repair, and the first carrier thereupon repaired the car and afterwards delivered it to the connecting road, *held*, that the delivery by the first carrier did not take place so as to release it from liability until the repairs were made: *Ibid*.

66. **Storage:** A common carrier receiving goods from a connecting road for transportation, to be delivered to another connecting carrier, is not relieved of responsibility by storing the property, and while holding the goods in warehouse its liability as carrier continues: *Bancroft v. Merchants' Despatch, etc., Co.*, 47-262.

67. **Not joint contractors:** Where one common carrier furnished, upon request of a pre-

ceding connecting carrier, its freight charges for a particular shipment from the beginning of its line to the termination of the transportation beyond its line, and the shipment was accordingly made, *held*, that it did not become the initial carrier between the commencement of its line and the end of the transportation, nor a joint contractor, nor a partner with the carriers between the terminus of its road and the end of the transportation, and that an agreement between such carrier and the succeeding carrier as to rate of freight for the entire transportation was not sufficient to make the two joint contractors: *Hill v. Burlington, C. R. & N. R. Co.*, 60-196.

68. **Burden of proof as to excuse:** Having received goods and undertaken their transportation, if a loss occurs the burden is on the common carrier to show circumstances that excuse it from liability. There is a distinction in this respect between common carriers and other bailees: *Angle v. Mississippi & M. R. Co.*, 18-555; *McCoy v. Keokuk & D. M. R. Co.*, 44-424.

69. In an action against a common carrier for injury to goods, the plaintiff makes out a *prima facie* case by showing that he delivered them to the carrier in good order, and when the carrier delivered them to the consignee they were in a damaged condition. The carrier may then show that the injury to the goods was caused by the act of God or the public enemy, and the burden of proof is upon him to show that fact: *Winne v. Illinois Cent. R. Co.*, 31-588.

70. **Damages:** Interest on the value of goods lost or not delivered is a proper element of damage: *Cobb v. Illinois Cent. R. Co.*, 38-601.

71. Interest upon the damage recovered should be computed from the time the goods should have been delivered at their destination: *Robinson v. Merchants' Despatch, etc., Co.*, 45-470.

72. **Statutory regulation as to contracts:**¹ Under provision set out in the foot-note, a contract such as is therein prohibited is void, whether it is with or without consideration: *Brush v. Sabula, A. & D. R. Co.*, 43-554.

¹ Code, § 1838. No contract, receipt, rule, or regulation, shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation, been made or entered into.

Delivery.

73. Whether this section would be applicable to a contract made in Iowa but to be wholly performed in another state, *quære*; but it was held applicable to a contract to transport cattle from Clinton, Iowa, to Chicago, on the ground that it was to be partly performed in Iowa: *McDaniel v. Chicago & N. W. R. Co.*, 24-412.

74. A company is not prohibited from providing by contract that it shall not be liable beyond the terminus of its road: *Mulligan v. Illinois Cent. R. Co.*, 36-181, 187.

75. The common law liability of a common carrier attaches to a carrier of live stock, so far as the rule is not inapplicable by reason of the peculiar character of the property. Responsibility for the carriage of stock cannot, therefore, be restricted by contract: *McCoy v. Keokuk & D. M. R. Co.*, 44-424.

76. A rule or custom limiting liability for injury to all stock, including such as is of especial value as being *blooded*, to the value of common stock, is void: *McCune v. Burlington, C. R. & N. R. Co.*, 52-600.

77. This section does not render the carrier liable for loss occurring by the act of the owner: *Hart v. Chicago & N. W. R. Co.*, 69-485.

78. Whether a carrier, in the absence of any statute restricting his powers, can, by rule, regulation or contract, limit the amount for which he will be liable in case of loss of the property, *quære*. But the statutory provision prohibits the making of such contract: *Ibid*.

79. This statutory provision is applicable to contracts for transportation from a point within to a point without the state, and is not unconstitutional in that respect: *Ibid*.

c. Delivery.

80. To the real owner: A common carrier may excuse a non-delivery, pursuant to the bill of lading, by delivering the goods upon demand to the real owner: *Brunswick v. United States Ex. Co.*, 46-677.

81. But where goods are shipped to a consignee, and delivered by the carrier to one who demands them under the claim that they should have been shipped to him, such demand not being in accordance with the facts, the carrier will be liable: *Ibid*.

82. Delivery to stranger: Where property was delivered by a common carrier to a stranger who assumed to act for the consignee, and who then turned the property over to such consignee, and claiming to be the consignor received the pay therefor, *held*, that the loss must fall upon the consignee and not upon the carrier: *Ryder v. Burlington, C. R. & N. R. Co.*, 51-460.

83. Where the bill of lading showed one name as consignee and following it an entry, "Notify"—, naming another person, *held*, that the second was also a consignee, and a receipt by such second person from the carrier was proper: *State v. McEvoy*, 69-63.

84. Damaged condition: The consignee is not bound to accept goods which are offered in a damaged condition: *Cobb v. Illinois Cent. R. Co.*, 88-601.

85. Receipt as evidence of condition: An instrument signed by the consignee acknowledging the receipt of the goods in good condition is *prima facie* evidence of that fact, but is not conclusive, and its effect will turn upon the circumstances of each particular case: *Porter v. Chicago & N. W. R. Co.*, 20-73.

86. Receipt may be demanded: The requirement by a common carrier that the person to whom delivery is made shall give a receipt for the goods showing them to have been received in good condition is reasonable, and a party refusing to execute such receipt cannot recover possession of the goods: *Skinner v. Chicago & R. I. R. Co.*, 12-191.

87. Examination; replevin: The person demanding the goods has a right to make an examination of them to determine whether they are in good condition before giving such receipt, but this examination must be made at the place of delivery and before the removal of the property unless otherwise allowed: *Ibid*.

88. Where goods are shipped by a common carrier to be paid for by consignee on delivery, consignee has no right, in the absence of consent by consignor, to open the package and inspect the goods before accepting and paying therefor, and he cannot maintain replevin on the refusal of an agent to permit such examination before delivery: *Wiltse v. Barnes*, 46-210.

89. Responsible for failure to deliver; custom: In the absence of the consignee of

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the property, or his failure to receive the goods, the carrier should still make all reasonable effort to place the goods in proper hands, or, if that cannot be done, hold them himself and thus end his responsibility as carrier: *Angle v. Mississippi & M. R. Co.*, 18-555.

90. If, by the regular and uniform course of business of the carrier, goods not delivered are to be disposed of or kept in a particular manner, the carrier cannot terminate his responsibility by lodging them with a third person not authorized to receive them. If delivered to a person as the agent of the consignee, the carrier must know that he is such agent or must have been misled by the consignee or owner in order to excuse himself by such delivery: *Ibid.*

91. Custody as warehouseman: Where goods are deposited after the termination of the transportation in the warehouse of the carrier in accordance with its published rules, it is after that time liable as warehouseman only and not as common carrier: *Ibid.*; *Porter v. Chicago & N. W. R. Co.*, 20-73.

92. Contract of agent for storage: While an agreement made by an agent as to the storage of goods in the carrier's depot might not be valid for want of a consideration, yet a carrier might, nevertheless, be bound thereby so as to prohibit the delivery of the goods to a third person: *Angle v. Mississippi & M. R. Co.*, 18-555.

93. An agent having general charge of the business of a common carrier would *prima facie* have the power to make an agreement allowing goods to remain in the depot, but he could not do so in the face of a rule forbidding the same, known to the other party: *Ibid.*

94. A contract between the carrier and a warehouseman for delivery by the former to the latter of all grain shipped over the line of the former, and not delivered to the consignee, held, not to be a contract imposing unlawful restraint upon the duties of the carrier: *Richmond v. Dubuque & S. C. R. Co.*, 83-422, 493.

95. Carrier's liability terminates, when: Where goods are unloaded by the carrier at their destination and placed in a warehouse, the liability of the common carrier ends and that of warehouseman begins, and in the

latter relation there is no responsibility for loss in the absence of negligence. But if goods should arrive out of time, and the carrier fail to give notice to the consignee, his liability as a common carrier might be extended: *Francis v. Dubuque & S. C. R. Co.*, 25-60.

96. The liability of a railway company as common carrier of freight terminates, and its responsibility as warehouseman commences, upon the arrival of the goods at the point of destination and their deposit there in the warehouse of the company to await the convenience of the consignee: *Mohr v. Chicago & N. W. R. Co.*, 40-579.

97. Want of notice to the consignee will not render the company liable for subsequent destruction of the goods without other negligence, at least unless it can be shown that the destruction was due to the want of such notice, and that by reason of a custom of the company to give notice, the failure to give it was negligence: *Ibid.*

d. Compensation and lien.

98. Presumed: Where goods are delivered to a common carrier for transportation in the usual course of business, the carrier becomes entitled to a reasonable compensation without any agreement therefor, and may recover on *quantum meruit*. In such case it is not presumed that the transportation was to be gratuitous or that the ordinary liability of a common carrier did not arise: *Winne v. Illinois Cent. R. Co.*, 81-583.

99. Guaranty of rates by connecting carrier: Where one carrier furnished, upon request, to a preceding carrier rates of transportation over its own and subsequent lines to the end of the transportation, held, that such representation was personal as between the two carriers and the second did not render itself liable thereby to the shipper for overcharges of subsequent carriers: *Hill v. Burlington, C. R. & N. R. Co.*, 60-196.

100. Statutory regulation: Interstate commerce: Where a contract of shipment from a point within to a point without the state is entire, it is not affected by a statute of the state in which the contract is made regulating rates of transportation: *Carlton v. Illinois Cent. R. Co.*, 59-148.

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101. The regulation by a board of railroad commissioners that rates of transportation from a point without to a point within the state shall conform to like distances within the state is unconstitutional and interferes with interstate commerce: *State v. Chicago & N. W. R. Co.*, 70—.

102. Where a contract for transportation by a carrier provided for transportation of the goods from one point within the state to another point also within the state, and the rates of transportation were in excess of those fixed by statute, *held*, that the excess of charges paid might be recovered back, although it was shown that the intention was that the property should be delivered by the carrier receiving it to a connecting carrier and continuously transported to a point without the state, and although the charge for the entire transportation would have been a reasonable one: *Heiserman v. Burlington, C. R. & N. R. Co.*, 63-732.

103. Recovery of excessive charges: Where the statute defines the charges which can lawfully be made by a common carrier, charges in excess of those prescribed are unlawful, and may be recovered back in an action for the excess. The amount fixed by statute will be conclusively presumed to be the limit of reasonable compensation: *Ibid*.

104. The enactment of a statute imposing penalties for excessive charges recoverable by the party injured, and providing a punishment against the agent of a carrier for exacting and collecting excessive charges, does not take away the right existing at common law to recover money paid in excess of a reasonable charge: *Ibid*.

Further as to statutory regulation of railway rates, etc., see RAILWAYS, VII.

105. Protest not necessary: In an action to recover excessive charges paid, the plaintiff need not show objection or protest prior to or at the time of making payment which is in excess of a reasonable compensation: *Heiserman v. Burlington, C. R. & N. R. Co.*, 63-732.

106. Lien lost by delivery: The lien of a common carrier for its charges is lost by the delivery of the goods to the consignee: *Reinemann v. C. C. & B. R. Co.*, 51-338.

107. Delivery of a portion of the goods covered by the lien may be made without

releasing the balance from the lien for the entire charge of the transportation on the whole: *Chicago & S. W. R. Co. v. Northwestern U. P. Co.*, 38-377.

108. Lien for expenses: Where by the bill of lading a common carrier was relieved from liability for losses arising from dangers of navigation, etc., and was compelled to incur expenses by way of salvage in recovering the property from a wreck occurring without its fault, *held*, that its lien covered its charges for salvage: *Ibid*.

II. CARRIERS OF PASSENGERS.

a. Who are passengers; regulations; expulsion.

109. When rights commence: One who enters the office or waiting-room provided for passengers, and informs the agent of his intention and desire to become a passenger, and places himself under the direction of such agent, becomes thereupon entitled to protection as a passenger: *Allender v. Chicago, R. I. & P. R. Co.*, 37-264.

110. A person intending to take passage may become entitled to protection as a passenger before entering the train or buying a ticket: *Green v. Milwaukee & St. P. R. Co.*, 41-410.

111. Payment of fare; free pass: Payment of fare is not essential to create the relation of carrier and passenger. The carrier is liable for negligence resulting in injury to a passenger riding free: *Rose v. Des Moines Valley R. Co.*, 30-246.

112. After expiration of ticket: A passenger riding on a ticket which has by its terms expired is not entitled to transportation, and the fact that he has been improperly allowed to use the same ticket on several occasions after its expiration will not estop the carrier from refusing further to accept it: *Sherman v. Chicago & N. W. R. Co.*, 40-45.

113. Fraudulent ticket: One who tenders in payment of his fare a ticket issued to another person at a reduced rate under the express agreement that it shall not be transferable, such agreement and the name of the person to whom the ticket was issued appearing on the face of the ticket, does not become entitled to the rights of a passenger. A per-

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son cannot claim transportation under a non-transferable ticket issued for reduced rates to another. The statutory provisions against discrimination do not change the rule in this respect: *Way v. Chicago, R. I. & P. R. Co.*, 64-48.

114. **Purchase of ticket:** The regulation that a passenger shall pay full rate upon failure to procure and present a ticket which he might have purchased from the agent at a reduced rate is not unreasonable: *State v. Chovin*, 7-204.

115. The carrier may make a regulation requiring passengers to procure a ticket before taking passage in a caboose car attached to a freight train, and may eject from the car, in a proper place and manner, any person failing to comply with such regulation: *Law v. Illinois Cent. R. Co.*, 82-534.

116. By statute (15 G. A., ch. 68, § 2; McClain's Ann. Stat., 363) a railway company is allowed to collect an additional sum over the regular rate of fare from passengers who fail to purchase tickets, and the reasonableness of such regulation is not a question for the jury: *Hoffbauer v. Davenport & N. W. R. Co.*, 52-342.

117. In an action to recover for being ejected from a train for want of a ticket, where the plaintiff claimed that he was not able to procure such ticket on account of the failure of the company to have its ticket office open before the starting of the train, held, that it was proper to allow defendant to introduce evidence of the character of the station and whether the facilities extended to the traveling public to purchase tickets were such as required for the convenience of the public. While it is required that the office should be open for business a sufficient time before the departure of the train, in order to enable passengers to procure their tickets, receive and count their change, if any, and prepare to board the train, without unnecessary interference with each other, yet it is not required that the office shall remain open up to the instant the train moves off. The question is, might the passenger have procured a ticket within a reasonable time before the departure, and not up to the very moment of departure: *Everett v. Chicago, R. I. & P. R. Co.*, 69-15.

118. The fact that a station is an unfit

place for passengers to remain in waiting for the trains cannot be shown in an action to recover damages for being ejected from a train for not procuring a ticket, that reason not having been alleged to the conductor as a reason for not having a ticket: *Ibid.*

119. The failure of the company to sell a ticket to a passenger before entering the cars cannot be made a ground for recovery of damages where the passenger afterward tenders with his fare to the conductor the extra amount required on account of not having a ticket: *Curl v. Chicago, R. I. & P. R. Co.*, 68-417.

120. **Mistake in amount of fare; ejection:** Where, by mistake of the conductor in making change, the amount paid is less than sufficient to pay for the transportation of the passenger to his destination, the conductor can properly require him to correct such mistake, and upon failure to do so, eject him upon reaching the point to which the amount paid entitles him to carriage: *McCarthy v. Chicago, R. I. & P. R. Co.*, 41-482.

121. **Refusal to pay; expulsion:** A passenger who takes his seat in the carrier's conveyance and states his destination, but refuses to pay the fare rightfully demanded, becomes a trespasser and is no longer entitled to the rights and privileges of a passenger and may be rightfully ejected: *Stone v. Chicago & N. W. R. Co.*, 47-82.

122. After being thus rightfully expelled the passenger cannot again enter the same conveyance to be carried to the same destination originally given, upon payment of fare from the point of expulsion to such destination, and the fact that he procures from the ticket agent a ticket to such destination will not entitle him to passage on the conveyance from which he has been expelled: *Ibid.*

123. Where payment of fare has been demanded of a passenger and refused, he may be ejected, although he subsequently tenders the amount demanded. After payment is refused all obligation to carry the passenger on that train ceases: *Hoffbauer v. Davenport & N. W. R. Co.*, 52-342.

124. A passenger is entitled to a reasonable time after his fare is demanded by the conductor in which to tender it, and if tendered within such reasonable time the conductor

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cannot refuse it and eject the passenger from the train for non-payment, although he may have already rung the bell for the purpose of stopping the train. The question as to what is a reasonable time is for the jury: *Curl v. Chicago, R. I. & P. R. Co.*, 63-417.

125. The threat of a conductor to eject a passenger for refusal to pay the additional amount required by reason of not having previously procured a ticket, whereby the passenger is induced to pay the amount demanded, will not be sufficient ground for a recovery by such passenger of punitive damages for injury to his feelings; and *held*, in a particular case, that the evidence did not show malice or wantonness on the part of conductor: *Paine v. Chicago, R. I. & P. R. Co.*, 45-569.

126. The fact that the conductor accepts from the passenger the regular fare for the distance to be traveled, at the same time demanding the additional amount for not having procured a ticket, will not render ejection for non-payment of such amount illegal: *Hoffbauer v. Davenport & N. W. R. Co.*, 52-342.

127. Place of ejection: While reasonable and ordinary care must be employed in ejecting a passenger, it is not necessary that it be done at a station or public crossing: *Brown v. Chicago, R. I. & P. R. Co.*, 51-235; *Everett v. Chicago, R. I. & P. R. Co.*, 69-15.

128. Damages for ejection: Where the conductor, without wantonness or unnecessary violence or oppression, ejected plaintiff from his train in pursuance of what he supposed to be a valid rule of the company, *held*, that exemplary damages, or damages compensatory of injured feelings, mental anguish, etc., were not allowable: *Fitzgerald v. Chicago, R. I. & P. R. Co.*, 50-79.

129. Regulations: A carrier has power to make reasonable regulations for the guidance of its agents in the discharge of their duties and for the conduct of passengers in its charge, and all regulations will be deemed reasonable which are suitable to enable the company to perform the duties it undertakes, and also such as are necessary and proper to insure the safety and promote the comfort of passengers: *State v. Chovin*, 7-304.

130. Stopping over: When a passenger having a ticket takes his seat in a particular train going through to his destination, the contract of transportation to such destination is an entirety, and neither party can require the other to perform it in parts. The passenger cannot, without the carrier's consent, leave that train and take another and be transported under the original payment of fare: *Stone v. Chicago & N. W. R. Co.*, 47-82.

131. Persons of color: The carrier has no authority to establish and enforce a regulation depriving a person of color of the rights accorded to white persons upon its conveyance: *Coger v. Northwestern U. Packet Co.*, 37-145.

132. Removal of passenger from station: A railway company will not be liable for damages in causing the removal by a policeman from its depot of a woman of bad character who has gained admission to the ladies' waiting-room at night and at a time long before the train which she claims to intend to take is due: *Beeson v. Chicago, R. I. & P. R. Co.*, 62-173.

133. Where plaintiff, after arriving on defendant's train, left the depot and became intoxicated and returned, not for the purpose of awaiting a train on that road, *held*, that he was properly ejected. The waiting-room is for the accommodation of incoming and outgoing passengers, and not a place of resort for the general public: *Johnson v. Chicago, R. I. & P. R. Co.*, 51-25; S.C. 58-848.

134. Damages for unlawful removal: Where the removal of a person from the depot is affected without an assault and no special damage is shown, the recovery for such act, even if wrongful, would be limited to nominal damages: *Beeson v. Chicago, R. I. & P. R. Co.*, 62-173.

135. Removal of passenger from car: In an action against a railway company for damages caused to plaintiff by being removed from one car to another while the train was in motion, *held*, that whether there was improper conduct on the part of plaintiff so as to justify the conductor in removing him, and whether there was any unnecessary force used, or whether it was done at an improper time or in an improper manner, were questions of fact for the jury, and that the fact

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that the train was going at the rate of twenty miles an hour did not necessarily render the removal of the plaintiff improper: *Marquette v. Chicago & N. W. R. Co.*, 33-562.

b. *Liability.*

136. What care required: Carriers of passengers for hire are bound to exert the highest skill and prudence and the utmost care and diligence in conveying their passengers, and are of course responsible for the slightest negligence: *Sales v. Western Stage Co.*, 4-547; *Russ v. Steamboat War Eagle*, 14-383, *Frink v. Coe*, 4 G. Gr., 555; *Moore v. Des Moines & Ft. D. R. Co.*, 69-491.

137. It is the duty of carriers of passengers to exercise extraordinary care: *Raymond v. Burlington, C. R. & N. R. Co.*, 65-152; *Sandham v. Chicago, R. I. & P. R. Co.*, 38-88.

138. Stage-coaches and hacks: Therefore, *held*, that stage-coach proprietors were not only bound to furnish good coaches, harness, and horses, and careful drivers, but to keep such coaches, etc., in good repair and to see that their drivers drive with the utmost skill and diligence: *Sales v. Western Stage Co.*, 4-547.

139. Proprietors of hacks and stages are held to the same degree of care as other carriers of passengers, that is, the utmost skill and care which prudent men are accustomed to use under similar circumstances: *Bonce v. Dubuque St. R. Co.*, 53-278.

140. A railway company is required to use higher care in regard to safety of its passengers than it is to avoid injury to stock upon its track: *Sandham v. Chicago, R. I. & P. R. Co.*, 38-88.

141. The duty of a railway company as carrier of passengers is to so manage its train as not to expose such passengers to any danger which human foresight and care could apprehend and provide against. When such danger is reasonably to be expected to arise under the circumstances, it is bound to make provision against all danger which human oversight might expect: *Kellow v. Central Iowa R. Co.*, 68-470.

142. Duty arising from contract: The duty of a carrier to make provision for the safety of its passengers grows out of the con-

tract between them, and if he fails through negligence to provide for that danger and the passenger suffers an injury in consequence thereof, the carrier is held liable on the ground that his negligence constitutes a breach of his undertaking: *Ibid*.

143. Negligence as to platforms, waiting-rooms, etc.: The general rule is that railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their grounds reasonably near to the platforms where passengers would naturally be likely to go: *McDonald v. Chicago & N. W. R. Co.*, 26-124.

144. In a particular case, held, that the jury should have been directed to ascertain from the evidence whether the company had designated or set apart the platform as the place where it required all passengers to enter the cars, and if so, and it was known to plaintiff, and in disregard of such requirement and in advance of time, and without justification for so doing, plaintiff sought to enter at another place and met with injury in so doing, the company was not liable as common carrier: *Ibid*.

145. In an action for injury received while attempting to get on board a train at a station, by reason of defective steps, the question being whether plaintiffs attempted to do so by an unused, dangerous and unfrequented way, it was held competent to show that they did not, by the fact that such steps were a part of the platform; were in a direct route to the cars; and that they were used, among other things, for the purpose of going to and from another depot: *Ibid*.

146. There being a common law duty on railroad companies to provide reasonable accommodations at stations for passengers, it is proper to show in evidence, in an action for damages for injuries sustained while going to the train at an unusual time and place, that the waiting-room was so filled with tobacco smoke as to make it offensive to remain there: *Ibid*.

147. While in an action against a railroad company for injury to a passenger sustained while alighting, evidence is admissible to show that the platform at which the passenger is alighting is too high or too low for

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safety, yet evidence is not admissible to show that such platform is higher or lower than another platform: *Nichols v. Dubuque & D. R. Co.*, 68-732.

148. If there is a customary time for trains to stop at stations of a particular size, that fact may be shown in an action for personal injuries to a passenger in alighting, in order to show that the stoppage of the train was of customary duration; but it is not competent to allow a witness to state the usual length of time which a passenger train stops at the station in question: *Ibid.*

149. **Negligence in failing to protect against wrongful act:** Although the negligence of another may be the proximate cause of the injury, yet if the carrier has exposed the passenger to such danger, which might have been anticipated, and at the same time has taken no precaution to protect him therefrom, the carrier has thereby violated his undertaking with the passenger, and if the latter suffers injury in consequence of this violation the carrier is liable, even though the immediate cause of the injury was the wrongful or neglectful act of the other: *Kellogg v. Central Iowa R. Co.*, 68-470.

150. **Directions to passenger:** A carrier is liable for the consequences of negligence in giving directions to passengers as to the mode of entering its cars: *Allender v. Chicago, R. I. & P. R. Co.*, 48-276.

151. The inexperience of the passenger and the difficulty attending the reaching of the car may be taken into consideration in determining whether it was the duty of the agent of the carrier to assist the passenger in getting upon a car: *Allender v. Chicago, R. I. & P. R. Co.*, 37-264.

152. **Not liable to person wrongfully riding:** The extraordinary care required of a carrier of passengers toward the passenger does not exist as to a person who attempts to secure passage under a non-transferable ticket issued to another person: *Way v. Chicago, R. I. & P. R. Co.*, 64-48.

153. **Evidence; burden of proof:** An accident, such as the upsetting of a stage-coach causing injury to a passenger is *prima facie* evidence of negligence: *Frink v. Coe*, 4 G. Gr., 555.

154. Where a dangerous accident occurs which, under ordinary circumstances, would

not have happened had the carrier and its employees exercised due care, prudence and watchfulness, proof of such accident, with its attendant circumstances, raises a presumption of negligence, and the burden is then cast upon the carrier to rebut this presumption. To this end the carrier must show that in the selection and operation of the machinery which caused or contributed to the accident it used due care, skill, prudence and watchfulness. It is error in such case to instruct the jury that it devolves upon the carrier to satisfactorily explain the accident, and in the absence of such explanation negligence would be presumed, notwithstanding proof of due care, etc.: *Tuttle v. Chicago, R. I. & P. R. Co.*, 48-286. And see Evidence §§ 874-7.

155. **Testimony as to the condition of the track near the place of the accident** should be admitted: *Allison v. Chicago & N. W. R. Co.*, 42-274.

156. **Pleading:** In an action by a passenger to recover for personal injuries caused by the derailment of a car, it is sufficient, under the Iowa statute, if the petition state enough to raise a presumption of negligence on the part of the company. It need not state all the facts or acts showing want of care on the part of the railroad company: *Clark v. Chicago, B. & Q. R. Co.*, 4 McCrary, 360.

157. **Contract limiting liability:** A carrier of passengers cannot, by notice or special contract, restrict, limit, or avoid its common law liability for negligence: *Rose v. Des Moines Valley R. Co.*, 39-246.

158. **Contributory negligence; riding in unsafe place:** Where a passenger, being asleep when the train stopped at his destination, was awakened by a brakeman and directed to get off quickly, but on coming to the door found the train in such rapid motion that it was dangerous to alight, and while standing on the steps of the platform, without attempting to step off, was thrown off by the jerking of the train, no negligence on the part of the carrier being shown, held, that the passenger was guilty of contributory negligence by reason of remaining in an unsafe position and could not recover: *Lindsey v. Chicago, R. I. & P. R. Co.*, 64-407.

159. Where a passenger, with knowledge of the regulation of the company that passengers were not allowed to stand on the

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platform, left his seat before the train reached the station and stood upon the step of the platform awaiting an opportunity to alight as soon as the train should stop, and was by a sudden jerk of the train caused to fall and injure himself, *held*, that he was guilty of negligence: *Bon v. Railway Passenger Assurance Co.*, 56-664.

160. A person riding in a place of known danger instead of in the portion of the train set apart for passengers and others not engaged in the operation of the train cannot recover for injuries which would not have resulted had he been in the proper place: *Doggett v. Illinois Cent. R. Co.*, 84-284.

161. While the train is not in motion the platform cannot be considered a place of danger: *Walter v. Chicago, D. & M. R. Co.*, 89-83.

162. Getting on or off moving trains: The rule that leaving a train after it is in motion constitutes contributory negligence cannot be applied to a case where the passenger is already in the act of descending the steps of the car, when the train starts: *Nichols v. Dubuque & D. R. Co.*, 68-732.

163. Where persons are in peril and feel obliged to act upon the spur of the moment, they are not necessarily to be charged with negligence if they do not do the right thing: *Ibid.*

164. While it might not be contributory negligence under all circumstances for a passenger to attempt to get upon a moving train, yet *held*, under the circumstances of a particular case, the attempt of a passenger to climb upon a freight car while holding a lantern and stick in his hand, while the train was going at such rate of speed that he feared that he would not be able to get upon the caboose when it reached him, constituted contributory negligence: *McCorkle v. Chicago, R. I. & P. R. Co.*, 61-555.

165. Where a passenger, desiring to go upon the caboose of a freight train, was allowed sufficient time for that purpose by the persons in charge of the train, but, fearing that he would not reach the caboose in time, got upon a freight-car and was thrown therefrom and injured, by reason of the car being thrown off the track, *held*, that he was guilty of such contributory negligence as would defeat his recovery for such injury: *Player v. Burlington, C. R. & N. R. Co.*, 62-723.

166. Time and place of entering car: A railroad company may make reasonable rules and regulations respecting the time, mode and place of entering cars, and these, when known to the passenger, he is bound to conform to. In this case, *held*, that if plaintiffs attempted to enter the cars at a place which they knew, or, from the nature of the circumstances surrounding them, ought to have known, was not designed for receiving passengers, and at which the company did not allow passengers to enter, the company would not be liable as common carriers upon their contract for an injury happening in the prosecution of such an attempt: *McDonald v. Chicago & N. W. R. Co.*, 26-124.

167. An attempt by a passenger desiring to reach another train in a dark night to crawl under a freight train with locomotive attached is necessarily contributory negligence sufficient to defeat his recovery for injuries resulting from the moving of the freight train without proper signal: *Smith v. Chicago, R. I. & P. R. Co.*, 55-83.

168. The fact that an agent of the company makes statements calculated to throw the passenger off his guard as to danger may relieve the passenger from responsibility for want of vigilance, which might otherwise be imputed as contributory negligence; but in a particular case, *held*, that the passenger was not exonerated from exercising due care by reason of the general statement of the agent that there would be no danger or trouble in going to or upon the car in accordance with directions: *Allender v. Chicago, R. I. & P. R. Co.*, 37-264.

169. Injuries to passenger from fellow-passenger: If a carrier has no reasonable ground to believe that an assault upon a passenger by another passenger will be made, such carrier is not liable, even though the assault and the injury resulting therefrom might have been prevented by the presence of a sufficient number of employees upon the train: *Felton v. Chicago, R. I. & P. R. Co.*, 69-577.

170. So *held*, where a passenger riding with other excursionists in a flat-car, the sides of which were not protected by a railing, was thrown from the car and killed by reason of an assault made upon him by another passenger: *Ibid.*

 Passenger's baggage.

171. Action for breach of contract causing death: Whether, where the death of the passenger is caused by negligence of the carrier, a right of action for breach of the contract arises in behalf of his estate, *quære*; but at least it must appear, to support such an action, that at the time of the injury the contract was still subsisting: *Hyde v. Wabash, St. L. & P. R. Co.*, 61-441.

Further as to actions for injuries causing death, see ACTIONS, §§ 78-85.

c. Passenger's baggage.

172. Delivery; custom: Delivery of baggage may be made at the proper place of receiving it under the express assent or authority of the carrier without notice to its employees. Assent may be presumed from the course of business or custom of the carrier: *Green v. Milwaukee & St. P. R. Co.*, 38-100.

173. The question whether the evidence establishes a course of business and custom to the effect that the delivery of baggage at the station-house without notice to the agents of the company is regarded by the company as a delivery to its servants, or whether under this custom there is a sufficient delivery, should be left to the jury: *Green v. Milwaukee & St. P. R. Co.*, 41-410.

174. When liability commences: It is error, in an action for loss of baggage occurring after delivery to the carrier and before transportation has commenced, to instruct the jury on the theory that the carrier assumes no duties as respecting the baggage of one intending to become a passenger so long as he is in such position as to withdraw his baggage and conclude not to take passage. A person may be entitled to be protected as a passenger without purchasing a ticket or entering the car, and he may also, under similar circumstances, require that his baggage be cared for as the baggage of a passenger, and the liability of the carrier will be the same: *Ibid.*

175. Where it appeared that the agent of the carrier was advised that plaintiff intended to become a passenger on the morning train, and her trunk was sent to the depot on the evening before, properly marked, as was customary in such cases, and the trunk was

locked up in the defendant's baggage room, *held*, that the liability of the defendant as a common carrier with reference to such baggage attached: *Ibid.*

176. Liability after arrival at destination: Plaintiff purchased a ticket on defendant's railroad from O. to F. Being unable then to get his trunk he gave a check for it to defendant's agent, who agreed to forward it by next train. Plaintiff after arrival at F. applied each day for his trunk, which had not come, until the third day, when it was there, but had been broken open and its contents stolen in the night while locked in defendant's common passenger room instead of the ordinary baggage room. *Held*:

(1) Whether defendant was to be held to the diligence of a common carrier or that of a warehouseman, *quære*; but even if as warehouseman, it was liable for the value of the contents stolen.

(2) That plaintiff was entitled to a reasonable time after the arrival of the trunk within which to receive it.

(3) That the authority of defendant's agent to agree to forward the trunk was immaterial, since the company accepted and undertook to convey and deliver it.

(4) That upon plaintiff's paying his fare, defendant, by undertaking as a part of the consideration therefor and pursuant to its agent's agreement to deliver the baggage by a subsequent train, assumed the ordinary liabilities existing when the passenger goes on the same train: *Warner v. Burlington & M. R. R.*, 22-166.

177. Where trunks were left in the freight room to be called for by the owner and checked as baggage, *held*, that the company was only liable for them as gratuitous bailees for safe keeping and not responsible for theft without its fault: *Van Gilder v. Chicago & N. W. R. Co.*, 44-548.

178. The liability of a railway corporation as a carrier of baggage terminates as such upon the expiration of such reasonable time, after arriving at the place of destination, as will enable the traveler to receive and take charge of the same: *Mote v. Chicago & N. W. R. Co.*, 27-22.

179. When baggage is unclaimed within the proper time after reaching its destination, it is the duty of the carrier to store it in a

 When the writ will be granted.

proper and secure place until called for or disposed of as required by law, and when so stored, the carrier becomes liable as a warehouseman or mere bailee in deposit, and as such is held to common and reasonable care and diligence: *Ibid*.

180. **Statutory provision:** Code, § 2188, gives a remedy against a carrier of passengers for damages to baggage, and for detention caused thereby. It does not authorize a recovery on account of detention of baggage or failure to deliver the same, nor for detention of the traveler, unless it be on account of damages done to baggage: *Anderson v. Toledo, W. & W. R. Co.*, 32-86.

181. **Action by joint owners:** Where a box, the joint property of two passengers, and containing personal property belonging to each, was received to be transported for them jointly, *held*, that they might bring a joint action for the loss thereof: *Anderson v. Wabash, St. L. & P. R. Co.*, 65-131.

 CATTLE.

See ANIMALS.

 CERTIORARI.

I. WHEN THE WRIT WILL BE GRANTED.

II. PARTIES.

III. PROCEDURE.

I. WHEN THE WRIT WILL BE GRANTED.

1. **Common law writ:** The writ of *certiorari* is a common law writ which may be issued by courts having a common law jurisdiction: *Helmich v. Johnson*, Mor., 89.

2. **Discretion of higher court:** In an action of *certiorari*, the result of which is to annul the action of an inferior tribunal, board or officer, it is peculiarly the duty of the court to scrutinize the petition and interfere only in a case properly made, and even then the court may exercise a proper measure of discretion, and in general should exercise its power sparingly. It is not bound to grant a writ on merely technical grounds, and where no prejudice is shown: *Woodworth v. Gibbs*, 61-398; *Johnson v. Supervisors*, 61-89.

3. **Certiorari and appeal:** The writ of *certiorari* is never used to correct a mere

error, but only to test the jurisdiction of a tribunal and the legality of its action: *State v. Roney*, 37-30.

4. When a party has the right of appeal he cannot proceed by *certiorari*: *Ransom v. Cummins*, 66-137; *State v. Schmidt*, 65-556.

5. Where an inferior court illegally exercises its jurisdiction, and there is no adequate remedy by appeal, the writ of *certiorari* will lie: *Coburn v. Mahaska County*, 4 G. Gr., 242.

6. Where a joint action was brought against the several independent districts comprising what had formerly been a district township, for a debt of such district, and proceedings were had for the apportionment of the judgment among the independent districts, *held*, that *certiorari* would not lie from the proceedings of the court in making such apportionment. *Certiorari* will not lie where there is a plain, adequate and speedy remedy by appeal: *Independent School Dist. v. District Court*, 48-182.

7. The writ will issue when there has been a usurpation of power in the denial of a right to appeal: *Davis County v. Horn*, 4 G. Gr., 94.

8. **After reversal on appeal:** The judgment of a lower court being reversed on appeal and remanded for further proceedings in accordance with the opinion, such court has no jurisdiction to take any action inconsistent with such opinion, and if it attempts to do so its proceedings may be corrected by *certiorari*: *Edgar v. Greer*, 14-211.

9. **Justice of peace; summary proceeding:** Where a justice of the peace exercises a new jurisdiction created by statute, in which the proceedings are summary, and in a course different from the general principles of the common law, *certiorari* and not appeal is the proper method of having the action of the justice reversed: *Dubuque v. Rebman*, 1-444.

10. **Judgment wrongfully set aside:** Where the court has jurisdiction of the parties at the time of making an order, its action cannot be attacked by *certiorari*; the remedy then is by appeal. Where, however, during the term at which a judgment was made, approved and signed, but after counsel for one of the parties had left the court, such judgment was set aside and other pro-

When the writ will be granted.

ceedings had, *held*, that the order was without jurisdiction and might be corrected on *certiorari*: *Hawkeye Ins. Co. v. Duffie*, 67-175.

11. **Indefinite continuance:** Where a cause had been continued "until after the next ensuing term" of court, and neither the day nor the hour fixed, *held*, that defendant was not bound to appear from day to day to ascertain when it might suit the plaintiff to call up the case, and a judgment rendered in such case against the defendant was without notice to him and void, and that defendant would be entitled to the writ of *certiorari* as soon as he discovered that judgment had been so rendered, notwithstanding more than sixty days had elapsed since the rendition of judgment: *Rowley v. Baugh*, 33-201.

12. **Failure to appeal:** A party who fails to appeal within the time limited by law is not entitled to sue out the writ: *Sunberg v. District Court*, 61-597.

13. Where a party has, through his own fault, lost a plain, speedy and adequate remedy, which he might have availed himself of, as the right to appeal, he is not entitled to a remedy in *certiorari*: *Fagg v. Parker*, 11-18.

14. So he will not be allowed to select some erroneous ruling of an inferior tribunal and have it corrected by *certiorari*: *O'Hare v. Hempstead*, 21-33.

15. Thus, under Code of '51, it was held that an error of the county court in rejecting testimony in the proceedings before it should be corrected by appeal, and not by *certiorari*: *State v. Wilson*, 12-424.

16. **Administrator's settlement:** The proper remedy for a refusal of the county court to correct a mistake in an administrator's final settlement is by appeal, and not by *certiorari*: *O'Hare v. Hempstead*, 21-33.

17. **Condemnation proceedings:** Where, in right of way proceedings, it was not claimed that the land was such as could not be taken for right of way, nor that sufficient and proper notice had not been given, but simply that sufficient damages were not assessed and that the award was made on a day subsequent to that fixed in the notice, *held*, that the remedy, if any, was by appeal, not *certiorari*: *Cedar Rapids, I. F. & N. W. R. Co. v. Whelan*, 64-694.

18. Commissioners properly appointed to

appraise damages for the taking of land for a right of way cannot be considered a tribunal exercising judicial functions and held liable for exceeding their jurisdiction or acting illegally when the proceedings are regular, even though the case is one in which there is no right to condemn the right of way: *Forbes v. Delashmutt*, 68-164.

19. The proceedings of an inferior tribunal to establish a highway will not be annulled on *certiorari* unless it is shown that it has exceeded its jurisdiction, or is otherwise acting illegally: *McCollister v. Shuey*, 24-362.

20. Where a board is given a discretion, a court cannot on *certiorari* inquire into the correctness of their decisions: *Hildreth v. Crawford*, 65-339.

21. The statutes in reference to this subject do not contemplate that the decisions of inferior tribunals in regard to matters of fact, where the tribunal is clothed with authority to decide with reference to matters submitted to it, and the subject-matter and the parties are within its jurisdiction, may be reviewed by a writ of *certiorari*: *Tiedt v. Carstensen*, 61-334; *Darling v. Boesch*, 67-702.

22. Therefore, *held*, that in a proceeding by *certiorari* in the circuit court, the decision of the board of supervisors upon the question whether the public interests demanded a proposed highway, and whether it was practicable and expedient to establish it, could not be reviewed: *Tiedt v. Carstensen*, 61-334.

23. **Board of equalization:** *Certiorari* is not the proper proceeding to control the discretion of a board of supervisors acting as a board of equalization: *Smith v. Board of Supervisors*, 30-531.

24. The action of the board of equalization in increasing or diminishing the valuation of the property of a tax-payer cannot be reviewed by *certiorari*. Whatever the motive of the alleged wrongful action of the board, it cannot be deemed illegal in such sense as to be reviewed in that manner: *Polk County v. Des Moines*, 70—.

25. Where a board of equalization acts in a case not within its jurisdiction, *certiorari* the proper remedy: *Royce v. Jenney*, 50-676.

26. **County seat; relocation:** The action of a board of supervisors in determining upon the sufficiency of remonstrances, and the

When the writ will be granted.—Parties.

number of names signed thereto, in proceedings for the relocation of a county seat, is judicial, and may be reviewed on *certiorari*: *Herrick v. Carpenter*, 54-840.

27. **Intoxicating liquors; permits:** The court cannot on *certiorari* review the finding of the board of supervisors in granting a permit to sell intoxicating liquors, as to the good moral character of the applicant, or as to whether the granting of the permit was necessary for the accommodation of the neighborhood. But it may determine whether the proceedings were illegal by reason of no certificate whatever, signed by the electors as required by statute, having been presented to the county auditor: *Darling v. Boesch*, 67-702.

28. **Tax for railroad; illegal voting:** The action of township trustees in determining whether the petition for submission to vote on the proposition to levy a tax in aid of a railroad is of a judicial or *quasi* judicial character, or whether it is illegal or without jurisdiction, may be determined in this proceeding: *Jordan v. Hayne*, 36-9.

29. But the question whether there has been fraud or illegal voting cannot be determined, the proceeding not being intended or calculated to discover and defeat such frauds: *Ibid.*

30. **Assessor to correct errors:** Where an assessor has failed to make on his books the corrections ordered by the township board of equalization, and such books have passed beyond his control into the hands of the auditor, an action of *certiorari* to have the same corrected is the proper remedy: *Keck v. Board of Supervisors*, 37-547.

31. **School directors; illegal acts:** Illegal acts of a board of school directors in directing their secretary not to certify to the board of supervisors a tax voted by the electors of the district, may be corrected on *certiorari*: *Smith v. Powell*, 55-215.

32. **City council; streets:** *Certiorari* will lie to control the action of a city council in improperly vacating streets: *Stubenrauch v. Neyenesch*, 54-567.

33. **Legislative acts of a city council in passing ordinances cannot be interfered with by *certiorari*.** So held as to the action of a city council in passing an ordinance to regulate the sale of beer, wine, etc.: *Iske v. Newton*, 54-586.

34. **Remitting taxes:** The action of the city council in hearing a petition for the reduction of a tax and granting the same is a judicial action and properly brought in question by *certiorari*: *Collins v. Davis*, 57-256.

35. **The statute of limitations commences to run against a proceeding by *certiorari* to correct error in the action of a board of supervisors in holding a petition for the relocation of a county seat sufficient** (Code, § 285), from the time the board decides to submit the question to vote, and not from the time it passes upon the petition: *Jamison v. Board of Supervisors*, 47-888.

II. PARTIES.

36. **Person not affected:** A person in no way affected by the proceeding cannot interfere therewith by writ of *certiorari*: *Davis County v. Horn*, 4 G. Gr., 94.

37. Where the record discloses no specific right on the part of the plaintiff which is violated by the ordinance of a city, he will not be allowed on *certiorari* proceedings to contest its validity: *Iske v. Newton*, 54-586.

38. **Remission of tax; action by any tax payer:** A tax payer may, in this proceeding, question the action of a city council in remitting taxes assessed against another tax payer, although such plaintiff have no greater interest in the matter than other tax payers: *Collins v. Davis*, 57-256.

39. **Pecuniary interest; prohibitory liquor law:** While the general rule is that an action of *certiorari* cannot be maintained for the correction of irregularities or errors in proceedings of the board of supervisors by one having no pecuniary interest in the proceedings, yet under the prohibitory liquor law authorizing the board of supervisors to grant permits for the sale of liquors upon certain requirements being complied with by the applicant, and permitting any citizen to appear and show cause why the permit should not be granted, such citizen has sufficient interest in the granting of such permit to entitle him to have the proceedings reviewed and the errors and irregularities therein corrected by *certiorari* without having any pecuniary interest in the matter: *Darling v. Boesch*, 67-702.

 Procedure.

40. Joinder; taxes in different townships: Where taxes have been levied in different townships in aid of a railroad, the levy in each township is to be considered distinct, and tax payers of different townships cannot join as plaintiffs in an action of *certiorari* to test the validity of such taxes: *Woodworth v. Gibbs*, 61-398.

41. In a proceeding to review the action of the board of supervisors in assessing the costs of constructing a levee upon adjoining land, different property owners whose property will be subject to assessment on that question may join as plaintiffs: *Richman v. Board of Supervisors*, 70—.

42. Several owners of distinct pieces of land cannot join in a proceeding by *certiorari* to correct the action in assessing damages resulting from the establishment of a road: *Chambers v. Lewis*, 9-583.

III. PROCEDURE.

43. Special action: Under the Revision, *held*, that the proceeding by *certiorari* was a special proceeding and not a special action: *Ainsworth v. House*, 31-504.

44. Criminal cases; jurisdiction: The district and circuit courts have not jurisdiction indiscriminately under the Code (§ 3217). But the former has exclusive jurisdiction of all such proceedings in criminal cases, and the latter all those in civil cases, as provided in §§ 161, 162: *Keniston v. Hewitt*, 48-679.

45. Sufficient return; change of county seat: Where a proceeding by *certiorari* was brought to determine the legality of the action of the board of supervisors in submitting to vote the question of changing the location of a county seat, *held*, that the return of the board showing upon what evidence the board proceeded, and in what manner they reached the result upon which the order was based, was proper: *Stone v. Miller*, 60-243.

46. Duty of court to examine: Upon a return of the writ of *certiorari*, *held*, that it was the duty of the court to examine not only the statement of the defendant made in the return, but also the evidence submitted: *Ibid*.

47. Material facts certified: Although the writ may be defective in not having a suf-

ficient certificate as to the record, yet if the facts deemed material are in fact certified, no objection on account of the insufficiency of the writ can be afterwards raised: *Richman v. Board of Supervisors*, 70—.

48. Waiver of writ: The parties may waive a writ of *certiorari* and voluntarily submit themselves to the jurisdiction of the court: *Groves v. Richmond*, 56-69.

49. Return as showing notice: When the judge returns that notice has been given, it will be taken as duly and properly established that notice was given in the proper manner; but if the proof of notice is set out, and it appears to be insufficient, the correctness of the finding of the judge as to the notice will be overcome: *Schroder v. Carey*, 11-555.

50. Allegations to sustain application: The motion for the writ should point out specifically the illegalities in the proceedings complained of: *Chambers v. Lewis*, 9-583.

51. Direction: The writ should be directed to the officer against whom it issues by name and not merely by his official title: *Ibid*.

52. Evidence before supervisors; auditor's certificate: In a *certiorari* proceeding, a certificate of the county auditor as to whether oral evidence was received before the board of supervisors touching a particular question is not competent to overturn the action of the board: *Woolsey v. Board of Supervisors*, 32-180.

53. Facts not stated in writ: Under the Revision, *held*, that the court could not, in this proceeding, consider errors or illegalities relating to or dependent upon facts not stated in the petition or the writ: *Everett v. Cedar Rapids & M. R. R. Co.*, 28-417; *Smith v. Board of Supervisors*, 30-531.

54. Power to hear testimony: Also, *held*, under the Revision, that the case could be heard only on the record returned and that other evidence could not be introduced: *Jordon v. Hayne*, 36-9.

55. Under present provisions (Code, § 3222) the court is allowed to consider other evidence than that presented in the return of the writ, but it is not intended to extend the remedy so that inquiry can be made into matters other than the jurisdiction and legality of the proceedings of the inferior court.

Execution and delivery.

It is not the purpose of the statute to change the office of *certiorari* so that it will operate as an appeal wherein causes may be tried *de novo*. The provision for the introduction of other evidence is for the purpose of permitting the consideration of all the facts involved in the case bearing upon the issues in the proceeding, touching the jurisdiction and compliance with the law in the case reviewed: *Tiedt v. Carstensen*, 61-334.

56. On appeal: The supreme court cannot, upon *certiorari* from the circuit court, inquire whether the evidence before the latter justified the order made, and thus review, as upon appeal, its decision: *Wise v. Chaney*, 67-73.

57. Bond: It not being provided that judgment upon the bond should be summarily entered against a surety as provided in the case of appeal bonds, such a judgment will be erroneous: *Smith v. Bissell*, 2 G. Gr., 379.

CHAMPERTY AND MAINTENANCE.

See CONTRACTS, §§ 324-331; ATTORNEYS, §§ 94-102.

CHANGE OF VENUE.

In civil cases, see VENUE, II, III; and in criminal cases, see CRIMINAL LAW, III, 8, b.

CHATTEL MORTGAGES.

I. EXECUTION AND DELIVERY.

II. SUBJECT-MATTER; DESCRIPTION; FUTURE ACQUISITIONS.

III. VALIDITY AS TO THIRD PERSONS.

IV. RIGHTS OF PARTIES.

- a. Nature of respective interests.
- b. Priority of lien.

V. FORECLOSURE.

Sale of property by mortgagor constitutes a crime: See CRIMINAL LAW, §§ 456-460.

As to ACKNOWLEDGMENT, see that title.

As to recording, see RECORDING ACTS.

As to NOTICE, see that title.

When void on account of being made in connection with general assignment, see ASSIGNMENTS, V.

When void as FRAUDULENT CONVEYANCES, see that title.

I. EXECUTION AND DELIVERY.

1. In parol: A parol agreement for a lien upon personal property may be valid, and will not be within the statute of frauds if money is still to be expended in acquiring the property to be covered thereby: *Brown v. Allen*, 35-306.

2. By partner: A mortgage of firm property by one partner may be valid if within the scope of his authority: *Fromme v. Jones*, 13-474. But not without consent of copartner if it will practically terminate the firm business: *Osborne v. Barge*, 29 Fed. Rep., 725.

3. Parol evidence to show absolute sale intended as a mortgage: It is competent to show by parol evidence that a sale, absolute in its terms, was intended as security for a debt: *Votaw v. Diehl*, 62-676.

4. Delivery and acceptance: An acceptance by the mortgagee is necessary to constitute delivery. While actual manual delivery is not necessary, there must be that which, in legal contemplation, is equivalent thereto: *Day v. Griffith*, 15-104.

5. Even if the mortgagor agrees with a creditor to give security, the filing of the mortgage, by the mortgagor, with the recorder, but without the knowledge of the mortgagee, will not constitute a valid delivery: *Ibid*.

6. The subsequent acceptance of the instrument by the mortgagee, while it will make the instrument valid from that time, will not relate back to the original execution and delivery to the recorder, so as to cut off the rights of a creditor who has secured an attachment before such acceptance: *Ibid*.

7. Where a chattel mortgage was executed as security for a loan procured from the mortgagee, under an agreement that the mortgagor should give a chattel mortgage on sufficient property to constitute ample security for the loan, and file the same with the recorder for record, held, that such filing for record amounted to a valid delivery to the mortgagee, although he did not know what specific property was covered by the mortgage: *Everett v. Whitney*, 55-146.

8. Although the execution and filing for record by mortgagor of a mortgage upon certain property, in accordance with a prior agreement to execute such mortgage, may

Execution and delivery.—Subject-matter.

constitute a delivery to the mortgagee, yet, where a mortgage was thus executed and filed in accordance with a prior agreement to secure the debt by chattel mortgage, but without the particular property having been previously agreed upon, *held*, that such mortgage would not take priority over an attachment levied after the recording of the mortgage, but prior to its delivery to the mortgagee: *Cobb v. Chase*, 54-253.

9. Where a chattel mortgage from husband to wife was filed by the husband for record and recorded, but it did not appear that it had come into the hands of the wife, or been approved by her until after the accruing of other liens, *held*, that it would not take priority over such liens: *Wadsworth v. Barlow*, 68-599.

10. Although it is true that where a mortgage beneficial to the mortgagee is left with the recorder or other person, with the declaration that it is to be delivered to the mortgagee, or is for the mortgagee's use, and the facts come to the mortgagee's knowledge, acceptance from that time may be presumed, yet, where the instrument was filed with the recorder, with no declaration that it was to be delivered to the mortgagee, or was for her use, *held*, that acceptance by her would not be presumed from the mere fact of knowledge, at least where it did not appear that the mortgage was necessarily beneficial to her: *Ibid*.

11. Where, at the time a debt is contracted, it is agreed that a chattel mortgage shall be executed upon the happening of a specified event, to cover property specifically named, and the mortgage is executed upon the happening of such event, the law will presume that the mortgagee assented to the mortgage. The assent expressed in the agreement will be deemed to continue up to the execution of the mortgage: *In re Assignment of Guyer*, 69-585.

12. In such case, where the mortgagor has by agreement bound himself to execute the mortgage, and the mortgagee has assented thereto and agreed to accept it, the mortgagor will be authorized to file it for record, and the person to whom he delivers it will be authorized to do this as agent of the mortgagee: *Ibid*.

13. The execution of a chattel mortgage to secure a creditor will not prevent the

property covered thereby passing by general assignment executed after the execution of the mortgage and before its acceptance by the mortgagee: *Gage v. Parry*, 69-605.

14. Mortgage upon property held under replevin: Where, in a replevin suit to recover possession of property from an officer, the plaintiff dismissed suit before the joining of issues, but the property remained in his hands, and before the issuance of a writ of restitution plaintiff executed a mortgage upon such property, *held*, that a subsequent return of the property to the officer, under the writ of restitution, and a new levy thereon by him, would not give him any right prior to the mortgage, it appearing that the mortgagor was in fact the real owner of the property: *Case v. Woleben*, 52-389.

As to ACKNOWLEDGMENT and RECORDING, see those titles respectively.

II. SUBJECT-MATTER; DESCRIPTION; FUTURE ACQUISITIONS.

15. Certainty of description: A description of the property in a chattel mortgage which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property, is sufficient: *Smith v. McLean*, 24-322.

16. Therefore, the following description was held sufficiently definite: "five freight wagons and twenty-five yoke of cattle, being the train now in my possession:" *Ibid*.

17. Any description in a chattel mortgage, which will enable third persons, aided by inquiries which the instrument itself suggests and directs, to identify the property intended to be covered, is sufficient: *Rhutasel v. Stephens*, 68-627.

18. Therefore, *held*, that a chattel mortgage covering "all my stock hogs, being forty, more or less, with the pigs now with them," was sufficient, but that the description "one span of colts, three years old, one gray, and one bay," etc., etc., but making no reference to the ownership of the property, its location, or otherwise describing it, was insufficient: *Ibid*.

19. In order to charge third persons with constructive notice of a chattel mortgage, the description of the property as contained in the mortgage must direct the mind to evi-

Subject-matter; description.

dence whereby the precise thing conveyed may be ascertained, and if thereby absolute certainty may be attained, the instrument is valid. Otherwise it is void as to third persons for uncertainty: *Ormsby v. Nolan*, 69-130.

20. A description of a buggy and sulky showing by whom they were made and from whom bought, but not showing their ownership, location, etc., *held*, not sufficient: *Ibid*.

21. A chattel mortgage describing the property as in possession of the mortgagor, and showing the county in which the property is located, is sufficient: *Wells v. Wilcox*, 68-708; *Brock v. Barr*, 70—.

22. Specific description of animals, with the further fact shown by the mortgage that they are in the possession of the mortgagor, is sufficient: *Wheeler v. Becker*, 68-723.

23. The description "sixty head of two and three year old steers and forty head of yearling steers, also sixty-five acres of standing corn, situated in Clay township, Shelby county," *held*, not sufficiently specific, in that there was no suggestion that the animals were all the animals of that age and description which the mortgagor owned in that township: *Caldwell v. Trowbridge*, 68-150.

24. If the description is correct as far as it goes, but fails fully to point out and identify the property intended to be conveyed, a subsequent purchaser or incumbrancer is bound to make every inquiry which the instrument could be reasonably deemed to suggest: *Yant v. Harvey*, 55-421.

25. Therefore, where a mortgage described a horse as of brown color, whereas the evidence showed that some would call it brown and others would call it black, *held*, that there was not such a misdescription as to render the mortgage invalid: *Ibid*.

26. A description of property as a stock of goods, wares and merchandise, consisting of groceries, etc., and all other articles of goods now in stock, etc., in a store-room, etc., *held*, sufficient to cover kerosene and salt embraced in the stock, the salt being actually stored in a building used for that purpose in connection with the store-room, and the kerosene being at the time of levy under attachment, in front of the building, where it had

been rolled out on the same day for a temporary purpose: *Stephens v. Pence*, 56-257.

27. The terms "goods, wares, merchandise, fixtures, furniture and appliances," used in a chattel mortgage covering a stock of goods in a grocery store, *held*, not sufficient to include horses and wagons used in connection with the store in the delivery of goods, nor notes, drafts, accounts, etc., kept in a safe in such store: *Van Patten v. Leonard*, 55-520.

28. Under a chattel mortgage of the fixtures and appurtenances of a daguerrean room, *held*, that the term "appurtenances" covered such property as appertained and belonged to the room, or remained there permanently, and was used in carrying on the business, such as maps and pictures hanging on the wall, the stove and carpet, the apparatus and furniture necessary for the business, with the machines and stock, etc.: *Pickereil v. Carson*, 8-544.

29. Mistake in description: If the mortgage contains a specific description which is erroneous, and therefore misleading, it will not be upheld against innocent purchasers: *Ivins v. Hines*, 45-73.

30. Where a chattel mortgage upon a growing crop described it as upon "township 37, range 90," instead of "township 90, range 37," and a judgment creditor subsequently had the crop sold under execution for his debt, *held*, that the creditor was not chargeable with notice of the mistake in the description, and was not liable in an action by the mortgagee for the value of the crop: *Adams v. Commercial Nat. Bank*, 53-491.

31. Description of crop: Where the description of the property covered by the mortgage was "all the cut and growing, and having grown on the" premises described, *held*, that the description was too uncertain to be of any validity against an officer who had levied upon the property, and that the court would not insert or understand the word "crops" for the purpose of curing the defect: *Cray v. Currier*, 62-535.

32. Where the mortgage described the property as "all and the entire crop of flax and wheat and other grain or produce raised on" certain premises, *held*, that the description was too indefinite and uncertain, in that it did not appear where the crops were to be

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raised, and that even if it could be said to apply only to growing crops, it was insufficient because the year during which they were to be grown was not stated, and that in these respects the mortgage was not such as to put a subsequent mortgagee upon inquiry: *Eggerl v. White*, 59-464; *Barr v. Cannon*, 69-20.

33. A mortgage on crops to be sown or planted will not be deemed sufficient as against third persons unless the year or term within which the crops are to be grown is stated: *Pennington v. Jones*, 57-87.

34. A mortgage upon "all the crops raised by me in any part of Jones county for the term of three years," held too indefinite as against third persons: *Muir v. Blake*, 57-662.

35. A mortgage upon crops to be raised in the future for a certain year on certain land described is sufficient and will attach to such crops as soon as they come into existence: *Wheeler v. Becker*, 68-723.

36. Description too indefinite: The description of property as "one oscillating threshing machine, size 6, 30-inch cylinder, and also one Chicago Pitts, ten horse power," held, too indefinite and uncertain to be sustained as between the mortgagee and a creditor of the mortgagor who had attached the property: *Hayes v. Wilcox*, 61-732.

37. A chattel mortgage upon "sixty head of hogs" without other description, held, not to contain anything which would justify inquiry leading to the identification of the property, and therefore not sufficient notice, as recorded, to charge a subsequent purchaser of the property intended to be mortgaged: *Everett v. Brown*, 64-420.

38. Actual knowledge: Where it appears from the evidence that an attaching creditor and the officer levying the attachment had due notice of the mortgage prior to the levy, and intentionally levied on property included therein, the fact that the property is insufficiently described will be immaterial: *Hall v. Ballou*, 58-585.

39. Parol evidence: Where property intended to be covered by chattel mortgage is not so described as that it will, as a matter of law, constitute constructive notice of the mortgagee's rights, the mortgagee cannot recover possession of the property from one claiming under a subsequent mortgage unless he can show, and does show, by evi-

dence *aliunde* the mortgage, that the property claimed is that mortgaged: *Rowley v. Bartholomew*, 87-874.

40. The description in a mortgage cannot be varied by parol evidence for the purpose of showing an intent on the part of the parties different from that shown by the mortgage itself: *Lormer v. Allyn*, 84-725.

41. As between the mortgagee and an attaching creditor it is not proper to receive parol evidence to vary the instrument by showing that the words "goods" and "stock" therein used were intended to include fixtures: *Van Every v. Davis*, 51-637.

42. Identification: In an action to foreclose a chattel mortgage evidence may be introduced to identify the property as that described in the mortgage, although it has been removed or otherwise changed, without any allegation of such removal or change having been made: *Odell v. Gallup*, 62-253.

43. Extrinsic evidence is only admissible to identify the property covered by the mortgage when the mortgage suggests inquiry which will result in such identification: *Ormsby v. Nolan*, 69-130.

44. The question, whether the description is such as that the property intended to be covered could be identified therefrom, is one of fact to be determined by the jury: *Peterson v. Foli*, 67-402.

45. Description of indebtedness: A chattel mortgage to secure a certain sum "for or on account of advances made and money loaned by the party of the second part to" the mortgagor, "together with interest at the rate of ten per cent. per annum from the date of each several sum at divers times heretofore advanced by the said party on or before," etc., held, to sufficiently describe an indebtedness which it was given to secure, although such indebtedness consisted of several sums which, with interest, amounted to a few dollars more than the amount mentioned: *Clark v. Hyman*, 55-14.

46. Fixtures: As to whether a chattel mortgage, executed upon fixtures which are not severed from the realty *in fact*, will operate as a *constructive severance*, and pass the title in such fixtures to the grantee, *quære*; but the recording thereof will not impart to subsequent purchasers of the realty con-

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structive notice of such incumbrance: *Bringhoff v. Munzenmaier*, 20-518.

47. Where the owner of real property executes a mortgage upon chattels, which may properly be made fixtures, and subsequently affixes them to the realty, a person purchasing or acquiring a lien upon such real property with knowledge of the facts, takes subject to the mortgage; and *held*, that the mechanic who attached such fixtures to the realty was affected with notice by the recording of such chattel mortgage, and his lien was subject thereto: *Sowden v. Craig*, 26-156.

48. A chattel mortgage of certain machinery before it was placed in a mill, and which when so placed could be removed without material injury to the main building, *held*, not to be lost by such use of the property: *First Nat. Bank v. Elmore*, 52-541.

49. Where a chattel mortgage was given upon a mill separate from the land on which it was located, and afterward the land was conveyed to a party who had knowledge of the mortgage, *held*, that the purchaser was subject to the lien thereof: *Greither v. Alexander*, 15-470.

50. Natural increase: Where a mortgage upon two cows was duly recorded, no reference being made to their increase, *held*, that the mortgagee did not have a lien upon such increase which could be asserted as against a purchaser thereof in good faith, without notice, from the mortgagor in possession, after the increase had attained such age as to be independent of the dam: *Winter v. Landphere*, 42-471.

51. The chattel mortgagee having the right to possession under his mortgage of the property has also the right to possession of the natural increase of the property. Therefore, *held*, that, where a chattel mortgage was given upon mares, such mortgage covered foal from such mares until the colts were weaned or should be weaned according to the course of nature, or the usual custom of those raising horses: *Rogers v. Highland*, 69-504.

52. Future acquisitions: A railway company may mortgage future acquisitions: *Dunham v. Isett*, 15-284.

53. The future earnings of vessels and railroad companies, as well as property subsequently acquired, may be mortgaged, and such future earnings cannot be seized on

execution by garnishment: *Jessup v. Bridge*, 11-572.

54. While a chattel mortgage may be made to cover future acquisitions, it is necessary that such provision be expressly made in the mortgage in order to hold such property, and if the mortgage refers to a stock of goods, scheduling and describing them, and not specifying future acquisitions, it will not be held to cover additions afterwards made: *Phillips v. Both*, 58-499.

55. Where the description in a mortgage of a stock of goods included "credits arising out of said business," *held*, that the mortgage only covered credits existing at the time of the execution of the mortgage and not those subsequently arising: *Lormer v. Allyn*, 64-725.

56. A chattel mortgage upon "all the stock that I may own during the existence of this mortgage," *held* sufficiently definite in description to be valid as to stock subsequently acquired: *Hughes v. Wheeler*, 66-641.

57. Although by strict common law rule a party could not mortgage property not *in esse* so as to vest the property in the mortgagee when it should come into existence, yet courts of equity, and, under our laws, courts of law, also, will recognize the rights of such mortgagee, and enforce them against all persons having notice of such rights, provided the property described is capable of identification: *Scharfenburg v. Bishop*, 35-60; *Brown v. Allen*, 35-806.

58. A mortgage drawn with the intention of covering future acquired property which is at the time in existence, but not the property of the mortgagor, will be valid as to such property when acquired: *Hughes v. Wheeler*, 66-641.

59. Future crops: The supreme court is not committed to the doctrine that a mortgage upon a crop to be planted and grown is valid as against a creditor of the mortgagor. Whether the rule which has been followed in case of additions to the stock of merchandise covered by a mortgage would be applicable in such cases, *quære*: *Muir v. Blake*, 57-662.

60. Before a mortgage on crops to be sown or planted can be regarded as valid against third persons, the year or term in which the

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crop is to be grown must be stated: *Pennington v. Jones*, 57-37.

61. A chattel mortgage providing that future acquired property shall be transferred thereby is valid, and such property upon its acquisition becomes subject thereto. The fact that the property is not in existence at the time of the execution of the mortgage will not defeat the notice imparted by such record, after the property comes into existence: *Wheeler v. Becker*, 68-723.

And as to sufficiency of description of crops, see *supra*, §§ 31-35.

62. Does not cover proceeds: A chattel mortgage does not cover the proceeds of goods rightfully sold in the ordinary course of trade: *Lormer v. Allyn*, 64-725.

63. One who receives money from a debtor believing it to be the proceeds of the sale of chattel property is under no obligation to ascertain whether such property is covered by mortgage, and cannot be held as trustee for a mortgagee of the property. If the fact of the existence of the mortgage were known, and the identical proceeds could be traced, a different question might arise: *Burnett v. Gustafson*, 54-86.

64. A chattel mortgage does not become a lien upon the proceeds of the sale of the property covered thereby, unless the circumstances are such that the mortgagee cannot follow the property. Whether, in case the mortgagee cannot follow the property, he has any remedy, *quære*: *Waters v. Cass County Bank*, 65-234.

65. A note given the mortgagor for the purchase price of property covered by chattel mortgage is not subject thereto, and will pass to a purchaser without notice free from any claim of the mortgagee: *Kahler v. Hanson*, 53-698.

III. VALIDITY AS TO THIRD PARTIES.

As to who are protected against an unrecorded mortgage or bill of sale, when the mortgagor or vendor retains possession, see RECORDING ACTS, III, d.

66. Change of possession:¹ A change in the "actual possession," which will be sufficient under the statute to render the mortgage valid as to third persons without recording, must be something to indicate the change of ownership; if the property be left with the seller, whose relations to it continue unchanged, so far as the world may know from the acts of the parties, the possession will be regarded as continuing in him: *Boothby v. Brown*, 40-104; *Sutton v. Ballou*, 46-517; *Hickok v. Buell*, 51-655; *McAfee v. Busby*, 69-828.

67. The use of the term "actual possession" implies that a change of possession sufficient to constitute a delivery and pass the property as between the parties may not be sufficient to impart notice to others. To take a case out of the statute, something must be done to impart such notice. Therefore, where there was a sale of a field of corn standing on the farm of the vendor, the vendee not taking immediate charge of the corn nor control of the field, *held*, that the vendor retained actual possession within the meaning of the section: *Smith v. Champney*, 50-174; *Nuckolls v. Pence*, 52-581.

68. There must be an actual change of possession: *McKay v. Clapp*, 47-418.

69. The statute requires such transfer of dominion over the property as to imply notice to persons dealing with reference to the property that the title has been transferred: or such possession as will put such persons in possession of facts leading to inquiry as to the ownership. The possession need not necessarily be such as to imply notice to the public generally, but is sufficient if it implies notice to those who intend to purchase the property or deal with reference to it: *Deere v. Needles*, 65-101.

70. Not necessary where property is in the hands of third persons: Where the property is not in the actual possession of the mortgagor or vendor, or in his custody so that there may be manual delivery, an actual delivery is not necessary to the validity of the transaction. If the property is placed

¹ Code, § 1923. No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers, without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides.

[As bills of sale as well as mortgages of chattels are covered by this provision, so that the same rule as to what is sufficient change of possession or recording, etc., is applicable in either case, all the decisions on that question are collected here.]

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in the power of the purchaser, that is sufficient: *Barrows v. Harrison*, 12-588.

71. If the property at the time of the sale or mortgage is in the possession of a lessee, and remains in his possession, the vendor does not retain the "actual possession" of the property, so as to render recording necessary: *Thomas v. Hillhouse*, 17-67.

72. So held, also, where the goods were in the hands of a common carrier: *Alsberg v. Latta*, 80-442.

73. Where the property at the time of the sale is in the actual possession of a third person as lessee or the like, a sale without notice and without change of possession is valid, and it is wholly immaterial in such cases whether or not the owner has the right to the immediate possession: *Campbell v. Hamilton*, 68-293.

74. Where a landlord assigned his lease to his creditor, who thereupon became entitled to the landlord's share of the crops on the premises, held, such assignment was valid without record as to creditors and purchasers from the assignor without notice of the assignment, there being no retention of possession by the landlord: *Lufkin v. Preston*, 57-28.

75. Retention of possession by mortgagor not fraudulent: The retention of the mortgaged property by the mortgagor does not, as matter of law, render the mortgage fraudulent and void: *Torbert v. Hayden*, 11-435; *Jessup v. Bridge*, 11-572; *Fromme v. Jones*, 13-474; *Wilhelmi v. Leonard*, 13-330; *Smith v. McLean*, 24-322, 330.

76. Possession retained by vendor or mortgagor after recording the instrument is strictly lawful and not fraudulent or a badge of fraud, unless such retention is a part of the consideration of the sale: *Jordan v. Lendrum*, 55-478.

77. Under the statutory provisions as to recording, the mere retention of the possession of personal property by the mortgagor thereof, when the mortgage is duly recorded, is no longer either *per se* fraudulent or a badge of fraud in law, although it may be a circumstance with others to prove fraud in fact: *Hughes v. Cory*, 20-399.

78. The right given by statute to the mortgagor to retain possession of personal property implies the right to a reasonable use

thereof, especially when the act of using does not necessarily consume it: *Ibid.*

79. Right to sell in ordinary course of trade: A chattel mortgage which contains a reservation by the mortgagor of the right to sell the mortgaged property in the usual course of retail trade, with an agreement to keep up the stock to its original value, and a reservation of the right to retain the avails of the sales under an agreement to apply a portion thereof to the payment of the mortgage, is not fraudulent *per se*, as a matter of law, and whether fraudulent in fact, or not, must be decided upon all the evidence: *Ibid.*; *Meyer v. Gage*, 65-606; *Maish v. Bird*, 22 Fed. Rep. 576.

80. Nor does the fact that the mortgage provides that the debtor shall remain in possession of the goods, receiving the proceeds and paying the same to the creditor's banker, render the mortgage void. Such fact might be considered in determining the question of fraud, but it is not fraud *per se*: *Adler v. Clafin*, 17-89.

81. The provision that the mortgagor shall have the right to retain possession and carry on the business in the usual retail way for one year, paying costs and expenses of running the business and keeping up the stock to about what it was at the time of the execution of the mortgage, held, not sufficient to render the mortgage fraudulent in law, although no provision was made for an application of the profits to the satisfaction of the mortgage debt. It might be otherwise if the mortgage should provide for sales that would exhaust the stock without any provision for such application: *Jaffray v. Greenbaum*, 64-492.

82. The fact that there is no agreement to account to the mortgagee for the proceeds of sales of the mortgaged property in the course of trade does not affect the validity of the mortgage: *Clark v. Hyman*, 55-14.

83. Reservation of the right to sell in the ordinary course of trade and apply the proceeds to the mortgagor's own use will not render the mortgage fraudulent in law: *Sperry v. Ethridge*, 63-543; *Meyer v. Evans*, 66-179.

84. Nor will the fact that the chattel mortgage containing such agreement with reference to reservation of possession and

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right to sell in the ordinary course of trade and apply the proceeds to mortgagor's own use, if given after the mortgagor becomes insolvent, render the mortgage necessarily fraudulent: *Sperry v. Ethridge*, 63-543.

85. In the federal courts it is held that a mortgage of chattels which permits the mortgagor to remain in possession until default in payment of the debt secured, with power to sell the goods as theretofore, is fraudulent and void in law, and cannot be enforced by a court of equity. This being a matter outside the state statute, the decisions of the United States supreme court will be followed independent of the state decisions: *Crooks v. Stuart*, 2 McCrary, 13; *Wells v. Langbein*, 20 Fed. Rep., 183.

86. Although the rule in the federal courts is that reservation by mortgagor of the right to sell in the usual course of trade renders the mortgage fraudulent and void as to creditors, yet a plaintiff who in proceedings in the federal courts levies upon such mortgaged property as that of the mortgagor, treating the mortgage as invalid, becomes liable in the state court to an action for trespass: *Meyer v. Gage*, 65-606.

87. Circumstances indicating fraud: The provisions as to application of the proceeds and the fact of insolvency may be considered as tending to prove that a mortgage reserving right of sale to mortgagor was executed with the intent to defraud or delay other creditors: *Sperry v. Ethridge*, 63-543.

88. The mere fact that creditors who are secured by chattel mortgages are intimate friends or relatives of the debtor does not necessarily show that their mortgages are fraudulent: *Jafray v. Greenbaum*, 64-492.

89. Fraud in fact: Compliance with the provisions of the recording acts does not preclude the transaction being attacked on the ground that it is actually fraudulent as against creditors: *Singer v. Sheldon*, 56-354.

90. If the parties to the mortgage have a fraudulent intent, in creating the loan, to hinder and delay other creditors, and thereby confer advantages upon the mortgagor which he would not otherwise possess, this will be a fraud in fact which will render the mortgage void. The fact of fraudulent intent must, however, be shown by extrinsic evidence and found by the verdict of the jury.

It cannot be inferred from the mere provisions of the mortgage: *Torbert v. Hayden*, 11-435.

91. If possession by mortgagor is accompanied by the power of disposition or use in any way inconsistent with the object of securing the rights of the mortgagee, that fact would be a badge of fraud, not absolute but *prima facie*, requiring explanation. Whether possession by the mortgagor with a right to deal with the property as his own is fraudulent constitutes a question of intent, and will depend entirely upon the circumstances explaining such acts of ownership: *Ibid*.

92. The fact that a chattel mortgage is filed for record by the mortgagor, if under circumstances showing good faith, is not evidence of fraud: *Mason v. Franklin*, 58-506.

93. The fact of a variance between the true consideration and that expressed in the instrument is at most but a badge of fraud, proper to be submitted to the consideration of the jury as a fact bearing upon the question of fraudulent intent: *Ibid*.

94. The fact that a mortgage is given by an insolvent person for more than is due, and that such insolvency is known to the mortgagee, is a badge of fraud but not conclusive: *Wood v. Scott*, 65-114.

95. That fact, however, casts on the mortgagee the burden of showing that the mortgage was executed in good faith, and for an honest purpose, and of satisfactorily explaining why the amount named was greater than the actual indebtedness: *Lombard v. Dows*, 66-243.

96. A chattel mortgage in a certain case, given by the debtor to his brother to secure existing indebtedness, held, not fraudulent as to other creditors: *Clark v. Hyman*, 55-14.

97. The burden of establishing the invalidity of the chattel mortgage is upon the one who opposes its enforcement. This may be done by showing either that the provisions of the mortgage are such as to prove that the parties thereto intended to commit a fraud upon the rights of others, or by showing that the acts of the parties have been such that fraud is the necessary inference: *Maish v. Bird*, 22 Fed. Rep., 576.

98. Delay in recording the mortgage was held to be sufficiently explained by the fact that the mortgagor was trying to secure a

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large loan in New York, and if successful in so doing was then to pay off the mortgage before it was put on record, the mortgage debt not being created by the mortgage but already existing: *Ibid*.

99. Failure to record a chattel mortgage taken on a stock of goods, whereby other creditors are misled to give the mortgagor a credit which does not belong to him, will invalidate the mortgage as against such creditors without notice: *Simon v. Oppeheimer*, 20 Fed. Rep., 553.

100. After an assignment by the debtor, such mortgagee is on a like footing with other creditors without notice, of a date prior to the recording of the mortgage: *Rumsey v. Town*, 20 Fed. Rep., 558.

101. The federal courts do not differ from the state courts in regard to the effect of the state statute, but even under the state decisions actual fraud, which may be inferred as matter of law from the facts of the case, including the provisions of the mortgage, will render it void. Delay of mortgagee to put his mortgage on record, or his allowing mortgagor to sell the property and apply the proceeds to his own use instead of reducing the mortgage debt, so as to defraud creditors, will constitute fraud such as to deprive the mortgagee of the priority of his claim: *Lyon v. Council Bluffs Savings Bank*, 29 Fed. Rep., 566.

Further as to recording, see RECORDING ACTS.

102. With notice: A chattel mortgagee having knowledge affecting him with notice of the ownership of the property by a third person cannot assert his claims as against the rights of such third person: *Bray v. Flickinger*, 69-167.

103. Actual notice of a mortgage void for uncertainty will not affect a person with liens or claims thereunder: *Barr v. Cannon*, 69-20.

Further as to NOTICE, see that title.

104. Conflict of laws; mortgage in another state: In determining the validity of a chattel mortgage made in another state upon property in that state, the courts will follow the interpretation which the courts of that state give to its statutes in relation to the validity of such mortgages: *Fisher v. Friedman*, 47-443.

105. A mortgage of personal property, properly executed and recorded in another state where the property is, has the same force when the property is removed to this state as under the laws of the state where executed, and will be enforced here, and the possession of the property by the mortgagor beyond the time stipulated, against the consent of the mortgagee, and in spite of his efforts to recover it, will not defeat his rights thereto: *Simms v. McKee*, 25-341.

106. Consideration; antecedent debt: A mortgage given to secure an antecedent debt is not without consideration as between the parties, even though no extension of time or other new consideration is given, and it will be valid as against a subsequent assignment for the benefit of creditors and claims asserted thereunder: *Meyer v. Evans*, 66-179.

107. Where at the time of the contracting of a debt an agreement is made to give security therefor by chattel mortgage upon specified property upon the happening of a contingency, the mortgage executed upon the happening of such contingency will be supported by a sufficient consideration: *In re Assignment of Guyer*, 69-585.

As to when a chattel mortgage will be deemed void as constituting a portion of a general assignment not for the equal benefit of creditors, see ASSIGNMENT, V.

IV. RIGHTS OF PARTIES.

a. Nature of respective interests.

108. Security: A chattel mortgage is but a security for a debt: *Torbert v. Hayden*, 11-435.

109. The legal title, so far as it is in the mortgagee, exists for the purpose of enabling him to enforce his lien; the ownership remains in the mortgagor. So held, where it was sought, in an action to recover for a loss under an insurance policy, to defend on the ground that the policy, containing a clause that it should be void if insured was not "the sole and unconditional owner" of the property, was avoided by the fact that the property was covered by a chattel mortgage at the time that the policy was issued: *Hubbard v. Hartford F. Ins. Co.*, 83-825, 833, 841.

Nature of respective interests.

110. Possession after condition broken: Personal property becomes vested in the mortgagee in possession, upon failure of the mortgagor to perform the conditions of the mortgage: *Talbot v. De Forest*, 8 G. Gr., 586.

111. Mortgagor's interest not subject to levy: The mortgagee has the title and right of possession, subject to be divested only on performance of the condition, and the mortgagor has therefore no interest in the property which can be seized and sold under execution: *Campbell v. Leonard*, 11-489; *Gordon v. Hardin*, 33-550; *Vanslyck v. Mills*, 34-375; *Porter v. Knight*, 63-365.

112. Nor is such interest subject to levy under attachment: *Wells v. Sabelowitz*, 68-223.

113. The reason of holding that the interest of the mortgagor in the mortgaged property cannot be levied on and sold under execution is not that he has no interest therein which could be appropriated in satisfaction of his debts, but that the statutes of the state have made no provision under which his interest can be appropriated to that object by judicial sale: *Ibid.*

114. If mortgagee has the right to take possession, he may do so even after levy, and leave no interest in the mortgagor subject to levy: *Wells v. Chapman*, 59-658.

115. Where a contract creating a lien carries with it the right to take possession, if, in the exercise of this right, possession is taken forcibly and by violence, the mortgagee may be liable for the injury done in thus taking possession, but not for the value of the property taken in accordance with the terms of the agreement for the lien: *Brown v. Allen*, 25-306.

116. Where the mortgagor of chattels is in possession and has the right to possession of the mortgaged property for a definite period, his interest prior to the expiration of such period is the subject of levy and sale. But it is otherwise when the mortgagee may take possession at his pleasure, or where the mortgagor's right of possession is for no definite time: *Rindskoff v. Lyman*, 16-260.

[The rule is now changed by 21 G. A., ch. 117.]

117. Action by mortgagor for wrongful seizure: The mortgagor of exempt personal property may maintain an action for damages where the same has been wrongfully

seized and sold upon execution: *Evans v. St. Paul Harvester Works*, 63-204.

118. The fact that the legal title is deemed to have passed to the mortgagee will not prevent such action by the mortgagor as against third persons wrongfully interfering with the property in his hands: *Ibid.*

119. There is no presumption from the mere fact that a chattel mortgage has been given that the mortgagor is divested of the right to the property covered by it, but that question is to be determined by the stipulations contained in the instrument. Even where the right of possession passes to the mortgagee, the mortgagor retains the right of redemption and the ownership until they are extinguished by the foreclosure of the mortgage; and as against all the world except the mortgagee, or those claiming under him, the mortgagor is entitled to possession, and may maintain an action of replevin as against a person not claiming under the mortgage: *Goldsmith v. Willson*, 67-662.

120. Assignment of mortgagor's right: An assignment by the mortgagor passes to the assignee the interests of such mortgagor in the property, and the assignee may maintain the same action for recovery of possession as against any one not holding under the mortgage which the mortgagor might have maintained: *Ibid.*

121. The equity of redemption of the mortgagor of personal property after condition broken is subject to sale or transfer as other property, and passes under a general assignment. After such general assignment the assignee is not subject to garnishment in a suit against the mortgagor: *Gimble v. Ferguson*, 53-414.

122. Where, by agreement between mortgagor, mortgagee and an attaching creditor, it was agreed that the mortgaged property be sold in bulk, and the proceeds, after satisfying the mortgage, be applied upon the attachment, held, that this agreement transferred the mortgagor's equity of redemption and took priority over a subsequent attachment of such proceeds by another creditor: *Phelps v. Winters*, 59-561.

123. Possession by mortgagee: If possession is rightfully taken under a chattel mortgage, failure to sell the property cannot make it wrongful: *Bradley v. Redmond*, 42-452.

Respective interests.—Priority of lien.

124. If the mortgagee has a right to possession, he is not bound to proceed by replevin; but, after demand, may bring action for damages: *Tieman v. Haw*, 49-312.

125. Where the mortgagee seeks to recover possession of the property by virtue of his mortgage, he must recover on the strength of his own right to the property, and, in the absence of such right, cannot recover the property on the ground that the defendant is a mere trespasser: *Eggert v. White*, 59-464.

126. If the mortgagee, having the right under the mortgage to take possession, advertise and sell, does actually take possession, the owner cannot maintain an action for the recovery of the property on account of failure to advertise or account for the surplus; his remedy is to redeem, or by some proper proceeding compel sale according to the terms of the mortgage: *Whitaker v. Sigler*, 44-419.

127. Sale: A mortgage of chattels with power of sale confers no right upon the mortgagee to exchange the mortgaged property for other property, and the effect of such a transaction would be merely to transfer to the vendee the lien held by the mortgagee: *Edwards v. Cottrell*, 43-194.

128. A chattel mortgage invests the mortgagee with the title to the property, which can only be defeated by a compliance with the conditions of the mortgage, and upon a failure to comply with those conditions, the mortgagee becomes the absolute owner. If a sale is made in good faith, and in conformity with the provisions of the mortgage, it passes the absolute title to the purchaser, although he may be the mortgagee: *Bean v. Barney*, 10-498.

129. Where, under a power of sale in a chattel mortgage, the mortgaged property was sold by one of the mortgagees, as auctioneer, to a brother of his co-mortgagee and partner, for about one-sixth of its cost, held, that the purchaser took the property subject to the equity or right of redemption in the mortgagor or junior mortgagee: *Alger v. Furlley*, 19-518.

130. Where property covered by a chattel mortgage containing a power of sale has been sold in such a manner that practical certainty as to the proceeds is not attainable, a court of equity will not ordinarily enter

into the field of speculation or probabilities to ascertain the measure of damages, when a reasonably certain measure is presented by the positive evidence in the case: *Ibid*.

131. The mortgagee is not chargeable with the expense of the return of the property to the mortgagor, after it has been taken possession of by the mortgagee for the particular purpose of subjecting it to the payment of mortgage indebtedness: *Campbell v. Wheeler*, 69-588.

132. Garnishment of mortgagee: A mortgagor of personal property has a right to redeem, even after condition broken, and the mortgagee, although in possession after such breach, is liable to garnishment by creditors of mortgagor for any surplus remaining in his hands, in case of a sale of the property, beyond what is necessary to pay his claim: *Doane v. Garretson*, 24-351.

133. A mortgagee of personal property not in possession is not liable to garnishment for such property, or the amount by which the value thereof exceeds his claim: *Curtis v. Raymond*, 29-52; *First Nat. Bank v. Perry*, 29-266; *Fountain v. Smith*, 70—.

b. Priority of lien.

134. Over vendor: The mortgagee of chattel property acquires a superior lien over that of the vendor thereof for purchase money, whose lien is not reduced to writing and recorded: *Manny v. Woods*, 83-265.

135. Purchase price of seed: The fact that of two mortgages given upon crops to be grown in the future the second one is for the purchase price of the seed will not entitle it to priority over the first: *Bradley v. Gelkinson*, 57-300.

136. Over landlord's lien: The lien of a landlord upon chattel property of his tenant used on the leased premises is inferior to that of a mortgage thereon, executed and recorded prior to the execution of the lease, even though the mortgagee knowingly permits the property to be used on the leased premises: *Jarchow v. Pickens*, 51-381.

137. Possession of junior mortgagee: The fact that a senior mortgagee allows a junior mortgagee to proceed to take possession of the property and incur expenses in caring for and disposing of it will not estop such

Priority of lien.

senior mortgagee from asserting his prior lien, if his mortgage is properly recorded and the junior mortgagee has knowledge thereof: *Bradley v. Gelkinson*, 57-800.

138. An officer who has wrongfully seized mortgaged property in the possession of a junior mortgagee cannot defend against an action by such mortgagee on the ground that a senior mortgagee is entitled to possession. The rights of the junior mortgagee in possession are good against all the world except the senior mortgagee: *Sperry v. Ethridge*, 70—.

139. Where A. agrees with two persons, B. and C., that he will give each a mortgage upon his stock of goods to cover money borrowed from these persons, and both B. and C. are ignorant that A. owes any one but themselves, A. will have the right to give B. the preference, and the first mortgage recorded by A. in favor of B. will be valid and binding, and cannot be set aside by C., because he did not know that he was getting a second mortgage, nor that A. had acted as he agreed to do and given B. a mortgage and recorded it: *Capital City Bank v. Hodgin*, 24 Fed. Rep., 1.

140. Lien cannot be extended: The mortgagee cannot extend his mortgage to the protection of other creditors against a subsequent mortgagee without notice of the claims attempted to be thus protected: *Hunt v. Daniels*, 15-146.

141. Where the mortgagor caused a third person to bid in the property for him at the sale under the mortgage, and repaid to such purchaser the amount of his bid with money borrowed on a new chattel mortgage of the property, *held*, that the whole transaction amounted merely to an extinguishment of the original mortgage, revesting mortgagor with the title, and that the new mortgage was subject to another mortgage which was junior to the original mortgage but prior in time to the new one: *Kemerer v. Bloom*, 65-363.

142. Priority over claim of vendee before delivery: Where a manufacturer of buggies made a chattel mortgage upon buggies in his possession not quite finished, *held*, that the mortgagee acquired thereby a prior claim to that of the person for whom one of the buggies was being manufactured, and who had advanced the purchase price thereof,

the chattel mortgagee having notice that the buggy was being manufactured for such person but not that the price had been paid: *Hesser v. Wilson*, 86-152.

143. Release; duress: In a particular case, *held*, that the release of a chattel mortgage did not appear to be executed under fraud and duress in such manner as to entitle it to priority over a mortgage executed after such release and intended by the party making the release to be thus given priority: *Wood v. Wood*, 61-256.

144. Confusion of goods: Where it appears that some of the property included in the mortgage is still in the possession of mortgagor, and it does not appear what, if any, goods have been added to the stock, or the value thereof, the mortgagee will be entitled to priority, it being impossible to say that there are any goods which the mortgage does not cover: *Odell v. Gallup*, 62-253.

145. Priority over assignment: If a mortgage is given in good faith, neither the assignee of the mortgagor for the benefit of creditors nor the creditors can assert any matter of defense against it which the mortgagor could not have asserted if the assignment had not been made. Such parties have no rights or equities in matters anterior to the assignment, and the assignee is vested with only such interest as the mortgagor had in the property at the time of the assignment, and the creditors for whose benefit the assignment was made can have no higher interest than that: *Meyer v. Evans*, 66-179.

146. Rights of assignee of mortgage: Where the purchaser of chattel property covered by a mortgage given to secure a number of notes took with the assurance on the part of the owner that certain of those notes held by a third party were all that remained unpaid, and the mortgage was subsequently released by the mortgagee on the payment of said notes, *held*, that an assignee of other such notes which had not in fact been paid was not precluded from enforcing them against the property: *Martindale v. Burch*, 57-291.

147. Taxes not being a lien upon personal property before distraint, a mortgagee who takes possession of mortgaged property and sells it before it is seized for taxes has a prior claim on the proceeds over the claim of the

Foreclosure.

county for taxes against the mortgagor: *Maish v. Bird*, 22 Fed. Rep., 180.

148. Discharge of lien: The renewal of a note secured by a mortgage does not operate as a discharge of the mortgage, and the execution of a second mortgage to secure the indebtedness does not discharge the first unless by agreement of the parties: *Hoffman v. Wilhelm*, 63-510.

149. It is a general rule that a purchase by the mortgagee of the mortgaged property does not operate as an extinguishment of the mortgage, when it is the intention to keep the mortgage alive and it is the interest of the mortgagee to keep it alive, and it can be done without prejudice to the rights of the mortgagee or third persons; but such rule has no application to voluntary surrender or discharge of the mortgage, even though procured by fraud: *Ibid*.

150. Where a creditor was induced to surrender a chattel mortgage securing his claim, and rely upon a levy of attachment upon the same property, but subsequent to other levies, *held*, that misrepresentations as to the value of the goods would not be sufficient to render such discharge void, and the mortgagee could not afterwards claim priority over the other attachments by reason of his mortgage: *Ibid*.

V. FORECLOSURE.

151. By sale: In a particular case, *held*, that the foreclosure of a chattel mortgage in which the sale was in accordance with the agreement between the parties, was valid, no want of good faith on the part of the mortgagee being shown: *Gear v. Schrei*, 57-666.

152. A mortgagee does not lose his lien upon the property by consenting to the sale thereof by the mortgagor to a purchaser who agrees to pay the portion of the mortgage due, and the mortgage may be enforced against a second purchaser having due notice of the mortgage, although he had no knowledge of the agreement of his vendor to pay the same: *Oswald v. Hayes*, 42-104.

153. A party claiming to hold a prior incumbrance should be allowed, on application, to be made a party to the foreclosure: *Parrott v. Hughes*, 10-459.

154. Where a part of the chattels included in the chattel mortgage have been sold, it

seems that the purchaser may require the balance of the property to be exhausted before taking the part sold, but he cannot require the mortgagee to foreclose his mortgage before it is due; and where he complains of negligence of the mortgagee in allowing his property to escape, he must show, in order to entitle himself to relief, that such property would have been sufficient to satisfy the mortgage: *High v. Brown*, 46-259.

155. Contesting sale: After a transfer of the cause to court by injunction or otherwise as authorized by Code, § 3317, in case it is sought to contest the right to foreclose, the case stands as a foreclosure in court, and where usury is made to appear, a judgment of forfeiture in favor of the school fund may be rendered: *Hanlin v. Parsons*, 33-207.

156. The injunction is not to issue as a matter of right where it is not necessary to protect the rights of parties interested, and they have already adopted another proceeding affording a full and complete remedy: *Sweet v. Oliver*, 56-744.

157. This provision does not prevent one whose property is seized without shadow of right, upon the pretense that it is covered by the mortgage (as where it has been, by valid agreement, released from the mortgage at the time of its purchase from the mortgagor), from bringing an action at law to recover the property: *Black v. Howell*, 56-630.

158. Personal judgment: The mortgagee is not precluded from recovery upon the mortgage debt because he permits the property covered by the mortgage to be sold for an inferior claim or lien: *Jones v. Turck*, 33-246.

159. If, in the foreclosure proceeding, any property be sold not covered by the mortgage, no title will pass by such sale, and therefore injunction cannot be maintained by a junior mortgagee to restrain the foreclosure of a senior mortgage upon property which it is claimed is not covered thereby: *Rankin v. Rankin*, 67-322.

160. Under the circumstances of a particular case, *held*, that a sale under mortgage was valid, and that the fact that the property was by a previous appraisal higher than by a subsequent one under which it was sold, was not evidence of fraud: *Tootle v. Taylor*, 64-629.

Miscellaneous.

161. A sale made under power to sell given by the mortgage, without the posting of notices as required by law, will not be invalid in such sense that it will not confer title upon the purchaser, but it will pass a perfect title to the property and the mortgagor will be divested of his right and interest in it: *Campbell v. Wheeler*, 69-588.

162. Redemption by creditor: A creditor of the mortgagor may, before forfeiture, pay the mortgage debt and levy upon the property, or, if a forfeiture has taken place, he may tender the amount, and, if refused, go into chancery to redeem at any time before the equity of redemption has been barred by foreclosure, or he may garnish the mortgagee for the value of the property in excess of the debt secured: *Torbert v. Hayden*, 11-435.

163. When the debt secured by the mortgage is entirely paid off by a sale of a portion of the property sufficient to pay the debt and all costs connected with the sale, the right to possession of the unsold portion of the property ceases to exist either at law or in equity against the mortgagor or his assignee: *Landis v. Abrahams*, 11-284.

164. In equity: A chattel mortgage may also be foreclosed by an action in equity: *Packard v. Kingman*, 11-219.

CHURCH.

See ASSOCIATIONS.

CITIZENSHIP.

See ALIENS.

CIVIL RIGHTS.

1. The refusal of the owner of a skating rink to permit any particular person, as for instance a person of color, to enter and enjoy the privileges of his rink, does not give rise to a cause of action in behalf of the person thus denied, although the rink is kept open as a place of public amusement, it not being shown that the business of operating it is carried on under a license or privilege granted by the state, or the municipal corporation in which it is conducted, or that it is in any manner regulated or governed by

any of the police regulations of the city: *Bowlin v. Lyon*, 67-536. (But see 20 G. A., ch. 105, which now forbids the denial to any citizen of the full and equal enjoyment of the accommodations, advantages, etc., of inns, public conveyances, theaters, and other places of amusement.)

CODE.

See STATUTES.

COMMON LAW.

1. In Iowa: By the ordinance of 1787 the benefits of the common law were extended to the territory northwest of the Ohio river, and the court can therefore take judicial notice of the fact that the common law exists in the states formed out of such territory: *Holmes v. Mallett*, Mor., 82.

2. The common law was substituted for the civil in the territory of Missouri, of which the state of Iowa was once a part: *O'Ferrall v. Simplot*, 4-381.

3. Moreover, the ordinance of 1787 for the government of the Northwest Territory made the common law the law of that country, and such ordinance extended over Wisconsin, and the laws of Wisconsin were extended over Iowa: *Ibid*.

4. Moreover, so many rights and titles, so great interests, have grown up, by and under the common law, that it would be the duty of the court to hold that the people brought it with them: *Ibid*.

5. Early English statutes: Although by the act of 1840 it was provided that "no statutes of Great Britain shall be considered as law of this territory," held, that the term "statutes of Great Britain" applied only to statutes passed subsequently to the union of England and Scotland in 1707, and not to English statutes modifying the common law passed previous to that time: *Ibid*.

6. The statute of 27 Elizabeth, designed to protect subsequent good faith purchasers of real estate against fraudulent or collusive transfers, has never been re-enacted in this state, but, as it antedates the settlement of this country, it is part of our unwritten law: *Gardner v. Cole*, 21-205.

How far applicable.—Conveyance of real property.

7. As to crimes: Although there is no statute declaring the common law in force in this state, it is to be deemed in force without such statutory declaration; so it is held in regard to common law definition of crimes the punishment of which is provided for by statute: *State v. Twogood*, 7-252.

8. While the statute does not expressly adopt or repeal the common law, yet its principles are recognized in the Code as well as by our courts and are made the rules of decision both in civil and criminal cases: *Estes v. Carter*, 10-400.

9. How far applicable: While the common law is in force in this state, it is to be regarded as in force only so far as it is applicable to the habits and condition of our society and in harmony with the genius and spirit of our institutions; and in determining whether a particular principle harmonizes with the spirit of our institutions, we must look to the habits and condition of the society which has created and lived under these institutions. In determining whether a particular rule of the unwritten law is applicable, the court is not confined alone to considering whether it is or is not agreeable to our peculiar form of government: *Wagner v. Bisell*, 3-306.

10. Therefore, *held*, that the common law rule requiring the owner of cattle to keep them upon his own premises under penalty of being answerable in damages for injuries arising from their running at large, is not conformable to the wants, condition and situation of the people of the state, and, although not expressly abrogated by legislation upon the subject, is not in force: *Ibid*.

11. Under the same principle, *held*, that the statute *de donis*, being in its objects entirely foreign to the genius and policy of our institutions, is not in force in this state as a part of the common law: *Pierson v. Lane*, 60-60.

12. Abrogation: When the legislature has undertaken to legislate upon a subject by legal enactment, the common law is abrogated as far as applicable to such cases: *State v. McGrew*, 11-112; *Hamilton v. Schoenberger*, 47-385.

13. Presumption: The presumption is that a rule of law will be the same in another

state as in this state: *Leiber v. Union Pacific R. Co.*, 49-688.

And further on this point, see EVIDENCE, §§ 563-566.

COMPROMISE.

See that title in INDEX.

CONDEMNATION PROCEEDINGS.

See HIGHWAYS, II; RAILWAYS, III; and WATERS, IV.

CONFLICT OF LAWS.

1. Conveyance of real property: The validity of transfers of real property is to be determined by the law of the place where the property is situated: *Loving v. Pairo*, 10-282; *Doyle v. McGuire*, 38-410.

2. This rule is applicable not only to the manner or form of conveyances affecting land, but to the rights of the parties thereto and their capacity to contract. Therefore, *held*, that a conveyance of land to the wife, made in Pennsylvania as a satisfaction or security for money advanced to the husband, must be construed in accordance with the laws of Iowa, where the land was situated: *Doyle v. McGuire*, 38-410.

3. General assignment: The validity of a general assignment, as affecting real property, is to be determined by the law of the place where the property is situated: *Loving v. Pairo*, 10-282; *Moore v. Church*, 70—.

4. Devise: The law of the place where the property is situated governs as to the validity of a devise of real property: *Lynch v. Miller*, 54-516; *Ware v. Wisner*, 4 McCrary, 66.

5. Law of the forum; set-off: The law of the place of suit governs in regard to matters pertaining to the remedy. Therefore, the question of set-off is to be determined by the law of the forum and not that of the place of contract: *Savary v. Savary*, 3-271.

6. Release: The effect of the release of one partner upon the liability of a copartner is to be determined by the law of the place of suit and not by that of the place where it was made: *Seymour v. Butler*, 8-304.

7. Remedy; appraisement: The remedy is to be administered according to the law of

Place of contract.—What constitutes.

the place where the action is enforced. Therefore, *held*, that the appraisement laws of the state where the property was situated were to be applied, and not those of the place where the contract was made: *Shaffer v. Bolander*, 4 G. Gr., 201.

8. Law of place of contract: Where a sale and delivery of goods took place in one state and notes in payment therefor were executed by the buyer at his place of residence in another state, and forwarded to the seller, *held*, that the place of sale and delivery, and not the place of executing the notes, was the place of contract: *Whitlock v. Workman*, 15-351.

9. The law of the place where the contract is made governs in enforcing and expounding it, unless the parties provide for its execution elsewhere, when the law of the latter place controls: *Arnold v. Potter*, 22-194.

10. If the contract is made in one place to be executed in another, the parties may stipulate by which law it shall be governed, and as to the rate of interest, etc.: *Ibid*.

11. Garnishment in another state: When debtor and creditor are both residents of this state the former may have an injunction against the latter to restrain him from proceeding by garnishment in another state to subject to the payment of his claim an indebtedness due to the debtor in this state and exempt under the laws of this state: *Teager v. Landsley*, 69-725; *Hager v. Adams*, 70—.

12. Penal laws: The courts will not enforce the penal laws of another state, but a law of such state providing for the forfeiture of interest in case of usurious contracts is enforceable: *Arnold v. Potter*, 22-194.

13. Action for injury causing death: The right of action for an injury causing death exists only by reason of the law of the place of injury: *Hyde v. Wabash, St. L. & P. R. Co.*, 61-441.

And further, see ACTIONS, §§ 80-88.

14. Contract of common carriers: Where there is a conflict of laws applicable to the case, the parties are presumed to have made part of their agreement that law which is most favorable to its validity and performance: *Talbot v. Merchants' Dispatch, etc., Co.*, 41-247.

15. A contract of affreightment made in

another state, for transportation of goods from a point in that state to a point in this state, will be recognized by our courts if valid where made, although it would be void if executed and to be performed here; at least this is true in an action in the courts of this state for the loss accruing under such contract in an intermediate state in which the contract would also be recognized as valid: *Ibid*.

Presumptions: That the law of another state, when it is called in question, if not shown by evidence, will be presumed to be the same as the law of this state, see EVIDENCE, §§ 563-566.

Lex loci, as affecting BILLS AND NOTES, see that title, §§ 47-53.

As affecting CHATTEL MORTGAGES, see that title, §§ 104, 105.

As affecting CONTRACTS, see that title, §§ 437-441.

CONSPIRACY.

1. What constitutes: Allegations that parties conspired together to do a malicious act cannot alone make a cause of action for damages where nothing unlawful has been done: *McHenry v. Sneer*, 56-649.

2. A conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action: *Jayne v. Drorbaugh*, 68-711.

3. Participation: It is not a sufficient defense to a charge of conspiracy to show that the participation of the party was not necessary to the accomplishment of the purpose, and that it would have been consummated if he had not been a conspirator. He is to be held responsible for the natural and ordinary results of his acts, and if they were such as to naturally and ordinarily produce the unlawful result aimed at, he should be held responsible: *Green v. Cochran*, 43-544.

4. In an action for malicious prosecution, *held*, that the fact that defendants contributed money to the association of which they were members, for the purpose of prosecuting horse thieves, and that such money was expended in the prosecution of the plaintiff, was not sufficient to render the defendants liable for malicious prosecution unless they

Protection of person and property.—Due process of law.

aided in the action of the association in making such expenditures: *Johnson v. Miller*, 63-529.

As to admissibility of the testimony of co-conspirators, see EVIDENCE, §§ 258-266.

As to the crime of conspiracy, see CRIMINAL LAW, II, 3, c.

CONSTITUTIONAL LAW.

I. PROVISIONS FOR PROTECTION OF PERSON AND PROPERTY.

- a. *Due process of law.*
- b. *Trial by jury.*
- c. *Procedure in criminal prosecutions.*
- d. *Equality of rights.*
- e. *Establishment of religion.*
- f. *Ex post facto laws.*
- g. *Obligation of contracts; vested rights; retroactive laws.*
- h. *Taking private property for public use.*
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II. THE ELECTIVE FRANCHISE.

III. POWERS OF FEDERAL AND STATE GOVERNMENT.

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- a. *Executive department.*
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V. AMENDMENTS.

As to counties and county seats, see MUNICIPAL CORPORATIONS, §§ 779-802.

As to limitations upon state and municipal indebtedness, see STATE, § 8, and MUNICIPAL CORPORATIONS, §§ 155-186.

As to schools, school fund, etc., see SCHOOLS.

As to regulations relating to BANKS, see that title.

As to elections, vacancies in office, etc., see ELECTIONS.

As to STATUTES in general, see that title.

As to COURTS, see that title.

I. PROVISIONS FOR PROTECTION OF PERSON AND PROPERTY.

a. *Due process of law.*

1. **What constitutes:** The rule in respect to due process of law, stated in a general way,

is that every one is entitled to the protection of those fundamental principles of truth and justice which lie at the basis of all our civil and political institutions: *Trustees of Griswold College v. Davenport*, 65-633.

2. Due process of law means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights. It was intended thereby to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice: *Foule v. Mann*, 53-42.

3. Therefore, *held*, that the statutory provision limiting the remedy against a sheriff for wrongful levy to a recovery on the indemnity bond given by the plaintiff in execution was void in so far as it defeated the right of the person whose property was illegally taken to sue for the specific recovery thereof: *Ibid*.

4. The statute requiring that before action can be brought against an officer for wrongful levy of a writ of execution upon property of a person other than the one against whom the writ is directed, notice of the rights of such owner must be given to the officer in writing, is not unconstitutional as depriving the party of his property without due process of law: *Cheadle v. Guittar*, 68-680.

5. A person may be deprived of property by his own negligence. Also lapse of time may prevent recovery by reason of the statute of limitations, and existing remedies may be taken away and new ones given, all without infringement of due process of law: *Ibid*.

6. The meaning of the phrases, "due process of law," "due course of law," and "course of the common law," discussed: *Mason v. Messenger*, 17-261.

7. **Partition proceedings:** Judgment in proceedings for partition of property, brought against a defendant served by publication only, *held* not void as depriving the defendant of his property without the benefit of judicial proceedings according to the course of the common law: *Ibid*.

8. The provisions authorizing a sale of property in a partition suit when division thereof cannot be made are not unconstitutional as depriving the party of his property without due process of law. When parties

Due process of law.

by contract assume the relation of tenants in common, the law fixes their respective rights, one of which is that the property may be divided, and, if necessary, sold to effect that object: *Metcalf v. Hoopingardner*, 45-510.

9. The provisions of certain statutes of the territories of Iowa and Wisconsin providing a method for partition of a tract of land, known as the "half-breed tract," held, unconstitutional as providing for proceedings to determine private rights in a method not in accordance with due course of law: *Reed v. Wright*, 2 G. Gr., 15.

10. Proceedings in rem against lost goods and property, and against stray animals and against unknown owners of property, have been too long sanctioned to be now called in question as not being due process of law: *Kinney v. Roe*, 70—.

11. Claim for improvements on land: A statutory provision allowing a money judgment for the value of improvements to be rendered against the owner of the land in proceedings under the occupying claimant law, held, unconstitutional as not constituting due process of law: *Childs v. Shower*, 18-261.

12. A statute giving to any one who drains mineral land, even though without consent of the owner, one-tenth of the mineral taken therefrom, held, not unconstitutional as depriving the owner of his property without due process of law: *Ahern v. Dubuque, etc., Mining Co.*, 48-140.

13. The short foreclosure of mortgages on real property by notice and sale without action in court as at one time allowed, held, unconstitutional as depriving the owner of his property without due process of law: *Thatcher v. Haun*, 12-303.

14. But, under the constitution of 1846, which did not contain the clause relating to due process of law, held, that such a proceeding was not unconstitutional: *Boyd v. Ellis*, 11-97.

15. A proceeding in equity should be classed as due process of law: *McLane v. Leicht*, 69-401.

16. Taxation: The state has the taxing power, and where property is taken in the valid exercise of that power, the owner is not deprived of it without due process of law: *Allen v. Armstrong*, 16-508.

17. But there are indispensable prerequi-

sites to the exercise of the power which cannot be omitted without violating the constitutional provision as to due process of law: *Ibid.*

18. Therefore, held, that the statute making a tax deed conclusive of the regularity of all prior proceedings was unconstitutional: *McCready v. Sexton*, 29-356, 390.

19. Due process of law means ordinary judicial proceedings in court and has no reference whatever to the taxing power. Where property is taken in the due exercise of that power, it is not taken without due process of law: *Stewart v. Board of Supervisors*, 30-9.

20. Therefore, held, that the constitutional provision was not violated by a law authorizing local taxes in aid of railways: *Ibid.*

Further, as to constitutional power of taxation, see *infra*, §§ 221-251.

21. Eminent domain: A party cannot complain that his property has been taken for public use without due process of law when it has been taken for a highway by proper proceedings and his claim for damages has been disallowed and he has not taken the proper steps to have the disallowance corrected on appeal: *Tharp v. Witham*, 65-566.

And further as to taking private property for public use, see *infra*, I, h.

22. Contempt: A person cannot be imprisoned in pursuance of an order of the court in an investigation authorized by statute, but unusual or unheard of at common law or in the known and regular course of the administration of the law through courts of justice: *Ex parte Grace*, 12-208.

23. But the power to punish for contempt without the intervention of a jury is not in violation of due process of law: *Ibid.*

24. Under the chancery practice, as it existed at the time the constitution was adopted, a person could be deprived of his liberty or his property, and such deprivation has always been regarded as having been accomplished by due process of law, although no jury trial was allowed. Therefore, held, that a statutory provision not in accord with the common law, but more nearly like the proceeding in chancery, by which a debtor may be subjected to examination as to whether he has property, not exempt from execution, liable to the satisfaction of an execution

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against him, and may be imprisoned for contempt in not turning over such property to apply on such indebtedness under order of the court, was not in violation of the requirements of due process of law: *Eikenberry v. Edwards*, 67-619.

25. Imprisonment for contempt for the violation of an injunction against maintaining a nuisance is not involuntary servitude, within the prohibition of the constitution: *Martin v. Blattner*, 68-286.

26. License: A permit to sell intoxicating liquors for lawful purposes, granted in pursuance of statutory provisions not requiring the payment of any compensation for such privilege, is not property in such sense that the party having the permit cannot be deprived thereof without due process of law: *State v. Schmidt*, 65-556.

27. Other cases: A statute authorizing double damages in an action against a railway company for stock killed through failure of the company to maintain a fence along its track does not interfere with the constitutional protection to property nor deprive the company of its property without due process of law: *Mackie v. Central R. of Iowa*, 54-540.

28. Proceedings by fence-viewers being provided for by statute in the exercise of the authority of the legislature to provide special tribunals to determine the rights of the parties under proper rules applicable thereto, such provisions are not unconstitutional although they may operate to deprive the party of his property without the intervention of judicial proceedings or without allowing him a trial in court upon the facts passed upon by such fence-viewers: *McKeever v. Jenks*, 59-800.

29. The provisions of the amendment to the federal constitution guaranteeing due process of law, etc., have no application to the state courts except as expressly so provided, but, in the absence of such express provision, are merely restrictions upon the federal government: *Boyd v. Ellis*, 11-97.

b. Trial by jury.

30. What constitutes: The right of trial by jury implies a trial by jury of twelve men except where the constitution author-

izes trial by a less number: *Santo v. State*, 2-165.

31. The jury contemplated by the constitution is the jury recognized by the common law, which is constituted of twelve persons, and the legislature has no authority, in providing for jury trial under the constitution, to provide for a less number than twelve jurors. Therefore, *held*, that Code, § 2793, authorizing a verdict by ten or eleven jurors, when the jury has been reduced to that number by sickness, is unconstitutional: *Eshelman v. Chicago, R. I. & P. R. Co.*, 67-296; *Kelsh v. Dyersville*, 68-137.

32. It is immaterial that the party complaining of the illegality of the jury is a municipal corporation. Although it may be that such a corporation has no constitutional right to jury trial, yet the statute does not profess to make any special provisions for such cases: *Kelsh v. Dyersville*, 68-137.

33. Less than twelve jurors in inferior courts: As the constitution provides for a trial by a less number of jurors than twelve in inferior courts, and gives such inferior courts jurisdiction of offenses of an inferior grade, a trial in such a court of an offense within its jurisdiction by a jury of less than twelve is not a violation of the right of jury trial: *Bryan v. State*, 4-349.

34. If, in the inferior tribunal, a party has a trial before the constitutional jury provided for such court, though of less than twelve men, he cannot, of right, claim in the face of the statute a second trial on the merits on appeal to the district court: *Des Moines v. Layman*, 21-153.

35. A defendant accused of an offense triable under the provisions of the constitution before a justice of the peace by a jury of less than twelve cannot complain of being deprived of the right of jury trial, even though he is not allowed the right of trial by jury on appeal to the district court: *Baurose v. State*, 1-374.

36. The right to one jury trial is all that is guaranteed, and that is preserved by allowing an appeal to the district court, where the cause is to be tried anew by a jury: *Zelle v. McHenry*, 51-572; *State v. Beneke*, 9-208.

37. Ordinance of 1787: In so far as the constitution of the state modifies the common law right of trial by jury and authorizes trial

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by a jury of less than twelve in inferior courts, it is an alteration of the provision for jury trial found in the ordinance of 1787. The admission of the state under the constitution adopted by it amounted to an abrogation by mutual consent of the provisions of that ordinance in conflict therewith: *Higgins v. Farmers' Ins. Co.*, 60-50.

38. In equity cases: The right of trial by jury does not obtain in cases which are of equitable cognizance: *State v. Orwig*, 25-280.

39. As cases of mutual account are subjects of equitable jurisdiction, it is not unconstitutional to provide for a compulsory reference in such cases: *Burt v. Harrah*, 65-643.

40. The provisions of the prohibitory liquor law, allowing an injunction against persons engaged in the illegal sale of intoxicating liquors, are not unconstitutional as depriving defendant of the right of trial by jury. Such cases being of equitable cognizance at the time of the adoption of the constitution, and the court of equity having jurisdiction at that time to abate a nuisance, it is within the power of the legislature to enlarge the jurisdiction of the court of equity in such cases so as to allow that remedy even where property rights are involved: *Littleton v. Fritz*, 65-488; *Martin v. Blattner*, 68-286.

41. So, the right of trial by jury is not impaired by the provision that foreclosure of mortgages shall be by equitable proceedings, and that in the same action a recovery may be had on the note secured by the mortgage: *Clough v. Seay*, 49-111.

42. Trial de novo on appeal: By virtue of the constitutional provisions as to jury trial, and as to method of appeal in suits in equity, every party has a right either to a trial by jury or to a trial de novo on appeal: *Sherwood v. Sherwood*, 44-192.

43. References: Any provision authorizing the reference of questions of fact in actions by ordinary proceedings, without the consent of both parties, would be in violation of the right of jury trial: *McMartin v. Bingham*, 27-234; *Blair Town Lot, etc., Co. v. Walker*, 50-376.

44. Judgment on stay bond: The statutory provision giving to a stay bond the effect of a judgment confessed against the parties thereto is not objectionable as denying them

the right of trial, or depriving them of property without due process of law. The bond amounts to a waiver of the privilege which it is competent for them to make: *Cavender v. Smith's Heirs*, 5-157.

45. Appraisement of property taken for public use: The appraisers appointed to assess damages resulting to a land owner from the establishment of a highway are not a jury within the meaning of the constitutional guaranty of jury trial, and, upon appeal properly taken from their decision, such owner is entitled to trial by jury: *Sigafoos v. Talbot*, 25-214; and see *Des Moines v. Layman*, 21-153.

46. Contempt: A statute providing for imprisonment of a debtor for contempt in certain cases, where the object was to enforce the payment of a debt by summary proceedings, held, in conflict with the constitutional provisions for jury trial: *Ex parte Grace*, 12-208.

And see *supra*, §§ 22-25.

47. Jury fee: A provision requiring a party to pay a jury fee, or increasing the jury fee, is not in conflict with the guaranty of jury trial: *Adae v. Zangs*, 41-536; *Steele v. Central R. of Iowa*, 43-109; *Little v. McGuire*, 43-447; *State v. Verwayne*, 44-621.

48. Waiver of jury trial: It was held that in a criminal case the defendant might waive his right to a trial by a jury of twelve and consent to trial by a less number: *State v. Kaufman*, 51-578.

49. But it was afterwards held that defendant could not waive a jury trial in a criminal case and consent to a trial by the court, for the reason that such a form of trial in a criminal case is not authorized by law: *State v. Carman*, 63-180.

50. The right of jury trial in a civil case is not an attribute inalienable in its nature and character, but rather a privilege, which may be waived or forfeited: *Wilkins v. Treynor*, 14-391.

51. Thus, it may be waived by failure of the party to take proper steps to secure a transfer of the cause from the equity docket to the law docket, where by reason of the nature of the case it properly belongs: *Richmond v. Dubuque & S. C. R. Co.*, 33-422, 490.

52. The provisions of the federal constitution with reference to trial by jury have

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no bearing on the question of the right of trial by jury in the state courts: *McLane v. Leicht*, 69-401.

c. Procedure in criminal prosecutions.

53. Indictment: The constitutional provision that offenses of a certain grade shall be prosecuted only on indictment by a grand jury does not limit the power of the legislature to prescribe the form and constituent elements of an indictment, and authorize one as good and sufficient which would not be so at common law: *State v. Bevans*, 87-178.

54. The number of the grand jury is left to legislative regulation: *State v. Ostrander*, 18-435.

55. The provision of the federal constitution, that no person shall be held to answer for an infamous crime except upon indictment, is applicable alone to the exercise of power by the federal government, and is not a restriction upon the legislative authority of the state: *State v. Wells*, 46-662.

56. Form of accusation: An indictment for an offense, the punishment for which does not exceed a fine of one hundred dollars or imprisonment for thirty days, is not authorized, and all proceedings thereunder are unauthorized and void: *Walters v. State*, 5-507; *State v. Kæhler*, 6-398; *State v. Shawbeck*, 7-322.

57. When a defendant is tried before a justice for an offense of which the justice has not jurisdiction, the district court does not acquire jurisdiction on appeal from the judgment of the justice: *State v. Carpenter*, 23-506.

58. Where defendant is indicted for an indictable offense, but is found guilty of a lesser degree thereof, or of an offense necessarily included in the offense for which he is indicted, he may be convicted and punished for such lesser offense, although exclusive jurisdiction thereof is given to a justice: *State v. Shepard*, 10-126; *State v. Jarvis*, 21-44; *Orton v. State*, 4 G. Gr., 140.

59. So, under an indictment for larceny, charging the value of the goods stolen to be more than twenty dollars, the district court has jurisdiction to try defendant and sentence him, if found guilty, although the

jury find the value of the goods to be less than that amount: *State v. Stingley*, 10-488.

60. And the question whether the offense is triable as a misdemeanor or a felony is to be determined by the value of the property alleged in the indictment or information, and not by the value ascertained by the verdict of the jury: *State v. Church*, 8-252.

61. Right of appeal: The provisions of a statute not now in force, giving the state as well as defendant the right of appeal from the judgment of a justice of the peace in a criminal trial, *held*, not in conflict with the constitutional provision saving to defendant the right of trial by jury on appeal from a justice of the peace in a criminal case: *State v. Tait*, 22-140.

62. Extent of punishment in justices' courts: Where an ordinance provided that, in case of non-payment of a fine, defendant should be imprisoned for a period of time longer than that authorized by the constitution for imprisonment on conviction in an inferior court, *held*, that the ordinance was not void, but that it might be enforced up to the limit of the punishment allowed: *Keokuk v. Dressell*, 47-597.

63. The provision of a statute authorizing the imposition of a fine of one hundred dollars, and the imprisonment of defendant until the fine and costs are paid, does not make the case one which is beyond the jurisdiction of the justice, although the length of imprisonment for non-payment of fine and costs may extend beyond thirty days, the limit of imprisonment which the justice may impose. The imprisonment for non-payment of fine and costs is not a punishment for the crime, but a method of enforcing payment: *Albertson v. Kriechbaum*, 65-11.

64. The provision that only offenses which are punishable by fine not exceeding one hundred dollars, or imprisonment not to exceed thirty days, are within the jurisdiction of a justice, is not violated by allowing different offenses of the same kind by the same person to be joined in one information before a justice of the peace, although the aggregate of the fines imposed under such information may exceed one hundred dollars: *Jackson v. Boyd*, 53-536.

65. Right to be confronted with witnesses: The constitutional privilege of de-

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defendant in a criminal prosecution of being confronted by the witnesses against him has no reference to record evidence, and in a prosecution for bigamy, record evidence of the first marriage of the defendant may be introduced: *State v. Matlock*, 70—.

66. But this right is violated by allowing the introduction of a certificate of a notary public as to the fact that a bill of exchange has been protested, when such fact is material in establishing the guilt of the accused: *State v. Reidel*, 26-430.

67. Depositions of witnesses, or minutes of evidence on preliminary examinations, are not admissible as against a defendant in a criminal prosecution: *State v. Collins*, 32-36.

68. Where a deposition has been taken on behalf of the prisoner and filed in court, it is not error to allow the prosecuting attorney to read the same in evidence, it not appearing that the prisoner sought or desired to withdraw it from the files before the trial of the case: *Nash v. State*, 2 G. Gr., 286.

69. As defendant is entitled to be confronted with the witnesses against him, if a witness for the prosecution is subpoenaed from another state and the costs are afterwards taxed to the prosecution, such witness should be paid by the county for the distance traveled outside the state as well as in it: *Westfall v. Madison County*, 62-427.

70. This constitutional provision does not give defendant the absolute right to have a prisoner in the penitentiary or jail produced as a witness. The order which the court is authorized to make in such cases is discretionary: *State v. Kennedy*, 20-372.

71. Dying declarations may be received according to the rules of evidence without violating this constitutional provision: *State v. Nash*, 7-347, 377.

72. Waiver of privilege: The right to be confronted by the witnesses against him is personal with the accused and not jurisdictional, and may be waived; so held in a case where, by consent of the accused, a written transcript of the testimony taken on a former trial was read to the jury in place of recalling the witnesses themselves: *State v. Polson*, 29-183; *State v. Fooks*, 65-452.

73. Excessive fine or unusual punishment: The statutory provision making officers of municipal corporations personally

liable for failure to levy a tax for the purpose of paying off judgments, held, not unconstitutional as imposing an excessive fine or an unusual punishment upon such officers for breach of duty: *Porter v. Thomson*, 22-391.

74. The penalties provided for violation of the intoxicating-liquor law (20 G. A., ch. 143), held, not excessive within the constitutional provision: *Martin v. Blattner*, 68-286.

75. Right to bail: Where a bail bond recited that defendant was charged with "feloniously killing two persons," held, that, as the offense was not necessarily punishable with death, bail might be allowed and the bond was not void: *State v. Klingman*, 14-404.

76. A party charged with murder in the second degree is entitled to bail: *State v. Hufford*, 23-579.

77. Former conviction or acquittal; fraudulent: Where the former conviction or acquittal was procured by collusion or fraud, it may be treated as a nullity and disregarded: *State v. Green*, 16-239.

78. What constitutes jeopardy: A dismissal of the proceedings, either by the court or by the district attorney, after the trial has commenced, unless in the cases authorized by statute, will operate as an acquittal: *State v. Callendine*, 8-288.

79. Although defendant is put upon trial on a good indictment, yet if the verdict is so defective that no judgment can be rendered upon it, it may be set aside and defendant again put on trial. The defective verdict will not amount to an acquittal: *State v. Redman*, 17-329; *State v. Arthur*, 21-322.

80. Where the names of the witnesses for prosecution have not been indorsed on the indictment, defendant may be required to consent to their introduction, notwithstanding the defect, or consent to a continuance, but he has no right to ask a verdict nor insist on the procedure as a former jeopardy when again put on trial: *State v. Parker*, 66-586; *State v. Falconer*, 70—.

Further as to former jeopardy, see CRIMINAL LAW, III, 11.

81. New trial on appeal from justice's court: A defendant, acquitted before a justice of the peace in a prosecution for a crime over which the justice has jurisdiction, cannot be again tried upon an appeal to the dis-

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strict court, taken by the state, even though the statute may so authorize: *State v. Van Horton*, 26-402.

82. Conviction of lower degree: Where a defendant has been convicted of a lower degree of the offense than that for which he was indicted and put upon trial, such conviction operates as an acquittal of the degree for which he was tried, and if he appeal and secure a reversal, he cannot be again tried for any higher offense, or higher degree of the offense than that of which he was convicted: *State v. Tweedy*, 11-850; *State v. Clemons*, 51-274.

83. Punitive damages, when awarded for a criminal act, do not constitute a punishment in such sense that one who should also be criminally punished for the same act would be twice put in jeopardy for the same offense: *Hendrickson v. Kingsbury*, 21-879.

84. Searches and seizures: A search warrant is not unreasonable in the legal sense when it is for a thing obnoxious to the law, and of a person and place particularly described, and is issued on oath of probable cause: *Santo v. State*, 2-165.

85. Therefore, *held*, that the statute authorizing the issuance of a search warrant for the seizure of intoxicating liquors is not unconstitutional, as not requiring sufficient particularity in description, or as authorizing unreasonable search and seizure: *Ibid*.

86. Description of the place *held* sufficient in a particular case: *State v. Thompson*, 44-399.

Further as to SEARCH WARRANT, see that title.

87. Habeas corpus: The right of appeal in *habeas corpus* proceedings exists only as provided by law: *In re Curley*, 84-184.

d. Equality of rights.

As to uniformity of operation of laws, see *infra*, §§ 331-347.

88. Discrimination on account of color: The constitutional provision guaranteeing equality of rights forbids discrimination by a common carrier against a passenger on account of color. Therefore, *held*, that a regulation of a steamboat by which a colored person was denied the privilege of a seat at the table provided for passengers could not

be enforced: *Coger v. Northwestern U. Packet Co.*, 87-145.

89. Also, *held*, that colored children cannot be excluded from the public schools, nor compelled to attend a separate school: *Clark v. Board of Directors*, 24-286; *Smith v. Directors*, 40-518; *Dove v. Independent School Dist.*, 41-689.

90. Permits to sell liquors: The constitutional guaranty as to equality of rights is not violated by a statutory provision that permits to sell intoxicating liquors shall only be granted to persons of good moral character: *In re Ruth*, 82-250.

91. Discriminations against corporations: An act providing a special method for the taxation of the property of railway companies, *held*, unconstitutional because not made applicable to property of the same character owned by private individuals: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633.

92. But a statute authorizing the recovery of double damages for stock injured by a railway company on its track where it has a right to fence is not unconstitutional as denying to any person the equal protection of the law, such provision being intended merely as a penalty for the purpose of inducing the fencing of railroads: *Tredway v. Sioux City & St. P. R. Co.*, 43-527.

Uniformity of taxation, see *infra*, §§ 235-239.

93. Competency of witnesses: The constitutional provision as to the competency of witnesses renders competent as a witness for the defendant in a criminal prosecution a person who is jointly indicted with him for the same crime but is put upon a separate trial: *State v. Nash*, 10-81.

94. Even where such defendants are put upon trial jointly, either one is entitled to the testimony of his co-defendant: *State v. Giger*, 23-313.

95. The legislature may declare that interest in the event of a suit may or may not disqualify a witness, as shall be deemed best; and the statutory provision that husband or wife shall not be a witness for or against the other in a civil action to which either of them is a party is upheld on that ground: *Karney v. Paisley*, 13-89. But see, also, *Blake v. Graves*, 18-312.

96. The provision as to the competency of

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witnesses does not give a party the right to the testimony of a child not possessed of sufficient understanding, by reason of tender years, to feel the obligation of an oath: *Kilburn v. Mullen*, 22-498.

97. It is not a violation of any constitutional privilege to provide that the credibility of a witness may be affected by the fact as to his sensibility to the obligation of an oath: *Searcy v. Miller*, 57-613.

e. *Establishment of religion.*

98. **Exemption from taxation:** The statute exempting church property from taxation is not in conflict with the constitutional provision as to the establishment of religion: *Trustees of Griswold College v. State*, 46-275.

99. **The use of a school-house for the purpose of religious worship,** when authorized by a vote of the electors of the district, is not prohibited: *Davis v. Boget*, 50-11.

100. **Bible in the schools:** The guaranty of religious freedom is not violated by the casual use of a public building as a place for offering prayer and doing other acts of religious worship; and the statute allowing the Bible to be used in public schools, with the provision that no pupil shall be required to read it contrary to the wishes of his parent or guardian, is not unconstitutional: *Moore v. Monroe*, 64-367.

f. *Ex post facto laws.*

101. **Defined:** An *ex post facto* law is one which makes acts innocent when done criminal, or if criminal when done aggravates the crime, increases the punishment, or reduces the measure of proof: *State ex rel v. Squires*, 36-340.

102. An *ex post facto* law is a retroactive criminal law, and a statute which does not make an act already done a crime, although it subjects the person guilty thereof to liability, cannot be *ex post facto*: *Polk County v. Herb*, 87-361.

103. A change in the law by which petit larceny was made cognizable only before a justice of the peace and not upon indictment, held, not to affect the statute as to the punishment of larceny so as to prevent punishment, under the statute, of grand larceny com-

mitted prior to the taking effect of the change: *State v. Church*, 8-252.

As to retroactive laws, see *infra*, §§ 159-177.

g. *Obligation of contracts; vested rights; retroactive laws.*

104. A state bankrupt law does *prima facie* impair the obligation of contracts and is unconstitutional and void, except in case the debtor and creditor are domiciled in the state where the discharge is granted and the law was in existence at the time when the contract was made: *Collins v. Rodolph*, 8 G. Gr., 299.

105. The appearance of a non-resident creditor for the purpose of opposing the discharge of the insolvent will not constitute a waiver or abandonment of his exemption from the effect of such discharge: *Ibid*.

106. A discharge under a state insolvent law does not discharge a debt due to a citizen of another state, no matter where the debt was contracted or made payable, unless the creditor has appeared and submitted to the jurisdiction of the court by becoming a party or claiming a dividend: *Hawley v. Hunt*, 27-303.

107. **Existing vendor's lien:** The right to a vendor's lien, arising by virtue of contract of sale and conveyance without express reservation thereof, at a time when such lien was recognized, held, not to be affected by subsequent legislation declaring that such a lien should not be recognized or enforced after conveyance by the vendee unless reserved by conveyance, mortgage or other instrument duly executed and recorded: *Jordan v. Wimer*, 45-65.

108. **Attachment:** The actual service of an attachment upon property creates a real lien thereon which nothing subsequent can destroy but the dissolution of the attachment. Therefore, held, that an act exempting property of persons in the military service of the United States from levy or sale was not applicable to property already levied on by attachment: *Hannahs v. Felt*, 15-141; *Ryan v. Wessels*, 15-145.

109. **Change in procedure:** A change in the statutory provisions relating to the liability of the wife's property for debts of the

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husband which diminished such liability, *held*, not applicable to a contract entered into before such change took place, although proceedings were not commenced nor the property seized until after the change: *Schmidt v. Holtz*, 44-446.

110. **Dower:** The widow's right to dower becomes vested at the time of the husband's death and cannot be changed by a subsequent statute: *Burke v. Barron*, 8-182.

111. A statute increasing the extent of the widow's dower right cannot be made to operate against the purchaser of land conveyed by the husband before the taking effect of the statute: *Davis v. O'Ferrall*, 4 G. Gr., 168.

112. **Negotiability of bills and notes:** A statute attaching the attributes of negotiability to instruments which have not been previously negotiable, and thereby cutting off defenses as against an innocent holder, cannot be made applicable to contracts already in existence: *Griffey v. Payne*, Mor., 68; *Harlan v. Sigler*, Mor., 39.

113. But a provision that, in case of assignment of such an instrument, suit may be brought in the name of the assignee instead of that of the original payee for the assignee's benefit, merely affects the remedy and may be applicable to assignments already made: *Harlan v. Sigler*, Mor., 39.

114. Although the legislature is not prohibited from changing the remedy on a contract or the rules of evidence that shall be brought to bear upon it, yet a statute authorizing the defense of fraud to be set up as against a *bona fide* holder for value of a negotiable instrument acquiring the same before maturity, can only apply to contracts made after the taking effect of the statute: *Temple v. Hays*, Mor., 9.

115. **Effect of sealed instrument:** The statute allowing the want of consideration to be pleaded in an action on a sealed instrument does not impair the obligation of the contract when applied to an instrument executed out of the state, where the common law rule making the seal conclusive as to the consideration is in force: *Williams v. Haines*, 27-251.

116. **Corporate franchises; police regulation of:** While the legislature may not deprive a corporation of rights vested under its

charter without infringing an implied contract between the state and the corporation that there shall be no change in the laws existing at the time of incorporation which shall render the use of the franchise more burdensome or less remunerative, yet a corporation cannot complain of the passage of statutes in the nature of police regulations, although they may operate to its disadvantage: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

117. Therefore, *held*, that the statute making railway companies absolutely liable for damages caused by fires set out by their engines was not unconstitutional as applied to railways previously chartered: *Ibid*.

118. The statute (21 G. A., ch. 76) requiring foreign corporations doing business within the state to file articles of incorporation with the auditor, and receive permits to transact business, and subjecting them to penalties for doing business without such permit, held constitutional: *Goodell v. Kriebbaum*, 70—.

119. **Right of municipal corporation in taxes levied:** A municipal corporation acquires a vested right in taxes already levied under existing laws, which cannot be destroyed by a subsequent statute releasing property from the payment of such taxes: *Davenport v. Chicago. R. I. & P. R. Co.*, 38-633; *Dubuque v. Illinois Cent. R. Co.*, 39-56; *Dubuque v. Chicago, D. & M. R. Co.*, 47-196.

120. **Penalties on railroad taxes:** While penalties already accrued upon a tax in aid of a railroad cannot be taken away by the repeal of the statute under which the tax is voted, there is no vested right in the continuance of such penalties: *Tobin v. Hartshorn*, 69-648.

121. **Land dedicated to city for public use:** Where, by dedication, the title to property is vested in a city for special public purposes, the legislature cannot authorize the city to sell the land in violation of such trust: *Warren v. Mayor of Lyons City*, 22-351.

122. **Right to taxes not earned:** A statute providing that taxes voted in aid of a railway company should not be collected until the company complied with the conditions entitling it to receive such tax from the

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treasurer, *held*, not to interfere with vested rights: *Harwood v. Case*, 37-692.

123. Redemption and appraisement laws: An appraisement law providing that property levied upon under execution can only be sold at a certain proportion of the appraised value is unconstitutional as applied to contracts entered into before its passage. The law in force when the contract is made necessarily forms a part of the contract and fixes the rights and obligations growing out of it, and any substantial change in the law of the remedy which shall lessen its efficiency or burden it with any new conditions and restrictions comes within the constitutional prohibition: *Rosier v. Hale*, 10-470; *Landis v. Abrahams*, 11-284.

124. A law depriving a judgment debtor of the right to have his property appraised, or sold subject to redemption, is not unconstitutional as impairing vested rights: *Holland v. Dickerson*, 41-367; *Babcock v. Gurney*, 42-154.

125. But a change in the law regulating judicial sales, by which appraisement is allowed in cases where the right before did not exist, is unconstitutional in its application to sales under judgments rendered upon contracts made before the change in the law took effect: *Olmstead v. Kellogg*, 47-460.

126. A law giving a right of redemption from sales under foreclosure of mortgage in cases where it did not exist at the time when the mortgage was made, impairs the obligation of the contract and is unconstitutional: *Malony v. Fortune*, 14-417.

127. Valuation and appraisement laws in general are not applicable to sales under judgments existing prior to their enactments: *Burton v. Emerson*, 4 G. Gr., 393.

128. A judgment is not a contract within the provision of the constitution prohibiting legislation impairing the obligation of contracts, and valuation and appraisement laws may be applicable to a judgment for costs rendered before the enactment of such laws: *Sprott v. Reid*, 3 G. Gr., 489.

129. Valuation laws, so far as they do not impair the obligation of the contract, are applicable to executions under a judgment upon a contract entered into before they take effect: *Coriell v. Ham*, 4 G. Gr., 455.

130. Laws affecting the remedy: The legislature has the power to change the remedy and remedial proceedings upon contracts, and as to them the law in force when the remedy is pursued prevails unless there be statutory provisions preserving the old remedy. So *held* as to the method of sale under a judgment recovered after the change in the law as to appraisements in an action upon a contract made before such change: *Babcock v. Gurney*, 42-154; *Holland v. Dickerson*, 41-367.

131. Statutes may constitutionally be enacted changing the remedy existing when the contract is made, if they preserve existing remedies in substance and with integrity and do not destroy or embarrass the remedies existing when the contract is made so as substantially to defeat the rights of a creditor. A law merely limiting the amount of the costs recoverable does not so affect the remedy as substantially to defeat the rights of a creditors. So *held* in regard to a statute limiting the amount of attorneys' fees taxable as costs: *Kossuth County v. Wallace*, 60-508.

132. A change in the statute regulating the place of bringing action to foreclose a mortgage by which the action is authorized to be brought in the county where suit on the note may be maintained instead of in the county where the property is situated, is not such a change in the remedy as to be unconstitutional as to mortgages previously executed: *Equitable L. Ins. Co. v. Gleason*, 56-47.

133. A citizen has no vested rights in a particular course of practice in the courts nor to a particular remedy. Remedies are within the control of the legislature, subject to the restriction that the obligation of contracts shall not be impaired and all remedy for the enforcement of rights under a contract shall not be taken away. Retrospective laws which affect pending suits and give a new remedy, modify an existing one, or remove the impediment in the way of a legal proceeding, are not unconstitutional: *Tilton v. Swift*, 40-78.

134. Rules of practice of a court cannot be regarded as vested rights which may not be modified by a subsequent statute. A party has no vested right as to a particular course of practice: *Brotherton v. Brotherton*, 41-112.

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135. A law which, by construction, gives a new and more efficient remedy upon a contract does not impair its obligation: *Van Metre v. Wolf*, 27-341.

136. A change of statutory provisions relating to the production of testimony may be made applicable to suits before commenced: *Wormley v. Hamburg*, 40-22.

137. A retrospective statute, regulating the remedy but not affecting subsequent rights, is constitutional: *Johnson v. Semple*, 31-49.

138. So held as to a statute rendering a motion for a new trial in an action at law unnecessary in order to bring before the supreme court, on appeal, the question as to the sufficiency of the evidence to support the judgment: *Ibid.*

139. Proceedings are to be had in accordance with the statutes in force, even though they may have been passed subsequent to the commencement of the action: *Ballard v. Ridgley*, Mor., 27; *Inghram v. Dooley*, Mor., 28.

140. Statutes of limitation relate to the remedy and not to the substance of the contract, and may therefore be made to operate upon prior contracts without impairing their obligations: *Maltby v. Cooper*, Mor., 59.

141. If a substantial remedy is left for the enforcement of the contract, the fact that by the statute of limitations a particular action for its enforcement is completely barred will not render such a statute unconstitutional as to existing contracts: *Ibid.*

142. The statute of limitations found in Code of '51 and Rev. of '60, held, not unconstitutional as impairing the obligation of contracts, since the right to sue upon accrued causes of action was not cut off: *Campbell v. Long*, 20-382.

143. Extending time for defending: Laws which merely change the remedy are not liable to constitutional objection, although the remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult; but in altering the remedy the obligation of the contract must not be so impaired that the rights of the party in it are in effect destroyed or the remedy rendered hardly worth pursuing by reason of being burdened with new restrictions. Therefore, held,

that statutory provisions giving a defendant who should be in the military service of the United States, or of the state, the right to a continuance in actions pending or afterwards to be brought, did not impose on the remedy such new burdens or restrictions as to impair its benefit, and that therefore such restriction was not unconstitutional as to contracts already existing: *McCormick v. Rusch*, 15-127.

144. Extending time for bringing suit: A law extending the time within which action may be brought upon a contract is not unconstitutional: *Edwards v. McCaddon*, 20-520.

145. Nor is an act extending the time within which a defendant might answer in proceedings to foreclose a mortgage open to such objection: *Holloway v. Sherman*, 12-282.

146. Prohibition of action upon judgment: The statutory provision prohibiting an action upon a judgment within fifteen years from its rendition, without leave of the court, held, not unconstitutional when applied to judgments rendered before its passage, as impairing their obligation. Although it takes away one remedy, it leaves a complete one: *Watts v. Everett*, 47-269.

147. No vested right in pending action: The bringing of a suit vests no right to a particular decision, and the case must be determined on the law as it stands when the judgment is rendered: *Huff v. Cook*, 44-689.

148. Right to hold office: Therefore, where a woman elected to the office of county superintendent was held unqualified to fill that office, and subsequently a law was passed providing that no person so elected should be deprived of office by reason of sex, held, that on appeal taken after the passage of the act the statute would be given effect, and the judgment of the court below was reversed: *Ibid.*

149. In the absence of any express constitutional provision it is competent for the legislature to abolish an office, increase or decrease the duties devolving upon an incumbent, and add to or take away from him his salary. It is also within the legislative power to add to or change the method in which vacancies may occur, and make such changes

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applicable to existing offices and those holding them: *Bryan v. Cattell*, 15-538.

150. **Legal tender notes:** The act of congress making United States notes a legal tender in payment of debts previously contracted is constitutional: *Wilson v. Tribblecock*, 28-331; *Richmond v. Dubuque & S. C. R. Co.*, 28-422, 503.

151. **Taxation:** A change in the revenue law as to the mode of enforcing a tax does not impair the obligation of contracts: *Haskel v. Burlington*, 30-232.

152. Exemption from taxation is not a vested right, and may be taken away at the will of the legislature: *Shiner v. Jacobs*, 62-392.

The right of a municipal corporation to taxes levied is a vested right: See *infra*, § 248.

153. **License:** A license to sell intoxicating liquors is not a contract between the state and the person licensed, giving the latter vested rights, but is a mere temporary permit issued in the exercise of the police power, and subject to the direction of government, which may revoke it as it deems fit. Such power of revocation may be exercised by a municipal corporation where the license has been issued by it under authority of law: *Columbus City v. Cutcomp*, 61-872.

154. **Divorce:** A legislative divorce is not a law impairing the obligation of contracts: *Levins v. Sleator*, 2 G. Gr., 604.

155. **The decision of a court declaring a contract void** is not unconstitutional as impairing the obligation of contracts. So held in case of bonds issued by counties in payment for stock in railroad companies, where the bonds were held void: *McClure v. Owen*, 26-243; *Railroad Co. v. McClure*, 10 Wall., 511.

156. Change in judicial decision cannot be allowed to render invalid contracts which, when made, were held to be lawful: *Thompson v. Lee County*, 3 Wall., 327.

157. Where a state has passed no law nor put any construction upon any law impairing the obligation of a contract then in existence, but changes its policy or construction of the state constitution in regard to a class of contracts, the validity of any one of that class of contracts will be determined by the law then in force: *Railroad Co. v. McClure*, 10 Wall., 511.

158. **Subsequent contracts:** A law enacted prior to the formation of a contract cannot be objectionable as impairing the obligation thereof: *Davis v. Bronson*, 6-410.

159. **Retroactive laws:** A constitutional provision is not to be given a retrospective operation unless the words employed show a clear intention that it shall have that effect: *Burlington Ferry Co. v. Davis*, 48-133.

160. Retrospective laws, as distinguished from *ex post facto* laws, are not necessarily unconstitutional: *Iowa R. Land Co. v. Soper*, 39-112, 117.

161. Legislation operating retrospectively, to render binding and effective contracts before invalid, is not in conflict with the constitution. It does not impair the obligation of contracts, nor, as between the parties thereto, disturb vested rights: *Tilton v. Swift*, 40-78.

162. **Legalizing acts:** A legalizing act merely operating to carry out the intent of the parties, which would otherwise be defeated by formal defects, is valid: *Smith v. Callaghan*, 66-552.

163. As the legislature might provide by law that a conveyance should impart constructive notice without acknowledgment, so it may by a curative act provide that defective acknowledgments to instruments, which have been duly recorded, shall be legal and valid, notwithstanding such defects; but such curative acts cannot affect rights of third parties which have vested before their passage: *Brinton v. Seevers*, 12-389; *Newman v. Samuels*, 17-528; *Ferguson v. Williams*, 58-717.

164. But held that such acts legalizing conveyances defectively acknowledged were applicable only to conveyances which, without acknowledgment, would have been valid, but not to instruments (as for instance deeds of married women under the law as it then stood) which, unless acknowledged in the manner required, were void: *Heaton v. Fryberger*, 38-185.

165. A retrospective law authorizing an act, or curing defects in a proceeding which the legislature might have previously authorized, is not unconstitutional: *McMillen v. County Judge*, 6-391; *Huff v. Cook*, 44-639.

166. Therefore an act legalizing the estab-

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lishment of a county road is not unconstitutional: *Bennett v. Fisher*, 26-497.

167. A statute as to the method of enforcing the payment of taxes may be made applicable to taxes delinquent at the time of its passage, as well as those to become delinquent in the future: *Sully v. Kuehl*, 30-275.

168. In order to a rightful exercise of the legislative power to cure a defective proceeding, the legislature must have possessed the power to authorize the result by a prior legislative enactment; but it is not necessary that it might have accomplished the result in the precise manner adopted to cure the defect; nor is the power of the legislature to cure defective proceedings limited by the fact that but for such curative act the defective proceeding would be wholly invalid or inoperative: *State ex rel. v. Squires*, 26-340.

169. The power of the legislature to cure defective or irregular proceedings is not limited by the fact that but for such curative act the proceedings would be wholly inoperative; and *held*, that where the legislature has the power to authorize by general law the levy and collection of special taxes by municipal corporations without limitation as to rate, the legislature may rightfully legalize levies made in excess of lawful authority: *Iowa R. Land Co. v. Soper*, 39-112.

170. A law which purports to legalize an act of a municipal corporation which it had no lawful power to do, not in mere matter of form but in substance, is invalid. The legislature cannot legalize the passage of an ordinance which it could not specifically authorize in the first instance: *Independent School Dist. v. Burlington*, 60-500.

171. A valid curative act cannot be passed where the act to be cured is prohibited by the constitution: *Mosher v. Independent School Dist.*, 44-123.

172. While retrospective legislation may be proper under some circumstances, *held*, that a retrospective statute validating a deed by the chairman and clerk of the board of supervisors of a county, conveying to a railroad company certain swamp land belonging to the county, together with a cash indemnity to which the county was entitled from the United States, such cash indemnity not being included in the original contract of sale of said swamp land to the railroad company

which the electors had approved as required by law, was invalid: *Palmer v. Howard County*, 45-61.

173. As the legislature cannot amend corporate charters by special laws, it cannot legalize the passage of an ordinance not authorized by such charter: *Stange v. Dubuque*, 62-303.

174. But an act legalizing the action of a county superintendent in attaching territory of one district to another, not justified by the circumstances so as to render the original action valid under the statute, may be passed, as no general statute could be made applicable, and therefore the constitutional prohibition against special statutes does not apply: *Independent Dist. v. Independent Dist.*, 62-616.

175. Where a note individual in form was in fact given in payment for insurance of school buildings, and was signed by the officers of the school district with their individual names, affixing the words "President," "Secretary" and "Director," *held*, that the statute legalizing all contracts made by school officers for insurance of school buildings as well as evidence of indebtedness therefor, and relieving the members from their individual liability, was not applicable: *American Ins. Co. v. Stratton*, 59-696.

176. If the legalizing act is invalid it will not affect the former act: *Lytle v. May*, 49-224.

As to *ex post facto* laws, see *supra*, §§ 101-103.

177. Re-enactment of statute: The obligation of contracts is not impaired by the re-enactment of a statute in existence at the time the contract was made: *Bridgman v. Wilcut*, 4 G. Gr., 563.

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178. What constitutes a taking; security: The object of the provision requiring security for compensation is to protect and compensate the owner in case his land is entered upon pending proceedings for an assessment of its value, and if, after final determination thereof and before payment of the damages assessed, the occupancy of the land is abandoned, the owner's title and right of possession

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sion can be extinguished only by the payment of the damages assessed. Although entry is permitted at once upon security being given, such right of possession is but temporary and permissive until the compensation finally determined is paid. In case of failure to perform the obligation and pay such compensation, no right is acquired by the giving of security; and if the security given becomes unavailing to the land owner by way of compensation when the damages are finally assessed, possession can be retaken by him unless such compensation is paid: *White v. Wabash, St. L. & P. R. Co.*, 64-281.

179. Eminent domain: Power to take private property for public use is one of the sovereign powers of the state. It is a necessary attribute of sovereignty in the state, rather than any reserved right in the grant of property to the citizen: *Noll v. Dubuque, B. & M. R. R. Co.*, 32-66.

180. Public use: The constitution prohibits, by implication, the taking of private property for anything but a public use. The question as to when public exigencies demand the exercise of the power is solely a question for the legislature, upon whose determination the courts cannot sit in judgment; but the question as to what is such a public use as to justify the exercise of the power, is for the courts. However, if a public use be declared by the legislature, the courts will hold such use public, unless it manifestly appears from the provisions of the act that it can have no tendency to advance or promote such public use: *Bankhead v. Brown*, 25-540.

181. Therefore, *held*, that an act authorizing the taking of private property for the establishment of a private road was unconstitutional: *Ibid*.

182. A statute providing for condemnation of right of way for a public highway or railway to mineral land, the right of way thus condemned to be public, is not unconstitutional: *Phillips v. Watson*, 68-28.

183. Right of way for railways: The use may be a public one, though it be for private profit, and hence the exercise of the power of eminent domain in favor of railroads, mills, etc., is upheld: *Stewart v. Board of Superintendents*, 30-9. But see *Hanson v. Vernon*, 27-28.

184. When a right of way is, by statute, taken for the use of a railway company, it is in contemplation of law taken by the state for public use and not simply for the private use of the company in whose behalf it is taken, although the compensation be paid by the company. The easement thus acquired is in the nature of a grant from the state to the company for the uses and purposes fixed by law, and when the company fails to carry out the purposes of the grant the state may transfer the easement to another company upon compensation being made to the former company: *Noll v. Dubuque, B. & M. R. R. Co.*, 32-66.

185. Mill dams: The statute allowing the taking of private property for the purpose of erecting mill dams is constitutional: *Burnham v. Thompson*, 35-421.

186. Public highways: There is no doubt of the power of the legislature to provide for the condemnation of right of way for public highways upon notice by publication in newspapers or by posted notices. The proceeding is in the nature of a proceeding *in rem* in which the court acquires jurisdiction of the property which is the subject of the adjudication: *Wilson v. Hathaway*, 42-173.

187. When the location of a road over a party's land is changed, he should be allowed compensation for the additional damage caused by the change and no more: *Israel v. Jewett*, 29-475.

188. Vacation of highway: Where a person has only the right to the use of a highway which pertains to the general public, he cannot maintain an action for damages by reason of its vacation. Such proceeding is not the taking of private property within the constitutional provision: *Ellsworth v. Chickasaw County*, 40-571; *Brady v. Shinkle*, 40-576.

189. Streets: The use of land for a street is a public purpose for which it may be taken upon rendering compensation, and the court will not review the decision of the city authorities holding that the public interests require a street to be established: *Cherokee v. Sioux City & I. F. Town Lot, etc., Co.*, 52-279.

190. Use of streets by railway: The legislature may authorize the use of the streets of a city by a railway company for the construction and operation of its road without

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compensation being made to the city or to adjoining property owners. But the city may have property acquired for other authorized purposes, which could not be so taken without compensation being made: *Clinton v. Cedar Rapids & M. R. R. Co.*, 24-455.

191. The statute authorizing a city to grant to railroads right of way through its streets upon condition that compensation for damages be paid to abutting property owners is twofold in its objects: first, to secure to the city control over its streets; and secondly, to secure to property owners compensation for damages. And in a particular case, *held*, that although the first object could not be accomplished, owing to prior rights having been conferred by another railroad upon the company in question, nevertheless, the second object being a proper one, the statute would be upheld as constitutional: *Drady v. Des Moines & Ft. D. R. Co.*, 57-393.

192. Improvement of streets: Levying a tax upon property abutting upon a street, to pave such street, is not an exercise of the right of eminent domain, but of the power of taxation: *Warren v. Henly*, 31-31.

193. The compensation provided by statute for damages resulting from changing the grade of a street is not intended as compensation for the taking of private property for public use, and the constitutional provision as to compensation has no application: *Meyer v. Burlington*, 52-560.

194. Destruction of buildings to stop fires: An ordinance of a municipal corporation authorizing the destruction of buildings to stop the spread of fire is not an exercise of the power of eminent domain, but a regulation of the right which individuals possess to destroy private property in cases of inevitable necessity: *Field v. Des Moines*, 39-575.

195. A city cannot exercise the right of eminent domain except when that power is expressly given: *Ibid*.

196. Prohibitory liquor law: The legislature being the supreme judge and guardian of the public health, safety, happiness, and morals, may, if the traffic in certain property is deemed detrimental or dangerous to these public interests, prohibit it, and declare

that property illicitly held, kept, or used, shall be forfeited and destroyed; and such a provision is not one authorizing the taking of private property for public use: *Santo v. State*, 2-165, 216.

197. The provision of the same statute making the judgment for the wrongful sale of intoxicating liquor a lien upon the property in which the business is carried on is not the taking thereof for public use: *Polk County v. Hierb*, 37-361.

198. The present statute prohibiting the sale of intoxicating liquors (20 G. A., ch. 143) cannot be said to unlawfully deprive the owner of such property of his property without compensation, at least unless it be made to appear that such property was owned by such party prior to the enactment of the prohibitory statute of 1855: *McLane v. Leicht*, 69-401.

And further see INTOXICATING LIQUORS.

199. Just compensation: The provision as to "just compensation" means that the person whose property is taken for public use shall have a fair equivalent in money for the injury done him by such taking. This compensation should be precisely commensurate with the injury sustained from the taking of the property: *Sater v. Burlington, etc., Plank Road Co.*, 1-386; *Henry v. Dubuque & P. R. Co.*, 2-288.

200. A payment of the damages assessed is a condition precedent to the right to enter upon and take the land under the right of way act, and if the property is taken before such compensation is made, the owner may proceed as against a trespasser: *Henry v. Dubuque & P. R. Co.*, 10-540; *Daniels v. Chicago & N. W. R. Co.*, 35-129.

201. The statutory provision allowing the taking of property pending an appeal in the condemnation proceeding is not unconstitutional: *Peterson v. Ferreby*, 30-327.

202. It is only when the damages are properly assessed that they are to be paid or secured. The compensation must be ascertained in the mode prescribed by law: *McCrary v. Griswold*, 7-248.

203. If no damages are claimed, or if the appraisers appointed in the manner prescribed by law ascertain that the claimant is entitled to no damages and no appeal is taken from their decision, the property owner can-

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not enjoin the condemnation of his property on the ground that compensation has not been made: *Connolly v. Griswold*, 7-416; *Dunlap v. Pulley*, 28-469; *Abbott v. Board of Supervisors*, 36-354; *Tharp v. Wilham*, 65-566.

204. Benefits: By special constitutional provision, benefits to accrue to the property from the proposed improvement are not to be estimated: *Deaton v. Polk County*, 9-594; *Israel v. Jewett*, 29-475.

205. Benefits to result from the construction of the improvement, as well as from the use thereof are to be excluded: *Frederick v. Shane*, 32-254; *Bland v. Hixenbaugh*, 39-532.

206. Therefore, in an action for damages for breach of warranty by reason of the existence of a right of way upon land conveyed, the advantages resulting from the construction of a railway upon such right of way cannot be taken into account: *Koestenbader v. Peirce*, 41-204.

207. Advantages to the land resulting from its better drainage will not be taken into account in estimating the deterioration in value by reason of the taking of a portion thereof for the right of way of a railroad: *Britton v. Des Moines, O. & S. R. Co.*, 59-540.

208. Assessment by jury: An assessment of the damages by a jury of three persons appointed as provided by statute is an assessment by jury as required by the constitution: *Des Moines v. Layman*, 21-153. But see, *contra*, *Sigafoos v. Talbot*, 25-214.

209. A party cannot be deprived of his property without provision for a judicial proceeding either originally or by appeal: *Ragatz v. Dubuque*, 4-343.

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210. Extent of: The police power is very extended in its application. It cannot authorize the taking of the property of A. and the vesting of it in B., for this the constitution expressly prohibits; but short of this limit scarcely any restriction is imposed upon it: *Rodemacher v. Milwaukee & St. P. R. Co.*, 41-297.

211. Citizens of other states subject to: All privileges of citizens of the United States are subject to the police power of the state.

The fourteenth amendment was not intended to limit the power of the states in this respect: *Martin v. Blattner*, 68-286.

212. All property of the citizen is held subject to the police power and other regulations which the legislature may provide for the protection of the life and safety of the people, and no right of property can intervene to arrest the enforcement of penalties for the violation of the criminal statutes of the state: *Ibid.*

213. Regulation of the sale of intoxicating liquors: The legislature may, in the exercise of its police power, provide that property used with the consent or knowledge of its owner for the sale or manufacture of intoxicating liquors in violation of law shall be subject to the lien of any judgment rendered against the person occupying the property, on account of such illegal manufacture or sale: *Polk County v. Hierb*, 87-361.

214. In a proceeding against property to enforce a forfeiture for the improper use of the premises for the sale of intoxicating liquors, the premises may be proceeded against for the abatement of the nuisance, even to the extent of their destruction as provided by law: *Our House No. 2 v. State*, 4 G. Gr., 172.

215. The legislature may provide for licensing persons engaged in special pursuits, and require the payment of a fee therefor by the person to whom a license is granted: *Hildreth v. Crawford*, 65-339.

216. But a license thus granted is not a vested right. It is subject to revocation by the authority granting it: *Columbus City v. Cutcomp*, 61-672.

217. The state has the right and power to prohibit the sale of intoxicating liquors as a beverage: *McLane v. Leicht*, 69-401.

218. Regulation of commerce: The state, by virtue of its police power, may enact all such laws as are necessary or proper to protect its citizens in their persons, lives and property, and to guard them against frauds, impositions and oppressions, even where such laws may, in some respects, affect persons or corporations engaged in foreign or interstate commerce; but under this authority the state cannot impose a burden upon such commerce not within the necessary exercise of such power: *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45-338.

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See further as to regulation of commerce, *infra*, §§ 260-266.

219. Wharfage dues: In the exercise of their police powers the cities of the state may control the landings of boats and designate places where they shall discharge freight and passengers. It is within their power to require this to be done at wharves erected by them, and to charge a reasonable compensation therefor: *Dubuque v. Stout*, 32-80; *Keokuk v. Keokuk N. L. Packet Co.*, 45-196.

220. Where a city has the exclusive right under its charter to make wharves, collect wharfage and regulate wharfage rates, it can, consistently with the constitution of the United States, charge and collect wharfage proportioned to the tonnage of vessels from owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river. Such an assessment is not a tonnage tax: *Packet Co. v. Keokuk*, 95 U. S., 80.

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221. Not taking private property for public use: Legitimate taxation is not the taking of private property for public use without compensation within the constitutional provision. The protection afforded the citizen by the government is the just compensation required: *Morford v. Unger*, 8-82.

222. There are limits beyond which the legislative discretion cannot go in subjecting property to taxation, and while the judiciary will not interpose in every case of injustice or of oppression, yet this power may be so unreasonably and unjustly exercised as to amount to the taking of private property for public use without compensation: *Ibid.*

223. An unreasonable extension of the limits of an incorporated city, by which land needed only for agricultural purposes is brought within the city limits and subjected to municipal taxation, without deriving any advantage from municipal control, is unconstitutional, even though it is provided that it shall be assessed only at its value for agricultural purposes: *Ibid.*; *Langworthy v. Dubuque*, 16-271.

224. But where property included within an extension of the city limits was situated within three hundred feet of the old limits,

and used for pork house, etc., and the streets of the city were laid out and worked to and beyond the property, and the surrounding property was laid out into lots and blocks, *held*, that the proceeding by which it was brought within the city limits was not unconstitutional: *Butler v. Muscatine*, 11-433.

And as to extension of city limits, see further, MUNICIPAL CORPORATIONS, §§ 491-508.

225. Compensation: While the right to take private property for public use is conditioned upon compensation, the taxing power is not thus limited: *Stewart v. Board of Supervisors*, 30-9.

226. A special participation in the benefits of a particular tax on the part of the taxpayer has nothing to do with the right to impose the tax. The identical revenue collected by the special tax may be used for purposes from which the tax payers of whom it was received derive no benefit: *Warren v. Henly*, 31-31.

227. Not subject to judicial control: The taxing power being one of the sovereign powers vested in the general assembly by the people, and not being limited either expressly or by implication, the judicial power possesses no authority to limit it: *Ibid.*

228. Tax in aid of railroad: The imposition of a tax to aid in the construction of a railroad is an exercise of the taxing power for a public purpose: *Stewart v. Board of Supervisors*, 30-9; *Chicago, M. & St. P. R. Co. v. Shea*, 67-728. But see, *contra*, *Hanson v. Vernon*, 27-28.

Further, see RAILROADS, I.

229. Taxation of corporations: The constitutional provision that property of corporations for pecuniary profit shall be subject to taxation the same as that of individuals, requires the legislature to provide for the taxation of such property the same as private property, and an act releasing such property from city taxes is void: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633, 642; *Dubuque v. Illinois Cent. R. Co.*, 39-56. And see *Iowa R. Land Co. v. Woodbury County*, 39-172.

230. A statute relating to the taxation of express and telegraph companies, *held* not in violation of the constitutional provision as to taxation of the property of corporations, for the reason that it made such property liable to taxation in the same manner and to the

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same extent when held by individuals as when held by a body corporate: *United States Ex. Co. v. Ellyson*, 28-870.

231. Railroad property: So held, also, as to a statute regulating the taxation of railroad property: *Dubuque v. Chicago, D. & M. R. Co.*, 47-196.

232. No constitutional rights are infringed by providing a different method for assessing railroad property than that provided for assessing property of the same nature belonging to other owners: *Central Iowa R. Co. v. Board of Supervisors*, 67-190.

233. As to taxation of railroad property in general, see *Davenport v. Mississippi & M. R. Co.* 16-848; *Dubuque & S. C. R. Co. v. Dubuque*, 17-120.

See, also, TAXATION, §§ 158-175.

234. Taxation of water-works: The fact that a company operating water-works is exempted from taxation in part payment for water furnished the city does not render the provision a violation of the constitutional requirement as to taxation of corporate property: *Grant v. Davenport*, 36-896.

235. Uniformity of taxation: The restriction upon the power of taxation that taxes must be uniform is applicable generally to the principle or plan of taxation, and not to specific or particular taxes. It means that all individuals and all classes shall be uniformly taxed, and that all must contribute uniformly with like individuals and like classes to these burdens. The manner of imposing the burden must of necessity be left to the discretion of the legislative branch of the government: *Warren v. Henly*, 31-81.

236. Special taxes for improvement of streets: Therefore, held, that the levying of a special tax upon abutting property for the improvement of a street by a municipal corporation was a proper exercise of the taxing power: *Ibid.*

237. While it is competent for the legislature to tax any given species of property to the entire value of the property itself, yet, it is not competent for the legislature to provide for improvements upon the property of another against his will or without his consent (for instance, by the erection of sidewalks), and make him liable beyond the value of the property, or personally liable to any extent: *Buell v. Ball*, 20-282.

238. Double taxation: The fact that a statute subjects property to double taxation will not necessarily render it invalid, although it would excite the disfavor of the courts: *United States Ex. Co. v. Ellyson*, 28-870; *Western Union Tel. Co. v. Ellyson*, 28-380.

239. Money and credits of non-residents: A statute subjecting to taxation in this state moneys and credits belonging to a non-resident, but under the control and management of an agent in the state, is not unconstitutional as providing for the taking of private property for public use without compensation: *Hutchinson v. Board of Equalization*, 66-85.

240. Notice; special assessments: The rule that a citizen shall not be arbitrarily deprived of his property renders it illegal to enforce against such property a tax as to the assessment and levy of which the property owner has had no notice nor opportunity to be heard in pursuance of general statute or special provision: *Gatch v. Des Moines*, 68-718.

241. Property cannot be taken for the payment of taxes under a special assessment made without notice to the property owner and opportunity to be heard, at least where the assessment is made under a statute or ordinance providing for assessment according to benefits: *Trustees of Griswold College v. Davenport*, 65-633.

242. So held where a city council was charged with the duty of determining whether any part of the cost of constructing a sewer should be paid out of the general revenues, and if so, what part, the balance being payable by special assessment upon abutting property: *Ibid.*

243. Judicial proceeding: Courts are not necessary to taxation, and it is generally agreed that property taken for non-payment of taxes is not taken without due process of law, if the tax payer is afforded an opportunity to be heard in relation to the tax, though it be only before the officer clothed with power to assess: *Ibid.*

244. If there is any ground upon which a tax can be upheld, which has been levied without notice to the tax payer and without an opportunity to be heard, it is incumbent upon the party claiming its validity to show

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that the notice would have been unavailing: *Auer v. Dubuque*, 65-650.

245. At no time, nor in any court, nor before any tribunal or officer, has the tax payer the right to have a constitutional jury impaneled for the purpose of determining the rate of the levy or the assessable value of his property: *Davis v. Clinton*, 55-549; *Dunlieth, etc., Bridge Co. v. Dubuque County*, 55-558.

246. An act legalizing taxes which are invalid because in excess of authority, but which the legislature has power to authorize, does not interfere with vested rights: *Iowa R. Land Co. v. Soper*, 39-112.

247. Power of city to tax: The legislature may confer on a city council the power to tax transient merchants: *Mt. Pleasant v. Clutch*, 6-546.

But no such provision can be made as to merchants who are not residents of the state which is not equally applicable to residents: *Infra*, § 267.

248. Vested right in taxes levied: A municipal corporation authorized to levy taxes acquires a right in taxes levied, and cannot be deprived of such right by subsequent legislation releasing the property from such taxes: *Burlington v. Burlington & M. R. R. Co.*, 41-134; *Dubuque v. Illinois Cent. R. Co.*, 89-58; *Independent Dist. v. Independent Dist.*, 62-616.

249. Exemption from taxation: Church property may be exempted from taxation without a violation of constitutional provisions against the establishment of religion, etc.: *Trustees of Griswold College v. State*, 46-275.

250. An exemption from taxation is not a vested right, but may be taken away by statute: *Shiner v. Jacobs*, 62-392.

251. Federal taxation of state official bonds: The provisions of the act of congress requiring the stamping of official bonds of state officers, *held*, not unconstitutional, as authorizing the taxation of the agencies of the state government by federal authority: *Muscatine v. Sterneman*, 30-526.

II. THE ELECTIVE FRANCHISE.

252. The registry laws: The constitution confers upon persons possessing the qualifications mentioned therein the right to vote, which right cannot be impaired by legisla-

tion. But the legislature may regulate the exercise of the right, and provide a method for determining whether persons proposing to vote possess the required qualifications. A registry law is therefore not unconstitutional: *Edmonds v. Banbury*, 28-287.

253. Persons in military service: A statute providing that citizens of the state in the military service should have a right to vote at all elections authorized by law, whether at the time of voting they were within or without the state, and providing for the opening of polls and holding of elections wherever a regiment or battalion of Iowa troops was stationed, *held*, not unconstitutional: *Morrison v. Springer*, 15-304.

254. Residence: Where a student entered the state university at Iowa City while still a minor, making his father's home in another county his residence during vacations, and receiving support from his father, without having any definite intention of making Iowa City his home after graduation, *held*, that he was not a resident of the county in which he was attending school, so as to be entitled to vote there on coming of age: *Vanderpoel v. O'Hanlon*, 53-246.

255. If a person has actually removed to another place with the intention of remaining there for an indefinite time, and making it a place of fixed residence or present domicile, it is to be regarded as his domicile, notwithstanding he may entertain a floating intention to return at some future time. The place where a married man's family resides is generally to be considered his domicile: *State v. Groome*, 10-308.

III. POWERS OF FEDERAL AND STATE GOVERNMENTS.

256. State cannot be sued; mandamus against public officer cannot be maintained to compel him to act in his official capacity connected with the liability of the government, unless the government itself is liable and the officer has improperly refused to act. He cannot be compelled to execute a contract fixing a liability upon the government: *Chance v. Temple*, 1-179, 201.

257. The doctrine that the king can do no wrong does not mean that the sovereignty, through its officers, cannot be guilty of tort,

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but only that the redress must be voluntary and cannot be coerced: *Metz v. Soule*, 40-336.

258. Allowance of claim: Where a petition is presented to the legislative department, asking redress for injuries alleged to have been caused to petitioner by wrongful acts of the officers of the state, and a statute is passed for his relief, it must be presumed that liability on the part of the state was recognized, and compensation made in satisfaction thereof. It is not to be presumed that the act was passed out of mere charity, without recognition of the fact that an injury was done for which the state ought to make redress: *Ibid*.

259. Bankruptcy laws: The national bankruptcy law of 1867 did not operate to wholly suspend state insolvent laws, and the exercise of jurisdiction under the state law was valid, certainly, until the jurisdiction of the federal courts was called into exercise: *Reed v. Taylor*, 32-209.

260. Interstate commerce: Upon certain subjects pertaining to commerce the states, in the absence of congressional enactments, may adopt regulations, but when congress has assumed to act upon such subjects, a state enactment conflicting therewith cannot be enforced. Therefore, *held*, that certain state statutes respecting the transfer of freight, passengers, etc., from railways within the state terminating at a certain point, to connecting railways, was void as in conflict with acts of congress authorizing connecting railways to form continuous lines: *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45-338.

261. Any regulation of the transportation of interstate commerce, whether upon the high seas or lakes or rivers, or upon railroads or other artificial channels of communication, operates as a regulation of commerce itself: *Ibid*.

262. A state statute assuming to control and regulate shipments of freight from a point within to a point without the state under an entire contract is an interference with the power of the federal government to regulate interstate commerce, and therefore unconstitutional: *Carlton v. Illinois Cent. R. Co.*, 59-148; *Kaiser v. Illinois Cent. R. Co.*, 5 McCrary, 496.

263. The railroad commission is not authorized to prescribe that rates of transportation from a point without to a point within the state should conform to the rate for a like distance within the state: *State v. Chicago & N. W. R. Co.*, 70—.

264. A statute (21 G. A., ch. 76) requiring foreign railway corporations and other foreign corporations to procure permits from the auditor of the state before doing business within the state, and subjecting them to penalties for doing business without such permit, held, not to be unconstitutional as a regulation of interstate commerce: *Goodell v. Kriechbaum*, 70—.

265. A statute requiring railway companies to fix once each year their rates of freight and passenger tariff and post a schedule of the same at each station, and providing a penalty for wilful violation of such statute, or for charging a greater rate than those fixed, held, to be a police regulation only and not a regulation of commerce, and therefore not unconstitutional as applied to transportation from a point within to a point without the state: *Fuller v. Chicago & N. W. R. Co.*, 31-187; *Railroad Co. v. Fuller*, 17 Wall., 560.

266. A statute prohibiting corporations engaged in transporting goods or passengers between different states from limiting their liability as common carriers by contract is not a regulation of interstate commerce so as to be unconstitutional as applied to a contract for transportation from a point within to a point without the state: *Hart v. Chicago & N. W. R. Co.*, 69-485.

267. License tax on non-resident merchants: A city ordinance imposing a license tax upon transient merchants and peddlers who are non-residents, which is not imposed upon persons who reside in the state, is unconstitutional: *Marshalltown v. Blum*, 58-184; *Pacific Junction v. Dyer*, 64-38.

268. Taxation of telegraph and express companies: While it is not competent for the states by taxation, direct or indirect, to interfere with interstate commerce, yet the property employed therein is not therefore free from taxation. It can be taxed as property but not as a business. So *held* as to a statute providing for the taxation of telegraph and express companies: *United States Ex.*

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Co. v. Ellyson, 28-370; *Western Union Tel. Co. v. Ellyson*, 28-380.

269. Liquor laws: Laws regulating the sale of intoxicating liquors are police regulations, and are not unconstitutional as an improper regulation of interstate commerce, although they permit the sale of wine from native fruit and prohibit the sale of that manufactured from fruit grown outside of the state: *State v. Stucker*, 58-496.

270. The state may prohibit the sale of spirits as a police regulation, excepting only the importer of foreign spirits selling in the original quantities imported: *Santo v. State*, 2-165, 202.

271. Wharfage dues: The provisions of the constitution and of the ordinance of 1787, prohibiting states from taxing interstate commerce, or abridging the free use of the Mississippi river, are not violated by municipal charters and ordinances providing for the erection of wharves by cities on the Mississippi river, and the charge of reasonable compensation for their use: *Keokuk v. Keokuk N. L. Packet Co.*, 45-196.

272. Tonnage dues: Neither are such charters and ordinances unconstitutional as allowing tonnage dues, even though the wharfage fees are made dependent upon the tonnage of the vessels: *Ibid.*

273. The state as stockholder in corporation: The provision in the state constitution that the state shall not become a stockholder in any corporation is not violated by authorizing aid to be voted by counties of the state towards the construction of a railway: *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Gr., 1.

274. An act making an appropriation to a corporation to assist it in testing the validity of the barb wire patents, *held*, not unconstitutional under the same provision: *Merchants' Union Barb Wire Co. v. Brown*, 64-275.

275. A treaty and an act of congress being each the supreme law of the land, a subsequent act of congress will repeal a previous treaty in the same way that a previous statute would be thereby repealed: *Webster v. Reid*, Mor., 467.

276. Federal limitations not applicable to states: The limitations in the federal constitution apply to the federal government

and not to the states unless it is expressly so provided: *Boyd v. Ellis*, 11-97; *State v. Wells*, 46-662; *McLane v. Leicht*, 69-401.

IV. DIVISION OF POWER AMONG RESPECTIVE DEPARTMENTS.

a. *Executive department.*

277. Suspension of other state officers: The statutory provision for the suspension by the governor of other officers elected by the people is not unconstitutional: *Brown v. Duffus*, 66-193.

278. Mandamus against executive officer: It is not in violation of the constitutional provision that the different departments are independent and separate, to allow a court to call in question the action of an officer of the executive department, as, for instance, by compelling the auditor of state by *mandamus* to issue a warrant for the payment of the salary of an officer, where the auditor has refused to act: *Bryan v. Cattell*, 15-538.

279. Extra sessions: Although the executive is authorized on extraordinary occasions to convene the general assembly by proclamation, and state to it, when assembled, the purpose for which it is convened, yet when thus convened it has full legislative authority, and is not confined in its action to the special purpose for which it is called: *Morford v. Unger*, 8-82.

280. Approval of bills: An act is not passed by the legislature until it is approved by the governor, who, for such purpose, is a part of the legislature: *United States v. Fanning*, Mor., 348.

281. In case a bill is submitted to the governor for his approval during the last three days of a session of the general assembly, and he neither signs nor returns it with objections before the adjournment, it becomes a law only in case he subsequently approves it; and the filing of the bill within the thirty days mentioned, with the secretary of state, without approval or disapproval, will not give it the effect of a law: *Darling v. Boesch*, 67-702.

282. The fact that a law passed thirty-four years previously did not bear the signature of the governor, *held* not sufficient to render the act void. The presumption would be that

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the act became a law by failure of the governor to return it within proper time after its presentation to him: *Collins v. Laucier*, 45-702.

283. The copy or certificate, in the printed acts, of the approval by the governor is but evidence of the fact and is not essential in order that the act may take effect. It is the approval of the original bill filed in the office of the secretary of state which is required to give the act validity: *Dishon v. Smith*, 10-212.

b. Legislative department.

284. General scope of power: In ascertaining the power of the legislature under the constitution, the courts look not at what the instrument authorizes but at what is prohibited: *McMillen v. County Judge*, 6-391.

285. The legislature possesses sovereign legislative power over all subjects except such as are prohibited to it in the state constitution: *Boyd v. Ellis*, 11-97.

286. The general assembly possesses all legislative authority not delegated to the general government or prohibited by the constitution. The constitution, as applied to the legislative department, is a limitation and not a grant of power: *Morrison v. Springer*, 15-304. And see *State v. Hockett*, 70 —.

287. The rule in construing the state constitution is, that the state legislature may exercise all rightful legislative powers which are not expressly prohibited or necessarily included in the prohibited powers: *Purcell v. Smidt*, 21-540.

288. All the legislative authority inherent in the people is vested in the general assembly, and the legislative power of the general assembly is therefore supreme, except as it is bounded by the limitations written in the constitution: *Stewart v. Board of Supervisors*, 30-9, 18.

289. The power of legislation is vested in general terms in the general assembly, and thereby there is conferred upon that body the authority to legislate upon all rightful subjects, unless prohibited from so doing expressly or by clear implication: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633.

290. The theory of the constitution is that all powers not vested in the general assembly

remain in the state: *State ex rel. v. Wapello County*, 13-388.

291. There is, as it were, back of the constitution, an unwritten constitution which guaranties and well protects all the absolute rights of the people. (Per Beck, J.): *Hanson v. Vernon*, 27-28, 73.

292. While the constitution vests the legislative power in the general assembly and it may legislate on all subjects not prohibited by express words or necessary implication, yet under the constitutional provision placing the educational interests of the state under the management of a board of education authorized to legislate and make all needful rules and regulations in relation to schools, *held*, that the power to legislate on such subject was thereby denied to the legislature: *District Tth v. Dubuque*, 7-262.

293. Legislative divorces: Under the terms of the organic law providing "that the legislative power of the territory shall extend to all rightful subjects of legislation," *held*, that the territorial legislature was invested with as much power as is usually vested in an unrestrained legislative body, and that such power included the power to grant legislative divorces, even where the grounds for divorce were not such as to entitle the party to relief in the courts: *Levins v. Sleator*, 2 G. Gr., 604. (But under the state constitution, art. III, § 27, legislative divorces cannot now be granted.)

294. The taxing power being one of the sovereign powers of the state vested in the general assembly, and not being limited by the constitution as to the kinds or classes of property subject to taxation, the general assembly has general legislative authority to subject all kinds and classes of property to taxes for all proper purposes: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633.

295. It being within the proper scope of legislative authority to pass general laws for the levy and assessment of taxes, the passage of a general law curing and legalizing the levy and collection of taxes irregularly or illegally levied is also an exercise of legislative authority and not an encroachment upon judicial power: *Iowa R. Land Co. v. Soper*, 39-112.

And further as to taxation, see *supra*, §§ 221-251.

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296. Judicial revision of legislative action: Where the legislative authority reserves to itself the power to act under certain circumstances, the existence of such circumstances is to be determined by it, and a court cannot call into question the propriety of its action: *Miners' Bank v. United States*, 1 G. Gr., 553.

297. The judicial branch of the government has no power to determine whether an act of the legislative branch is wise or unwise, nor has it power to declare an act void except in cases where the statute in question is plainly, palpably, and without doubt, repugnant to some provision of the constitution: *Merchants' Union Barb Wire Co. v. Brown*, 64-275.

And further, as to when the courts will hold a legislative act unconstitutional, see *infra*, §§ 368-385.

298. Delegation of legislative power: The legislative authority being vested in the general assembly, it is not competent for it to submit the question whether an act shall become a law to the vote of the people. Therefore, *held*, that a statute providing for the submission to vote, in each county, of the question as to whether a prohibitory liquor law should be in force in that county, was unconstitutional, and that the act itself was in force throughout the state without such submission: *Santo v. State*, 2-165, 203; *State v. Beneke*, 9-203.

299. So the license act of 1857, containing a provision that the prohibitory law of 1855 should not be repealed in any county except by a vote of the people of that county, was held unconstitutional: *Geebrick v. State*, 5-491.

300. *Held*, also, that a statute providing for the submission to vote in each county of the question whether a previous prohibitory liquor law allowing the sale of wine and beer should be repealed within that county, and the sale of wine and beer prohibited, was unconstitutional: *State v. Weir*, 33-134.

301. *Held*, also, that a statute which prohibited stock from running at large, and was a valid enactment in itself, but contained a section providing that the act should not be enforced in any county until adopted by the electors of that county, was in force throughout the state without any such submission to

vote, the provision for a submission being unconstitutional: *Weir v. Cram*, 37-649.

302. But a statute allowing the county judge to submit to vote in each county the question whether sheep and swine should be allowed to run at large was held not unconstitutional as being a delegation of legislative power, inasmuch as the law itself was in force without such vote, and the people of each county were simply authorized to adopt its provisions as a police regulation: *Dalby v. Wolf*, 14-228.

303. Although the general assembly cannot delegate to the people the right to make or repeal a law, it has not been held that the state cannot delegate legislative power to municipal corporations within proper bounds: *State v. King*, 37-462.

304. It is not unconstitutional to provide, in an act enlarging the boundaries of a city, that it shall only take effect after its acceptance by the city council: *Morford v. Unger*, 8-82.

305. A statute empowering cities of a certain grade to establish superior courts by vote is not unconstitutional as providing for an exercise of legislative power by the people. The statute itself is in force without any vote, but simply confers upon cities an option to be exercised by vote to avail themselves of the power conferred: *Lytle v. May*, 49-224.

306. A statute conferring upon cities authority to be exercised at their discretion is not void as delegating legislative power. Such statute confers authority which the city may exercise or not, as it chooses: *Des Moines v. Hillis*, 55-643.

307. The voting of aid to railways by a county is not in derogation of the legislative power vested in the general assembly: *Dubuque County v. Dubuque & P. R. Co.*, 4 G. Gr., 1.

308. Exclusive privileges; monopolies: The provision of the constitution prohibiting the granting of exclusive privileges, etc., does not affect exclusive charters or franchises already granted: *Burlington, etc., Ferry Co. v. Davis*, 48-133.

309. General and special laws: A statute which operates upon a particular condition and attaches to it certain consequences, so that whenever that condition exists such consequences follow, is a general and not a

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special statute: *Iowa R. Land Co. v. Soper*, 39-112.

310. A law which affects all persons who may be brought within the relations for which it provides is a general and not a special law, within the meaning of those provisions of the constitution prohibiting the passing of special laws in cases where general laws may be made applicable. Therefore, *held*, that the statute regulating the liability of railway companies for injuries to employees is general and not special, within the constitutional prohibition: *McAunich v. Mississippi & M. R. Co.*, 20-338.

311. Special laws as to taxation: The constitutional prohibition of special laws for the assessment and collection of taxes is not infringed by Code, § 814, allowing a debtor to deduct the amount of his moneys and credits in listing his property for assessment: *Macklot v. Davenport*, 17-379.

312. A law remitting penalties upon taxes not paid within a certain time is not a special law within the meaning of this provision: *Beecher v. Board of Supervisors*, 50-538.

313. A curative act legalizing the levy and assessment of taxes made for a year when no law authorizing any levy and assessment was in force, *held*, not in conflict with this section: *Boardman v. Beckwith*, 18-292.

314. For the incorporation of cities and towns: The legislature cannot pass a special act amending the charter of a municipal corporation. Such act would be in conflict with the clause prohibiting special acts for the incorporation of cities and towns, and would be a law not of general and uniform operation, in a case where a general law could be made applicable: *Ex parte Fritz*, 9-30; *Davis v. Woolnough*, 9-104; *Hetherington v. Bissell*, 10-145; *Baker v. Steamboat Milwaukee*, 14-214.

315. This provision is not violated by a law empowering cities and towns, incorporated under a special charter, to amend such charter: *Von Phul v. Hammer*, 29-222.

316. Applicable to municipal corporations: A law applicable to all cities and towns existing under special charter is not unconstitutional, even though it be considered an amendment of their charters: *State v. King*, 37-462.

317. A law establishing a special court in

a particular town named, and providing for the jurisdiction, etc., thereof, *held* unconstitutional, as being in fact an amendment to the city charter, and as being a local and special law in a case where a general law could be made applicable: *McGregor v. Baylies*, 19-43.

318. An act which operates upon a particular condition, and attaches to it certain consequences whenever that condition exists, is not in conflict with this provision. So an act applying only to cities under special charters was held not unconstitutional, although it could apply to but few cities: *Hassel v. Burlington*, 30-232.

319. A statute validating the acts of municipal corporations in levying special taxes in excess of the legal limit, to pay judgments, *held* constitutional: *Iowa R. Land Co. v. Soper*, 39-112.

320. As the legislature cannot amend the charter of a city, it cannot legalize an act of such city not authorized by the charter, as such an act would be equivalent to an amendment: *Independent School Dist. v. Burlington*, 60-500; *Stange v. Dubuque*, 62-303.

321. By the constitutional provision that no corporation shall be created by special laws, it was not intended to repeal city charters already granted: *Warren v. Henly*, 31-31.

322. The special provision authorizing the general assembly to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly, has reference exclusively to corporations for pecuniary purposes, and does not authorize the amendment of the charters of municipal corporations by special statute: *Ex parte Fritz*, 9-30.

323. The provisions of the Code relating to the enforcement of judgments against municipal corporations are not in any proper sense amendments to the charter of a city, and are not obnoxious to this constitutional prohibition: *Porter v. Thomson*, 22-391.

324. Although the passage of a local or special law incorporating a certain school district would be in conflict with the constitutional provision above referred to, yet, a curative act legalizing a defective organization thereof is not unconstitutional. In such

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case a general law could not be made applicable: *State ex rel. v. Squires*, 26-340.

325. Boundaries of counties: The provision that no law changing the boundary of a county shall have effect until submitted to the people of the counties affected, applied: *Duncombe v. Prindle*, 12-1.

326. Other cases of special laws: A special act authorizing the building of a particular railroad, *held*, not in violation of the provision of this section, for the reason that the object of the act was to execute certain trusts confided to the state, to secure the building of a railroad on a particular route: *Clinton v. Cedar Rapids & M. R. R. Co.*, 24-455.

327. Statutes legalizing official acts done without authority are not invalid on account of being special statutes, for the reason that a general statute could not be made applicable in such cases: *Independent Dist. v. Independent Dist.*, 62-616.

328. An appropriation is necessarily made by a special act, and is not invalid because not general and uniform throughout the state: *Merchants' Union Barb Wire Co. v. Brown*, 64-275.

329. All statutes punishing criminally the violation of law, or providing for the prevention of crimes, are special in their character, and do not come within the restriction that they shall be of uniform operation with respect to different crimes. They may provide remedies and penalties as to nuisances, for instance, committed by the sale of intoxicating liquors, which are not extended to other cases of nuisance: *Martin v. Blattner*, 68-286.

330. An act providing for the holding of terms of court in a particular county at a place other than the county seat is not unconstitutional. A general law could not be applicable in such case: *Cooper v. Mills County*, 69-350.

331. Uniformity of operation: If a law operates upon every person within the relations and circumstances provided for, it is sufficient as to uniformity: *Iowa R. Land Co. v. Soper*, 39-112, 116.

332. Therefore, held, that Code, § 1807, as to liability of railroad company for injuries to employees, is not open to the objection that it is not of uniform operation: *McAunich v.*

Mississippi & M. R. Co., 20-338; *Deppe v. Chicago, R. I. & P. R. Co.*, 36-52; *Bucklew v. Central Iowa R. Co.*, 64-603; *Central Trust Co. v. Sloan*, 65-655.

333. So held, also, as to Code, § 1289, making railroad companies liable in certain cases for double damages for stock killed: *Jones v. Galena & C. U. R. Co.*, 16-6; *Welsh v. Chicago, B. & Q. R. Co.*, 53-632.

334. Uniformity in taxation comes within the purview of the provision as to uniform operation of laws: *Dubuque v. Illinois Cent. R. Co.*, 39-56.

335. But a statute providing a special method for the taxation of express and telegraph companies, held not objectionable under this provision, as the burdens imposed by it fell equally upon all citizens coming within a certain class or condition: *United States Ex. Co. v. Ellyson*, 28-370.

336. It is not a violation of this provision that the general assembly shall provide a different method for assessing the property of railroad companies from that provided for the assessment of other property: *Central Iowa R. Co. v. Board of Supervisors*, 67-199.

337. Also, held, that the power given to cities to improve streets and make the cost thereof a lien upon abutting property was not void as authorizing unequal taxation: *Warren v. Henly*, 31-31.

338. The fact that a city is authorized to exempt from water rent property within its limits which has not the benefit of the water supply does not render such a provision unconstitutional: *Grant v. Davenport*, 36-396.

339. A statute allowing each county to determine by vote whether swine and sheep should be allowed to run at large, held not unconstitutional as not being uniform in operation: *Dalby v. Wolf*, 14-228.

340. The statute prohibiting the sale of ale, wine and beer within two miles of the corporate limits of a municipal corporation, held not objectionable on the ground of want of uniformity in its operation: *State v. Shroeder*, 51-197.

341. So, also, the statutory provisions as to granting of permits to sell intoxicating liquors, by which a permit could only be given to persons of good moral character.

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were held not unconstitutional: *In re Ruth*, 32-250.

342. A city ordinance discriminating in favor of resident merchants of such city and against other merchants of the state, by imposing a license tax on the latter, would be unconstitutional as not being of uniform operation: *Pacific Junction v. Dyer*, 64-38.

See, also, *supra*, § 267.

343. A curative act is not necessarily unconstitutional as not being of uniform operation: *McMillen v. County Judge*, 6-391.

344. So a law legalizing the defective organization of a specified school district was sustained: *State ex rel. v. Squires*, 26-340.

345. The statute providing that the fact that defendant in an action was in the military service of the United States or the state should be sufficient cause for a continuance so long as such defendant was in such service, held not unconstitutional as not being of uniform operation: *McCormick v. Rusch*, 15-127.

346. An exclusive privilege already granted by due authority before the adoption of the constitutional provision prohibiting exclusive privileges and requiring laws to be of uniform operation, held not to be affected thereby: *Burlington, etc., Ferry Co. v. Davis*, 48-183.

347. A statute providing for excluding property from city limits would be unconstitutional if not made applicable to cities already incorporated as well as those to be incorporated: *Whiting v. Mt. Pleasant*, 11-482.

348. Subject to be embraced in title: In an act to amend the charter of the city of Keokuk was inserted a section purporting to legalize elections previously held to determine whether the city council should subscribe to the stock of a certain railroad; held, that such section was not in any sense an amendment to the charter, and the object was not embraced in the title, nor germane to anything contained therein, and the section was, therefore, void: *Williamson v. Keokuk*, 44-88.

349. Every law prescribing duties must have the sanction of liabilities; therefore, held, that Code, § 1307, prescribing the liabilities of railroad companies in certain cases, etc., was sufficiently embraced in the title of the bill in which it was originally enacted,

which was "An act in relation to the duties of railroad companies:" *McAunich v. Mississippi & M. R. Co.*, 20-338.

350. Where an act in one section legalized the organization of a school district, and in another legalized the acts of the officers thereof, held, that the second was so connected with the first that it was sufficiently embraced in the title "An act to legalize the organization of the," etc., or at least that the invalidity on this ground would extend only to the second section: *State ex rel. v. Squires*, 26-340.

351. Provisions made in an act entitled "An act to amend an act to incorporate the city of Muscatine," for enlarging the corporate boundaries of said city, held, to be sufficiently specified in the title: *Morford v. Unger*, 8-82.

352. Provisions for excluding territory from the limits of cities already incorporated are sufficiently covered by the title of an act "for the incorporation of cities:" *Whiting v. Mt. Pleasant*, 11-482.

353. A section contained in an act entitled "An act providing the place of bringing suits in certain cases," designating upon whom service might be made in such cases, held germane to the subject expressed in the title: *Farmers' Ins. Co. v. Highsmith*, 44-330.

354. Provisions of the Code as to the method of enforcing a judgment against a municipal corporation are sufficiently connected with the subject of the chapter on executions under which they are found, not to be objectionable under this constitutional provision: *Porter v. Thomson*, 22-391.

355. Act to embrace but one subject: The intention of the provision prohibiting more than one subject being embraced in the same act was to prevent the union in the same act of incongruous matter and of objects having no connection or relation. But there must be some limit to the division of matter into separate bills and acts. It cannot be held that each step should be embraced in a separate act. The unity of object is to be looked for in the ultimate end designed to be attained, and not in the details looking to that end: *State ex rel. v. County Judge*, 2-280.

356. Therefore, held, that an act containing sixty-six sections, entitled "An act in relation to certain state roads," in which forty-

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six roads were established, others vacated, and provisions for the relocation of still others were made, was not in conflict with the constitutional provision: *Ibid.*

357. The statute prohibiting the sale of malt or vinous liquors within two miles of city limits, and giving cities authority to regulate and license the sales of such liquors within those limits, *held* not unconstitutional as containing more than one subject: *State v. Shroeder*, 51-197.

358. The fact that the title of an act embraces more than one subject will not affect its validity: *Ibid.*

359. An act entitled "An act for revising and consolidating the laws and incorporating the city of Dubuque and establishing a city court therein," *held* not objectionable as embracing more than one subject: *Davis v. Woolnough*, 9-104, 107.

360. The act of 1855 for the suppression of intemperance, *held* not to embrace more than one subject, the several provisions therein being but so many steps fairly conducive to the end or object expressed in the title: *Santo v. State*, 2-165.

361. The act of 20 G. A., ch. 143, amendatory of prior legislation, intended for the suppression of the traffic in intoxicating liquors, and providing for additional penalties and remedies against the violators of the statute, does not embrace more than one subject under the prohibition of this provision: *Martin v. Blattner*, 68-286.

362. The statute in relation to school bonds (Code, §§ 1821-4) is not unconstitutional as embodying more than one subject: *Ackley School Dist. v. Hall*, 118 U. S., 135.

363. Publication of statutes: Under the provision found in a former constitution, that statutes should take effect only when published and circulated by authority, *held*, that the publication without legislative authority was not sufficient to bring the statute into operation: *Calkin v. State ex rel.*, 1 G. Gr., 68.

364. An act conferring upon the governor authority to publish acts of a general nature, and providing that they should take effect from such publication, *held* unconstitutional as delegating to the governor the power given to the legislature to determine what acts should go into effect by publication: *Scott v. Clark*, 1-70; *Pilkey v. Gleason*, 1-522.

365. The legislature at a special session is not limited to legislation upon subjects stated by the governor convening it as furnishing the object of the call: *Morford v. Unger*, 8-82.

c. *Judicial department; declaring statutes unconstitutional; effect.*

366. Judicial authority: The provisions of Code, § 481, for proceedings in the circuit court for the annexation of contiguous territory to a city, are not unconstitutional as conferring upon a court powers not judicial in their nature. The question as to whether the conditions therein mentioned exist, or whether, under the circumstances, justice and equity require the annexation, are of a judicial character, and their determination may properly be vested in the judicial department: *Burlington v. Leebrick*, 43-252.

367. The charter of a city, conferring upon the mayor judicial authority, is not in conflict with the constitutional provision that the three departments of government shall be distinct. The mayor of a city is not a part of the government of the state of Iowa: *Santo v. State*, 2-165, 220.

368. Power to declare statute unconstitutional: The constitutional provision that no person charged with the exercise of powers properly belonging to one of the three departments of government shall exercise any function appertaining to either of the others does not prohibit the judicial department from passing upon the legality of the acts of the officers of the several departments: *Bryan v. Cattell*, 15-588.

369. To the judicial department is intrusted the power to decide all questions of constitutional law. It belongs to that department, as a matter of right and duty, to declare every act of the legislature made in violation of the constitution, or any provision of it, null and void; but the violation of the constitution should be clear and apparent before the act should be declared void: *Reed v. Wright*, 2 G. Gr., 15.

370. To declare an act unconstitutional and void is the exercise of the highest power of the court and is not to be resorted to unless it becomes necessary. It is the duty of the court to give an act such a construction, if

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possible, as to avoid the necessity and uphold the act: *State ex rel. v. County Judge*, 2-280.

§71. The power of the court to hold an act of the legislature unconstitutional and void, while everywhere admitted, is of the most delicate and responsible nature and should not be resorted to unless the case be clear, decisive and unavoidable: *Santo v. State*, 2-165, 208; *McCormick v. Rusch*, 15-127.

§72. It is the duty of the court to give a statute such construction, if possible, as will maintain it rather than one which will render it unconstitutional: *Santo v. State*, 2-165, 208; *State ex rel. v. County Judge*, 2-280; *Duncombe v. Prindle*, 12-1; *Iowa Homestead Co. v. Webster County*, 21-221.

§73. The supreme court will not consider constitutional questions, unless it is necessary for the disposition of the case: *Bond v. Wabash, St. L. & P. R. Co.*, 67-712.

§74. The court will not decide the constitutionality of a statute unless it be necessarily involved in a case which cannot be disposed of without such decision. If there is any other point upon which the question can be decided, the constitutionality of the statute will not be passed upon. Parties cannot, by waiving other questions, form an agreed case upon which the courts will decide the constitutional question: *Dubuque & D. R. Co. v. Diehl*, 64-635.

§75. Where a party assails the constitutionality of a statute and goes into the supreme court as appellant, that court will scrutinize the record with considerable strictness to see whether the determination of the constitutional question is necessary to the decision of the case: *State ex rel. v. Rosencrans*, 65-882.

§76. Appellate courts will not decide questions of constitutional law, unless absolutely necessary, when the bench is not full, or when all of the judges cannot assist in the determination: *McClure v. Owens*, 21-133.

§77. A statute should be supported unless its unconstitutionality is so obvious as to admit of no doubt: *Whiting v. Mt. Pleasant*, 11-482.

§78. A court should declare an act of the legislature void only when it violates the constitution so clearly, palpably and plainly as to leave no doubt or hesitation in their minds: *Morrison v. Springer*, 15-304.

§79. It is an elementary principle in deter-

mining the constitutionality of a statute, that any reasonable doubt must be solved in favor of the legislative action, and the act sustained: *Gates v. Brooks*, 59-510.

§80. The authority and power of the court to annul an act of the legislature in conflict with the fundamental law is universally acknowledged, but this authority should be exercised only when the statute is clearly, palpably, plainly, and beyond reasonable doubt in conflict with the constitution: *Stewart v. Board of Supervisors*, 30-9.

§81. It is fundamental that a statute should not be declared unconstitutional unless it is clearly so: *Central Iowa R. Co. v. Board of Supervisors*, 67-199.

§82. The court is not authorized to pass upon the justice or expediency of a statute. Expediency and public policy and state necessity are not within its domain. Therefore the court has no authority to annul an act of the legislature as unconstitutional unless it is found to be in clear, plain and palpable conflict with the constitution: *Ibid.*

§83. Where the legislature had passed an act appropriating a sum of money to aid a private corporation in testing the validity of the barbed wire patents, *held*, that the courts had no jurisdiction to inquire into the question whether such an appropriation was wise or not: *Merchants' Union Barb Wire Co. v. Brown*, 64-275.

§84. Under the provision of the constitution that a special statute should not be passed in cases where a general law could be made applicable, *held*, that the legislature is not the sole judge of whether a general law can be made applicable, but that the special law might be declared unconstitutional for the reason that a general law applicable to the subject might be framed: *Ex parte Pritz*, 9-80.

§85. Where the statute allows an appeal from the action of the board of supervisors in establishing a road, a court in determining such appeal may pass upon the constitutionality of the act under which the road is laid out: *Bankhead v. Brown*, 25-540.

§86. Construction of the constitution: To arrive at the meaning of words used in a section of the constitution, sections preceding and following it, having reference to the same subject-matter, must be read and

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considered, unless the words to be construed have such a clear and express meaning that there can be but one conclusion as to what was meant: *Allen v. Clayton*, 63-11.

387. Where, after considering previous and subsequent sections relating to the same matter, there is any doubt as to the meaning of the language used, then the court may consider, first, the evil intended to be remedied; second, the debates on the subject in the convention which framed the constitution; third, the contemporaneous legislative construction of the constitution; and fourth, the practical construction adopted by the people: *Ibid*.

388. Effect of unconstitutionality: Where money is paid under mistake of law as to the unconstitutionality of a statute, there being no charge of fraud, duress, deceit or mistake of fact, it cannot be recovered back: *Kraft v. Keokuk*, 14-86.

389. So held where a license fee for the permission to sell intoxicating liquors had been paid to a city in pursuance of a provision of a statute which, after the expiration of the time for which the license was granted and the enjoyment of the privilege by the person paying the tax, was declared unconstitutional: *Ibid*.

390. Unconstitutionality of part: Statutes which are partly in conflict with the constitution will be held void no further than as to those parts which are unconstitutional. Provisions which are within the legislative authority will be enforced. The same rule applies in case of the ordinance of a city. But if the parts of the statute or ordinance be necessarily connected and dependent, the whole must fail with the void part: *Keokuk v. Keokuk N. L. Packet Co.*, 45-196; *Packet Co. v. Keokuk*, 95 U. S., 80.

391. An act void in part as unconstitutional is not necessarily void *in toto*. If sufficient remain to effect its object without the aid of the invalid portion, the latter only shall be rejected and the former shall stand: *Santo v. State*, 2-165, 205.

392. Therefore, held, that the prohibitory act of 1855, one section of which provided that it should take effect from a certain date provided it was adopted by a popular vote, became a law although the provision for such submission was unconstitutional: *Ibid*.

393. Where an act was in three sections, the

subject-matter of the first and third being properly embraced in the title, held, that these portions were constitutional, although the second section referred to a subject-matter not embraced in the title: *Henkle v. Keota*, 68-334.

394. When one section of a statute is void and others valid, and it evidently appears that one section is the compensation or inducement for the other, and the connection between them is such as to warrant the belief that the valid part would not have been passed alone, then the whole should be held void. But, in a particular case, held, that one section was not an inducement to, but was entirely distinct and separate from the other portion of the act, and that the balance of the act was valid although that one section was unconstitutional: *Dubuque v. Chicago, D. & M. R. Co.*, 47-196.

395. Where a portion of a statute is unconstitutional and that portion affects the validity of the entire statute, it must all fall: *Geebrick v. State*, 5-491.

396. Where a city ordinance provided that an offense should be punished to a greater extent than the city had authority to inflict punishment, held, that a conviction thereunder would authorize the infliction of punishment up to the limit of the authority of the city: *Keokuk v. Dressell*, 47-597.

397. Decisions of other courts as authority: In questions arising upon the construction of the laws and constitution of this state, the supreme court of the United States is not the final arbiter, but it is required to look to the courts of this state for the rules of construction of its laws and constitution: *McClure v. Owen*, 26-243.

398. The construction given to the constitution of a foreign state by the court of last resort of such state will be regarded as authority by the courts of this state: *Brown v. Phillipps*, 16-210.

399. Distinction between law and equity: The distinction between law and equity is maintained in the constitution, and the two jurisdictions should not be confounded: *Cooper v. Armstrong*, 3 G. Gr., 120.

And see COURTS, §§ 9-16, 23, 24.

400. Superior and inferior courts: An inferior court is one from which an appeal lies to a superior court, and over which the

Amendments.—Contempt of court.

latter has a supervisory power and control. Under the constitutional provision that the judicial power shall be vested in the supreme court, district court, and such other courts inferior to the supreme court as the general assembly may from time to time establish, courts may be organized not inferior to the district, provided they be inferior to the supreme court: *Hetherington v. Bissell*, 10-145.

401. A statute for the organization of a city court possessing in some respects a co-ordinate jurisdiction with the district court, held not unconstitutional under such provision: *Davis v. Woolnough*, 9-104.

As to the jurisdiction of the supreme, district, and other courts under the constitution and statutes, see COURTS.

V. AMENDMENTS.

402. **Observance of forms:** The provisions of the constitution for its own amendment are not simply directory, to be disregarded with impunity. The department charged with their observance is not the sole judge whether or not they have been complied with. The courts may inquire as to whether an amendment that does not relate to its own powers or functions has been adopted in the manner prescribed in the constitution, and if it finds that the requirements of the constitution have not been observed, it may declare that such amendment has not become a part of the constitution: *Koehler v. Hill*, 60-548.

403. **Effect of adoption of new constitution:** Provisions in a city charter inconsistent with the new constitution were repealed by its adoption: *Dively v. Cedar Falls*, 27-227; *Scott v. Davenport*, 84-208.

404. Crimes already committed were subject to punishment the same as though the new constitution had not been adopted: *State v. Art*, 6-511.

CONTEMPT.

As to contempt by ATTORNEYS, see that title, V.

1. **Contempt of court:** By statutory provision (Code, § 3491), contemptuous or insolent behavior must be toward the court while it is engaged in judicial duty, and such be-

havior must tend to impair the respect due to its authority in order that such acts may be punishable as contempt: *Dunham v. State*, 6-245.

2. If by general rule, or by special rule made as to some cause on trial, a publication of the testimony pending the investigation has been prohibited, a wilful violation of such rule might amount to contempt on the ground that it would be a resistance to the rule thus made, and especially if the rule itself declared such act a contempt: *Ibid.*

3. It would seem that the provisions of the Code must be regarded as a limitation upon the power of courts to punish for any other contempts than those therein specified: *Ibid.*

4. The publication of newspaper comments upon the decision of a court when the case is disposed of and the decision announced are not punishable as contempt: *Ibid.*

5. Publication of articles in a newspaper reflecting upon the conduct of a judge in relation to a cause disposed of before such publication does not amount to a contempt: *State v. Anderson*, 40-207.

6. **Argument by attorney:** After the decision of the court has been made, the time for argument in reference thereto has passed, and an attorney cannot, except by asking and obtaining leave, further argue the question or deny the statements of the court with reference to the facts involved in such determination: *Russell v. French*, 87-102.

7. **Proceedings to punish:** A proceeding for contempt for violating an order of injunction issued in an equity case may be prosecuted in a court of equity. The same court must inflict the punishment for contempt in which the order violated is granted: *Manderscheid v. District Court*, 69-240.

8. It is proper to conduct the proceedings for contempt under the title of the cause out of which the contempt arises: *Ibid.*

9. Any irregularity in serving a rule to show cause against punishment for contempt will be waived by the appearance of the party: *Ibid.*

10. A party charged with contempt has not a right to a jury trial although the act charged also constitutes a crime. The punishment for the contempt is not a punishment of the act as a crime, and the crime may be separately punished: *Ibid.*

Violation of injunction.

11. **Violation of injunction:** The writ of injunction, for the violation of which the proceedings are instituted, need not be filed in the proceeding: *Jordan v. Circuit Court*, 69-177.

12. While the provision for a fine of five hundred dollars for violation of an injunction prohibiting the sale of intoxicating liquors is extraordinary in amount, it is not in that respect unconstitutional: *Ibid*.

13. Attachment for contempt is the proper mode of enforcing obedience to a continuing order in the nature of a mandatory injunction: *State v. Baldwin*, 57-266.

14. **In replevin:** The judge is authorized in vacation to punish as contempt an unlawful obstruction or hindrance to an order for the taking of property: *State v. Myers*, 44-580.

15. **In mandamus:** Where a writ of *mandamus* to collect a tax is disobeyed by the board of supervisors, but one action for contempt is allowed against them, and that a joint action. If the board are severally proceeded against, the actions may be consolidated so long as the act charged is disobedience of the same writ of *mandamus*: *Durant v. Supervisors*, Woolworth, 377.

16. **Action against receiver:** It is contempt to bring an action in a state court against a receiver appointed by a federal court without first obtaining leave of the court appointing the receiver. It is immaterial whether the property is thereby disturbed or not: *Thompson v. Scott*, 4 Dillon, 508.

17. **Refusal to make affidavit:** A witness may be punished for contempt in refusing to make an affidavit, and to answer questions as provided by Code, §§ 3692, 3693, and the fact that the affidavit desired would not be legally admissible in the proceeding in which it is sought, is no excuse for such refusal: *Robb v. McDonald*, 29-330; *State ex rel. v. Seaton*, 61-563.

18. **Refusal to disclose property:** Under statutory provisions (Code, § 349) the judge has power to impose a punishment upon a witness who refuses to answer questions propounded to him in a proceeding for the purpose of discovering his property: *Lutz v. Aylesworth*, 66-629.

19. **Attachment of witness:** A party cannot take advantage of the refusal of the court to attach a witness for contempt, who

refuses to produce evidence: *Manning v. Perkins*, 16-71.

20. **Nature of proceeding:** The proceeding to punish a contempt of process is merely incidental to, and, to a great extent, independent of the original proceeding in which it may be invoked. It is in its nature criminal: *First Cong. Church v. Muscatine*, 2-69.

21. An action for contempt is a criminal action, and if in the federal courts, the United States is a party thereto: *Durant v. Supervisors*, Woolworth, 377.

22. **Arrest:** While it is true that proceedings to punish for contempt are in a certain sense of a criminal nature, they are not governed by the code of criminal procedure, but by a special statute, and under such provisions it is sufficient to serve a rule upon defendant to show cause against the punishment, and the court is not bound to secure the arrest of defendant and his personal presence before proceeding against him: *Jordan v. Circuit Court*, 69-177.

23. Where the proper order had been served upon defendant, *held*, that the court might proceed to take evidence, although defendant was not present personally or by counsel: *Ibid*.

24. A warrant may be made returnable on a certain day, which may be at a subsequent term, and it may direct the arrest of a person in contempt, in vacation, and provide for his release on bail: *State v. Archer*, 48-310.

25. **Hearing:** Where it is complained that after appearance of defendant in answer to a citation to show cause, the case is set down for hearing at such time as not to allow defendant sufficient opportunity to prepare therefor, he should make a special showing for postponement: *Jordan v. Circuit Court*, 69-177.

26. **Jurisdiction:** In the absence of statute, each court of record is the sole and final judge in matters of contempt with reference to its proceedings: *First Cong. Church v. Muscatine*, 2-69.

27. The visiting committee of an insane hospital has no authority under the Code to punish a witness for contempt for refusing to testify when summoned before it: *Brown v. Davidson*, 59-461.

28. **Accusation:** In a proceeding against an attorney for contempt, the accusation

Evidence.

should specify the manner in which he was disrespectful to the court. If it was done by insulting language, the words used by the accused should be given; if by disrespectful acts, those acts should be described so that the accused may know what words or acts he is required to meet. In a particular case, *held*, that the charge of contempt "in disobeying the orders of your Honor while engaged in your official capacity" was not sufficiently specific: *Perry v. State*, 8 G. Gr., 550.

29. In such case the finding or judgment should specify the particular charge or charges upon which the attorney's guilt is pronounced: *Ibid*.

30. Evidence: By statute (Code, § 3497), if the action of the court is founded upon evidence given by others, such evidence must be in writing, filed and preserved, and if the court acts upon its own knowledge in the premises, a statement of the facts upon which the order is founded must be entered upon the records of the court, or filed and preserved when the court keeps no record; and these provisions are applicable to proceedings for a contempt in refusing to deliver property under a writ of replevin: *State v. Myers*, 44-580.

31. An order entering a fine for contempt will be reversed when a statement of facts, upon which the order is founded, is not entered on the record in a case where the court acts upon its own knowledge: *State v. Utley*, 13-593; *Skiff v. State*, 2-550; *State v. Dougherty*, 32-261.

32. Where neither the record nor the warrant of commitment shows upon what evidence or facts an order of commitment is based, nor whether the same were within the knowledge of the court, the order will be reversed on *certiorari*: *State v. Folsom*, 34-583.

33. The affidavit required where the contempt is not committed in the immediate view or presence of the court, or does not come officially to its knowledge, need not show that affiant has personal knowledge of the facts: *Jordan v. Circuit Court*, 69-177.

34. Although a failure of the judge to file and preserve a statement of the facts on which the order of contempt is founded will render the contempt invalid, yet where the transcript of the examination of a witness

showing the questions asked, and the refusal to answer, was filed by the judge with his certificate, *held*, that it constituted a sufficient compliance with the requirements of the statute, although the transcript was made afterwards by a shorthand writer from notes taken at the time: *Lutz v. Aylesworth*, 66-629.

35. In a proceeding for contempt for publishing false, scandalous and defamatory articles in relation to the judge of the court, it is proper to hear testimony of witnesses as to the meaning and intent of the articles, and whether the same in their opinion referred to or meant the court or the judge thereof: *Henry v. Ellis*, 49-205.

36. Excuse or explanation: Where a reasonable time is asked to prepare a written explanation, it should be granted: *State v. Duffy*, 15-425.

37. Upon a proceeding for an alleged contempt in failing to obey an order of court, defendant may by answer show that there was no contempt in fact by reason of the impossibility of performing the required act. He is not required to proceed by appeal or otherwise for a modification of the original order: *Hogue v. Hayes*, 53-377.

38. A party cannot, in a proceeding for contempt for disobedience to a judicial order rendered by a court having jurisdiction, call in question the correctness of the order itself. The only legitimate inquiry in such case is, did the court have jurisdiction, and did it make an order which has been violated: *State v. Baldwin*, 57-266.

39. It is improper to punish for contempt, even when committed in the presence of the court, without giving the offending party opportunity to make a written explanation of his conduct under oath for the purpose of excusing the contempt or reducing the punishment, and such reasonable opportunity must be given before the party is adjudged guilty of contempt and punishment therefor is inflicted. When the court deems that a contempt of its authority has been committed in its presence, the attention of accused should be called thereto and a reasonable time fixed within which he may make the written explanation contemplated by the statute. He should not be called upon to do so on the instant when the accusation is

Punishment.— Discretion; grounds.

made, unless the emergency is more than ordinarily great: *Russell v. French*, 67-102.

40. Where the statement of an administrator, required by order of court to pay over money received by him as such, shows the receipt of such money, but does not show its disbursement upon lawful claims, he does not purge himself of contempt by showing that he has disbursed the money upon claims not lawfully presented and allowed, and that he has no money of his own with which to satisfy the claim against him: *Wise v. Chaney*, 67-73.

41. **Punishment:** The court cannot punish an attorney for contempt by revoking or suspending his license. That can only be done in the manner provided by § 217 *et seq.*: *State v. Start*, 7-499.

42. Nor can it, by summary proceeding for contempt, compel a party to deliver to the sheriff a key or property claimed by another: *Ibid.*

43. A judge may, in vacation, impose the same punishment for contempt as if he were acting in court: *State v. Myers*, 44-580.

44. The judge or court imposing a fine for contempt may direct imprisonment of defendant until such fine be paid; the extent of imprisonment being limited by the directions of Code, § 4509: *Ibid.*

45. A party who is in contempt has no right to be heard in defense of the action in which the contempt has been adjudged, but failure to pay money awarded as temporary alimony for which judgment has been entered does not constitute contempt in this respect: *Baily v. Baily*, 69-77.

That a party in contempt cannot file pleadings so as to save default against him, see DEFAULT, §§ 25-27.

CONTINUANCES.

[The statutory provisions on this subject, Code, §§ 2748-2760, are applicable to both civil and criminal cases: See Code, § 4419.]

1. **Discretion:** The application for a continuance is addressed peculiarly to the sound legal discretion of the judge, and his ruling thereon will not be interfered with on appeal, unless the supreme court is clearly satisfied that this discretion has been abused and injustice thereby done: *Widner v. Hunt*, 4-355;

Childs v. Heaton, 11-271; *State v. Rorabacher*, 19-154; *Boone v. Mitchell*, 33-45; *Finch v. Billings*, 22-228; *Harrison v. Charlton*, 37-134; *Peck v. Parchen*, 52-46; *State v. Wells*, 61-629.

2. Application for continuance not based upon absence of witnesses, but upon the ground that the prisoner should suffer substantial prejudice if then compelled to go to trial, is addressed peculiarly to the discretion of the lower court and will not be interfered with unless abused: *State v. Reid*, 20-413.

3. The discretion which is conferred upon the court is, however, not arbitrary, but is to be governed and controlled by legal rules: *Purington v. Frank*, 2-565.

4. Where a party clearly brings himself within the law in an application for continuance, and no special circumstances are shown defeating his right, it is the duty of the court to grant the motion, and a refusal to do so will constitute reversible error: *Welsh v. Savery*, 4-241; *State v. Barrett*, 8-536.

5. While much is left to the discretion of the court in passing upon such an application, its ruling should not be arbitrary nor in violation of the rights of either party: *State v. Painter*, 40-298.

An appeal does not lie from the ruling of the court upon a motion for continuance. It is a mere intermediate order, not materially affecting the final decision, and error in the ruling can only be urged upon appeal from the final judgment: See APPEALS, § 39.

6. **Grounds; absence of evidence:** In a criminal case the state as well as defendant is entitled to reasonable opportunity to procure its witnesses and be prepared for trial, and where a proper application for a continuance is made by the state with sufficient showing of diligence, it should be granted: *State v. Painter*, 40-298.

7. In a particular case, *held*, that a continuance should have been granted on application of defendants to allow them to procure testimony as to their general character: *State v. Nash*, 7-347, 373.

8. Where, in a prosecution for murder, defendant asked a continuance on account of the absence of a witness by whom he expected to prove that he (witness) did the killing, *held*, that the improbability that the witness would thus subject himself to

Party not at fault.—Diligence required.

a criminal prosecution, was not sufficient ground for refusing a continuance: *State v. Farr*, 33-553.

9. Party not at fault: A continuance should not be granted for a cause growing out of the fault of a party: *Connor v. Griffin*, 27-248.

10. A continuance on the ground of the absence of a witness should not be granted to defendant in default, who offers no defense, nor when the residence of the witness is not given, and diligence in ascertaining it is not shown: *James v. Arbuckle*, 8-272.

11. Diligence required: Application for continuance, based upon absence of papers which have been taken from the court by the attorney of the party asking the continuance, may properly be refused: *Wright v. Clark*, 2 G. Gr., 86.

12. The party seeking a continuance on the ground of the absence of a witness must show that he has availed himself of the means given by the statute to procure the attendance of such witness, or to obtain his deposition: *State v. Cross*, 12-66.

13. The fact that a witness examined before the grand jury, and whose name is indorsed upon the indictment, is subpoenaed by the prosecution but does not appear, cannot be made the basis of a motion by defendant for continuance, after the jury is sworn, upon the ground that he is a material witness for defendant. If his attendance on behalf of defendant is desired, he should be subpoenaed by defendant and steps taken to ascertain whether he will be present: *State v. Hayden*, 45-11.

14. Where defendant was a resident of California, and his attorney had been for more than two months in communication with him, but it did not appear that he had taken any steps to secure the testimony of his client, *held*, that there was not sufficient showing of diligence to entitle defendant to a continuance for the purpose of having his testimony taken: *Argall v. Pugh*, 56-308.

15. Absence of a witness *held* not sufficient ground for a continuance where the deposition of the witness could have been taken: *Bell v. Chicago, B. & Q. R. Co.*, 64-321.

16. A party must show, not only that he made proper efforts to obtain the desired evi-

dence after he knew that it might be obtained, but also that he used due diligence in discovering it: *State v. Bell*, 49-440.

17. An affidavit in a particular case, *held* insufficient, in that it did not show that the witness' absence was unknown until so near the term that his deposition could not be taken: *Widner v. Hunt*, 4-355.

18. A party is held to greater diligence in procuring the deposition of a non-resident than that of a resident witness: *Peck v. Parchen*, 52-46.

19. Where a commission issued in December to take the deposition of a witness, and was not returned before trial in the following June, *held*, that sufficient diligence was not shown: *Cole v. Stratford*, 12-345.

20. It is not required of a party, in the exercise of proper diligence, that he have witnesses in attendance from a distance to meet a claim not yet made in the pleadings, although he may have noticed that such claim will be made: *Sapp v. Aiken*, 68-699.

21. The supreme court would be slow to disturb an order of continuance made upon application of the prosecution after the failure of the jury to agree in a criminal prosecution submitted to them, where the ground for asking such continuance is that witnesses for the prosecution have been allowed to depart from the court before the conclusion of the trial and cannot be secured before the next term: *State v. Miller*, 65-60.

22. A party is not entitled to a continuance for the purpose of taking testimony where the action has been so long pending and the necessity of the testimony has been apparent for such length of time that it is negligence on his part not to have procured his testimony sooner: *Greither v. Alexander*, 15-470.

23. A party cannot have a continuance on account of the absence of a witness where it does not appear that proper steps were taken to secure his attendance or that the party had any reason to believe that the witness would remain within the reach of a subpoena during the term: *Fiske v. Berryhill*, 10-203.

24. As to whether sufficient diligence was used under particular circumstances, see *Fiske v. Berryhill*, 10-203; *State v. Scott*, 44-93; *State v. Spurbeck*, 44-667; *State v. Dakin*,

Showing of diligence.—Statement of testimony.

52-395; *Brandt v. McDowell*, 52-230; *Kimball v. Bryan*, 56-632; *State v. Stone*, 65-366.

25. Showing of diligence: It is not sufficient to state that due diligence has been used; the facts constituting such diligence must be shown: *Thurston v. Cavenor*, 8-155.

26. The facts constituting due diligence must be shown, and from such facts the court will determine whether the necessary diligence has been exercised: *Brady v. Malone*, 4-146.

27. Affidavits for the purpose of showing due diligence should be strictly construed and most strongly against the applicant for the continuance: *Brady v. Malone*, 4-146.

28. The showing in particular cases for a continuance on account of the absence of material witnesses held sufficient: *State v. Dakin*, 52-395; *State v. Nash*, 7-347, 373.

29. In particular cases held that the showing of diligence was not sufficient to require the court to grant the continuance: *Thurston v. Cavenor*, 8-155; *Walker v. Scofield*, 39-666; *Adams v. Peck*, 4-551; *Brotherton v. Brotherton*, 41-112; *State v. Spurbeck*, 44-667; *Randall v. Fockler*, 52-618; *Finch v. Billings*, 22-228.

30. Statement as to what absent witness will prove: Where the application for continuance is made on account of the absence of witnesses, the affidavit ought to give the names of the witnesses, their residence and the particular facts which the party expects to prove, or give some excuse for not doing so, not only in order that it may appear that substantial justice requires the continuance, but because the opposite party has a right to know the facts expected to be proved in order that he may admit them and thus prevent a continuance if he so desires. (Code, §§ 2750, 2751): *State ex rel. v. Tilghman*, 6-496; *Olds v. Glaze*, 7-86.

31. The affidavit as to what affiant believes witness will prove must state facts, as distinguished from legal conclusions: *State v. Felter*, 25-67.

32. A statement that the party expects to prove by the witness "all the material alle-

gations contained in his answer" is not sufficient: *Olds v. Glaze*, 7-86.

33. The affidavit must show that the witness would, if present, testify to facts material and relevant to the issue: *State v. Bennett*, 52-724; *State v. Williams*, 8-533; *State v. Falconer*, 70—.

34. Where the ground for continuance was the absence of defendants to the suit, who it was claimed were the only witnesses by whom the defense could be proven, held, that the application was not sufficient without setting out the facts to which such witnesses would testify: *Jackson v. Boyles*, 64-428.

35. Where the showing as to what it was expected to prove by a witness whose absence was made the basis of an application for continuance did not indicate that the matters to which he would testify would show any legal defense, held, that the continuance was properly refused: *State v. Clark*, 69-196.

36. Admission by opposite party of testimony set out in application:¹ Where the opposite party admits that the witness, if present, would testify to the facts stated, the affidavit may be read to the jury as the basis of such admission: *Strong v. Hart*, 7-484.

37. But it can be read only in so far as it states facts which the witness, if present, would be allowed to testify to: *State v. Sater*, 8-420.

38. The admission does not preclude legal objections which might be made to the testimony if the witness was present: *State v. Geddis*, 42-264.

39. The statements of the affidavit, if admitted and read, are to be taken as the testimony of the witness in court, and cannot be impeached by proof of different statements made out of court, unless a proper foundation therefor has been laid, even though such outside statements were under oath: *State v. Shannehan*, 22-435.

40. The affidavit and admission are not admissible as evidence at a subsequent term: *State v. Felter*, 32-49.

41. As to whether the provisions denying a continuance on the ground of absence of

¹ Code, § 2751. If the application is insufficient, it shall be overruled; if held sufficient, the cause shall be continued, unless the adverse party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the court to be properly stated.

Showing.—Other grounds.

witnesses in case of admission as to what the witness is expected to prove is in violation of defendant's constitutional right to compulsory process for the attendance of his witnesses, *quere*: *Trulock v. State*, 1-515.

42. No other witnesses: The affidavit must show that there are no other witnesses by whom the facts stated can be proved: *Thompson v. Abbott*, 11-193.

43. But where a party stated in his affidavit that he knew of no person by whom the same facts could be "as fully proved as by said" witness, *held*, that the affidavit was sufficient: *Welsh v. Savery*, 4-241.

44. Ability to procure witness at next term: The provision that the affidavit shall show reasonable ground of belief as to the attendance of witnesses at the next term, etc., contemplates more than a mere statement of a belief that the testimony can be procured: *State v. Rorabacher*, 19-154.

45. A continuance should not be granted upon an affidavit that the party knows of no witness in the state by whom he can prove the desired fact, where he fails to state that there is a person anywhere by whom such fact can be proven: *Thompson v. Lord*, 14-591.

46. Other grounds of continuance; absence of counsel: A continuance may be granted in a particular case on account of absence of counsel, but if such application is refused, the supreme court would require very strong circumstances, manifesting a clear abuse of discretion, before it would interfere: *Brady v. Malone*, 4-146.

47. While the absence of a party's attorney on account of sickness might be a ground for continuing a cause to a later day in the same term, under the circumstances of a particular case, *held*, that it was not sufficient to require a continuance over the term: *State v. Ostrander*, 18-435, 448.

48. Where it was shown that the attorney for one of the parties at the time of the motion for continuance was very sick and unable to do business, and the nature of the case was such that no other attorney could prepare for its trial at that time, *held*, that it was error to refuse a continuance, although it appeared that afterwards, and prior to the time of the trial, such attorney had so far recovered as to be at the court-house, though not in

a condition to try the case: *Rice v. Melendy*, 36-166.

49. Absence of the party: To warrant the granting of a continuance on account of the absence of the party himself, the court should require much stricter showing of diligence or cause for such absence than in case of a witness not a party: *Gates v. Hamilton*, 12-50.

50. Where an affidavit for continuance showed the absence of a party to the suit, but did not show that his presence was necessary except as a witness, and did not state what was expected to be proved by his testimony nor the particular facts to which he would testify, *held*, that a continuance was properly refused: *Jackson v. Boyles*, 64-428.

51. The showing in a particular case *held* not sufficient to entitle defendant to a continuance on account of his own absence: *Brandt v. McDowell*, 52-230.

52. The appointment of a guardian ad litem may be a proper ground for continuance to enable him to prepare the case for trial: *Blythe v. Blythe*, 25-266.

Further as to appointment of guardian ad litem, see PARTIES, §§ 235-238.

53. The substitution of an administrator as a party is not a ground for continuance: *Masterson v. Brown*, 51-442.

54. Military service: Under statute granting to defendants in the military service of the United States the right of continuance in actions brought by or against them, *held*, that under the terms of the statute the continuance might be granted as well before as after the filing of the answer: *McCormick v. Rusch*, 15-127.

55. Under such statute, *held*, that a paymaster in the United States service was entitled to continuance as much as any soldier or other officer, and that the disbanding of the volunteer forces would not take away such right if the condition of the service required him to continue on duty: *Clark v. Woodbury*, 23-61.

56. Prejudice must appear: Under equity practice, *held*, that where defendant had called for a replication under oath, and the same was duly given, he was not entitled to a continuance in order to procure attendance of plaintiff as a witness to testify concerning the same matter already embraced in his

Prejudice.—Affidavits.

sworn replication: *Stevens v. Campbell*, 0-538.

57. Where a criminal case was continued to a special term in the absence of the prisoner on account of the previous connection of the judge with the case, *held*, that no prejudice resulted to the accused in view of the fact that the continuance would have resulted from operation of law in any event: *State v. Linhart*, 23-314.

58. A party complaining of the refusal of the court to grant a continuance upon an amendment being filed by the opposite party must show that he suffered prejudice, such as that he had not information of all the evidence required to make his defense, or that his witnesses were not all present, or the like: *York v. Clemens*, 41-95.

59. Where defendant asked for a two days' continuance for the purpose of procuring testimony, which was overruled, and the cause was proceeded with, but defendant was not called upon to introduce evidence until the third day after, *held*, that he was not prejudiced by refusal to grant his application: *Winklemans v. Des Moines Northwestern R. Co.*, 62-11.

60. Where a case has been continued upon the application of a party at previous terms, reasonable prejudice should be shown before another continuance is granted: *Rosecranes v. Iowa & M. Telephone Co.*, 65-444.

61. Facts in a particular case *held* not to show sufficient prejudice to entitle a party to continuance on account of the absence of testimony: *Owens v. Hart*, 66-565.

62. Time for filing motion: The motion should be filed as soon after the second day of the term as it becomes certain that it will have to be filed: *Bays v. Herring*, 51-286.

63. If the affidavit is not made on the second day, a sufficient excuse therefor should be stated in the affidavit: *Randall v. Fockler*, 52-618.

64. If filed after the second day, and no reason for the delay is shown, the motion should be overruled: *Lucas v. Casady*, 12-567; *Chicago & S. W. R. Co. v. Heard*, 44-358; *Bell v. Chicago, B. & Q. R. Co.*, 64-321.

65. Under the facts in a particular case, *held*, that it did not sufficiently appear that the application was made as soon as it became

certain that it would need to be made as required by statute: *Bays v. Herring*, 51-286.

66. Where the application was made on the day the cause was regularly reached for trial, *held*, that in the absence of any showing to the contrary, it would be presumed that it was overruled for the reason that it was not made within the time required: *Woolheather v. Risley*, 88-486.

67. Continuance as to one party: Where the action was against two defendants as a firm and not against them as individuals, *held*, that a continuance against one would operate as a continuance against both: *Butler v. McCall*, 15-480.

68. Amendment of application: Before the enactment of the statutory provision (Code, § 2753) that the application shall be amended but once unless by permission to supply a clerical error, *held*, that the practice of suffering affidavits for continuance to be amended or new ones to be filed was one which might be productive of much evil, and should be permitted, if at all, with great caution: *Widner v. Hunt*, 4-855.

69. But *held* that it was certainly within the discretion of the court to refuse leave to amend an affidavit alleged to be insufficient or to file a new affidavit, unless it was for the purpose of presenting facts which have transpired or come to the knowledge of the party since filing the original: *Ibid*.

70. Affidavits: It is not competent for the attorney to swear to an affidavit as to facts for a continuance which are solely within the knowledge of his client: *Ibid*.

71. Counter-affidavits: In case of a motion for continuance on account of the absence of evidence, counter-affidavits are not receivable: *State v. Bowers*, 17-46; *State v. Dakin*, 52-395; *State v. Wells*, 61-629.

72. But where the motion was overruled because insufficient in itself, *held*, that the action of the court could not be reversed on appeal although counter-affidavits had been received and considered: *Williams v. Niagara F. Ins. Co.*, 50-561.

73. An application under Code, § 2749, authorizing a continuance when "justice will be thereby more nearly obtained," for instance, where it is asked on account of excitement and prejudice against defendant in

Form.

a criminal case, the application may be resisted by counter-affidavits as to the matters relied upon: *State v. Wells*, 61-629.

CONTRACTS.

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II. EXECUTION AND DELIVERY.

- a. *Signature.*
- b. *Date.*
- c. *Certainty of terms.*
- d. *Delivery.*

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- a. *Mutuality.*
- b. *Assent.*
- c. *Acceptance without signature.*
- d. *Public advertisements, rewards, bids, bounty.*
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- a. *Acceptance of services or benefits.*
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- a. *Infancy.*
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- f. *Demand; tender; offer to perform.*
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As to alteration of form of written contract, see ALTERATION OF INSTRUMENTS.

As to contracts for sale of personal property, see SALES.

As to contracts for sale of real property, see VENDORS.

As to SPECIFIC PERFORMANCE of contracts, see that title.

I. FORM.

1. *Under seal; bond:* The term bond implies an instrument under seal: *Steamboat Lake of the Woods v. Shaw*, 2 G. Gr., 91.

2. *Effect of:* The law in force at the time a contract is made determines whether the instrument is in such form as to be considered under seal or not: *Madera v. Jones*, Mor., 204.

3. *An allusion in the instrument to the seal, without any seal or scrawl in fact, does not make the instrument a specialty:* *Long v. Long*, Mor., 48.

4. *A recognizance* is an acknowledgment, before some judicial officer, of a previous indebtedness, and must be entered into before and in the presence of such officer. It need not be under seal: *Lewis v. Mull*, 3 G. Gr., 487.

5. *Distinguished from bond:* A bond, on the other hand, must be under seal, but need not be executed in the presence of an officer, even though required to be accepted and filed by him: *Ibid.*

6. *Of record; bail bond:* At common law the mode for taking a recognizance was for the court or magistrate taking the same to state at large to the bail the obligation and its condition to which they assented. Of

Execution and delivery.

this a short minute was made at the time, but it need not be signed. From this minute a formal record of a recognizance was prepared, and upon being filed, it became a part of the record of the court. In whatever form entered into, a bail bond amounts to an obligation of record, being entered into before a court or magistrate duly authorized to do some particular act: *State v. Gorley*, 2-52.

Further as to bail bonds, see CRIMINAL LAW, III, 12.

7. A judgment is a contract of record, and as one of the essentials of a contract is the assent of both contracting parties, a judgment by confession, entered into at the instance and request of the defendant without the knowledge or consent of the plaintiff, is not binding: *Farmers', etc., Bank v. Mather*, 30-283.

II. EXECUTION AND DELIVERY.

a. Signature.

8. Where to appear: It is immaterial in what part of a memorandum of a contract the names of the parties appear. It is a sufficient signing, under the statute of frauds, if a party's name is signed in any part, provided the signature is put there by the party or by his authority, and is applicable to the substance of the written agreement: *Wise v. Ray*, 3 G. Gr., 430.

9. Pleading; proof: When a written contract is set out in the pleadings and recognized by them on both sides, it is not essential to prove the signature: *Brewer's Estate v. Crow*, 4 G. Gr., 520.

See further, PLEADINGS, V, d.

10. Signature by one for all: All the persons jointly interested in a written contract as joint contracting parties may be liable, where one or more of the parties sign the same, if the signature is intended to bind all and is so accepted: *Seekell v. Fletcher*, 53-330.

11. One partner individually for all: So where one partner signs his individual name with the understanding of himself and the other partners that it is to bind the firm, and it is accepted by the other party with such understanding, the firm will be bound: *Barcroft v. Haworth*, 29-462.

Fraud or mistake: As to how far fraud or mistake can be relied upon to defeat a contract duly signed, see *infra*, V.

By agent: As to execution of a contract by an agent and how far the same is binding, either upon the agent or the principal, see AGENCY, III, a.

12. Official capacity; personal liability: The general rule is that the language of the body of the instrument controls, and if that imports a personal obligation it will be held to be such, notwithstanding the signers have attached to their names some official designation: and where the contract was one which the signers had no right to execute in their official capacity, and which, in the body of it, appeared to be executed in their individual capacity, held, that they were individually bound: *Revolving Scraper Co. v. Tuttle*, 61-423.

13. Persons assuming to bind a corporation by covenants made by them in its name become personally liable if there is no corporation to be bound: *Allen v. Pegram*, 16-163.

14. Where a constable contracted for the board of a prisoner, with the express agreement that the other party should look to the county for his compensation, held, that he did not become personally liable: *White v. Jones*, 67-241.

And see AGENCY, §§ 98-125, and SCHOOLS, §§ 78-81.

b. Date.

15. Presumption: As between the parties to an instrument, the date thereof raises a legal presumption of the time of its execution, but as to persons not parties no such presumption arises: *Meldrum v. Clark*, Mor., 130.

c. Certainty of terms.

16. Power to make certain: Where a contract provided for the making of certain improvements in accordance with specifications to be furnished by the other party, held, that as the latter had it in his power to render the contract certain, he could not object to it for uncertainty: *Audubon County v. American Emigrant Co.*, 40-460.

17. Where the vendee of land agreed that in case he sold the same for more than the purchase price, and a reasonable amount in addition thereto, he would pay vendor one-half

Delivery.—Mutuality and assent.

of the excess, it being contemplated that the land might prove to be coal land and worth much more than the purchase price, *held*, that such contract was not void for uncertainty: *Miller v. Kendig*, 55-174.

d. *Delivery.*

18. By third person: Where a contract was executed and placed in the hands of a third party to be delivered over upon the performance of conditions, *held*, that such third party had authority to make final delivery without direction from the party to the contract: *Burlington, C. R. & M. R. Co. v. Palmer*, 42-222.

19. Unauthorized delivery; railway subscription: Where it was provided in a subscription of stock to a railway company that the subscription should be turned over to the company and become binding upon the subscribers when a committee named therein should be satisfied that the road had been completed as therein specified, *held*, that a delivery of the subscription without the performance of the conditions required was unauthorized and did not bind the subscribers: *Davenport & St. P. R. Co. v. O'Connor*, 40-477.

20. Delivery after rescission: Where a contract was executed coupled with conditions, such conditions not being performed, and the party to the contract notified the person holding it for delivery that he would not be further bound thereby, and it was afterward delivered to the other party, who had notice of the refusal of the first party to be bound, *held*, that the contract could not be enforced: *Hastings & A. R. Co. v. Miles*, 56-447.

III. MUTUALITY AND ASSENT.

a. *Mutuality.*

21. Essential: Mutuality of obligation is essential to the validity of a contract: *Usher v. Livermore*, 2-117.

22. Unilateral: While it is competent for parties to make a unilateral contract, the intention to do so must be clear and satisfactory to warrant such a construction: *Flanders v. Merrill*, 38-583; *Nowlin v. Pyne*, 40-166.

23. Therefore, *held*, that an agreement to convey, upon payment of specified purchase

money to the other party, was sufficient in a particular case to bind the purchaser: *Flanders v. Merrill*, 38-583.

24. The fact that a contract recognizes a possibility of failure to perform on the part of one of the parties will not show conclusively that the contract was not intended to be binding upon such party: *Nowlin v. Pyne*, 40-166.

25. Courts will not give a unilateral construction to contracts, unless their terms clearly and beyond question show that such was the intention of the parties: *Barrett v. Dean*, 21-423.

26. Privilege to purchase: A contract in a lease of land to sell the undivided half of the premises, in case the lessee shall conclude to purchase at a certain time named, and at a price fixed, is not necessarily wanting in mutuality: *Crawford v. Paine*, 19-172.

27. Agreement to purchase of third party: A contract between A. and B., by which the former agrees to purchase land of C. and pay C. therefor, cannot be enforced by him, there being no consideration moving from A. to B., and C. not being a party nor bound: *Phillips v. Van Schaick*, 87-229.

b. *Assent.*

28. Wanting as to one particular: Where one of the parties named in a contract, when it was presented to him for signature, made a memorandum thereon in pencil, indicating that in one respect the contract was wrong, and then signed it, *held*, that there was no assent on his part, and that the contract was not binding, although the other party misunderstood such memorandum: *Richards v. Burden*, 59-723, 736.

29. Illegal condition: Where parties to a contract do not agree as to one of the conditions thereof, the contract is not binding, even though the condition as to which they disagree would be illegal if incorporated therein: *Steel v. Miller*, 40-402.

30. Assent to entire proposition: While an offer by one party, assented to by the other, will generally constitute a contract, the assent must comprehend the whole of the proposition. It must be exactly equal to its extent and terms and must not qualify it by any new matter. A proposal to accept, or acceptance of an offer on terms varying from

Assent.

those proposed, amounts to a rejection of the offer: *Baker v. Johnson County*, 37-186.

31. Proposition and acceptance: An acceptance in order to bind the parties must be unequivocal and unambiguous. Its language should be such as to leave no avenue of escape for the party using it from the obligation of the contract based upon such proposition and acceptance: *Goodenow v. Barnes*, 40-561.

32. Time for acceptance: Where an offer is made without limitation as to time, it will be considered a continuing one, and good for at least a reasonable time unless withdrawn: *Judd v. Day*, 50-247.

33. Withdrawal of proposition: Where a memorandum of pieces of goods was furnished marked "good for spring orders," and goods were furnished thereunder, *held*, that the memorandum was but a continuing offer, binding upon the party only so far as acted upon by the other party, and which might be withdrawn at any time without liability in damages for failure to fill further orders after giving notice of such withdrawal: *Reis v. McConnel*, 60-468.

34. Parol acceptance: Where an offer is made in writing, and the party to whom it is made directs a third person as his agent to obtain better terms if possible, and if not, to accept the offer, and the offer is then accepted in parol, the contract is to be regarded as oral and not written: *Hulbert v. Atherton*, 59-91.

And see *infra*, § 55.

35. Concurrent assent: Although consent of the parties is necessary, it is not essential that their wills should concur at the same instant of time. If the assent of the party receiving a proposition is declared before the will of the party making it is revoked, the presumption is, unless the contrary appears, that the will of the latter continues and the contract becomes complete: *Moore v. Pierson*, 6-279.

36. Contracts by mail; acceptance by letter: When an offer by letter is accepted, the contract is complete, provided the party making the offer is alive at the time of such acceptance: *Ibid*.

37. When a proposal is accepted by letter, the contract is deemed to become complete when the letter is mailed, provided the offer

is standing and the acceptance is made within a reasonable time: *Ferrier v. Storer*, 63-484.

38. When a negotiation is carried on by letter, the party to whom an offer is made is held to have accepted or rejected it from the time his answer is deposited in the mail: *Hunt v. Higman*, 70—.

39. Acceptance after the time limited, or in the absence of express limitation, after the lapse of a reasonable time, does not impose upon the person making the offer any obligation, and he is not bound by the acceptance, although he fails to notify the acceptor that the acceptance is too late: *Ibid*.

40. The burden of proving that the letter of acceptance was mailed within a reasonable time is upon the party seeking to establish the contract: *Ibid*.

41. Answer must correspond to proposition: To constitute a contract by correspondence one letter must contain a definite proposition and the answer must be an unqualified acceptance: *Baxter v. Bishop*, 65-582.

42. An offer is not accepted when the reply contains a qualification: *Clay v. Ricketts*, 66-362.

43. Certain matters contained in a letter making a proposition, *held* not to constitute a condition upon which the proposition was made, and therefore not necessary to be assented to by the party accepting: *Ferrier v. Storer*, 63-484.

44. In a particular case, *held*, that letters between the parties were not sufficient to constitute a proposition on one hand, and an acceptance on the other, for the reason that the proposition did not clearly appear and the acceptance did not conform to the terms of the proposition: *Knight v. Cooley*, 34-218.

45. Evidence, consisting of letters considered, and *held* not to amount to an acceptance of a proposition: *Crane v. Gritton*, 54-738.

46. Receipt of acceptance must be shown: It is not sufficient proof of a contract to show an acceptance of a proposition addressed to the party making it by the party to whom it was made, through the postoffice, without evidence of its receipt by the party to whom it is sent: *Compton v. Comer*, 4-577.

47. The place of contract is where the offer is made; and where an offer of sale is made,

Assent.—Acceptance.—Advertisements and rewards.

the payment of money by the opposite party in accordance with the proposition should be at that place unless otherwise specified: *Sawyer v. Brossart*, 67-678.

48. **Compliance with proposition:** While there can be no contract without the consent of the parties, it is not necessary that their wills should concur at the same instant. If A. promises B. to pay him a certain sum of money if he will do a particular act, and B. does the act, the contract becomes binding although B. at the time of the promise does not engage to do it: *Goodpaster v. Porter*, 11-161.

49. Upon the performance of the condition by the promisee the contract is clothed with a valid consideration which relates back, and the promise at once becomes obligatory: *Des Moines Valley R. Co. v. Graff*, 27-99.

50. A mere voluntary compliance with the terms of a proposed contract which has never been completed does not render it obligatory upon the other party: *Overman v. Kerr*, 17-485.

51. Where a step-mother agreed that if her step-daughter would remain unmarried, and live with her and assist her in caring for her property, she would convey such property to such step-daughter, and the latter did remain and perform the services contemplated, *held*, that an acceptance of the terms of the contract might be inferred from the rendering of the services: *Franklin v. Tuckerman*, 68-572.

c. *Acceptance without signature.*

52. **Acceptance of written contract:** Where a contract is signed by one party and delivered to and acted upon by the other, the latter may maintain an action thereon although it is not signed by him: *Dows v. Morse*, 62-231.

53. Where one party accepts and adopts as binding upon him a written contract signed by the other party thereto, and acts upon it, he becomes bound thereby to the same extent as if he had put his name to it: *Attiz v. Pelan*, 5-336.

Vendee may be bound by a contract to convey executed by the vendor and accepted by the vendee, although the latter does not sign it: See VENDORS. §§ 204, 205.

54. **Mere verbal consent to the making of a written contract by another, which does not purport to bind the person thus consenting, will not make him a party thereto:** *Mitchell v. McHenry*, 62-352.

55. **Oral contract:** If the party thus consenting verbally agrees to be bound by such contract, it will be an oral and not a written contract as to him: *Ibid*.

And see *supra*, § 84.

d. *Public advertisements, rewards, bids, bounty.*

56. **Representations in public advertisements:** Where a bank had induced the public to receive bank bills of another institution by representations in its public advertisements as to the solvency of such institution, and such bills had subsequently become worthless, *held*, that the bank inducing their acceptance was liable on its representations to every individual who saw the advertisement, or heard their representations, and acted thereon: *Tarbell v. Stevens*, 7-163.

57. **Reward for arrest of criminal or recovery of money:** A city cannot legally offer a reward for the arrest and conviction of a criminal: *Hanger v. Des Moines*, 52-193.

58. Neither can a county offer such reward; but it may offer a reward for the recovery of stolen property: *Hawk v. Marion County*, 48-472.

59. Where a person in another state acts upon the promise made by a board of supervisors in Iowa to pay a reward for the arrest and conviction of persons who have robbed the county treasury, he is bound to know the fact that the board has no power to offer such reward. In such case the members of the board will not be individually liable: *Huthsing v. Bosquet*, 3 McCrary, 569.

60. Under the statutory provision (Code, § 4172) that no compensation, fee, or reward can be paid to or received by a public officer of the state for services rendered or expense incurred in procuring a demand for a fugitive from justice, or the surrender of such fugitive from justice, etc., *held*, that a deputy sheriff who had, under contract with the surety on the bail bond of the escaped criminal, ascertained the whereabouts of such criminal and brought him back under requisi-

Ratification.

tion, could not recover from such surety the sum stipulated in the contract: *Day v. Townsend*, 70—.

61. If the reward for the recovery of the money is independent of that for the arrest and conviction of the criminal, it may be recovered although the latter cannot be: *Hawk v. Marion County*, 48-472.

62. Where a reward was offered by a county for the recovery of money, *held*, that a person giving information leading to the recovery of a portion of the money was entitled to a *pro rata* share of the reward: *Ibid.*

63. Peace officers acting under process in arresting a criminal are not entitled to a reward offered for such arrest unless the terms of the reward offered clearly include them: *Means v. Hendershott*, 24-78.

64. Bid: Where the right to reject any and all bids is reserved in a proposal made according to law by the board of directors of a school district to let a contract to the highest bidder, the action of the board in awarding the contract cannot be controlled by an action of *mandamus* at the suit of a bidder claiming to be entitled to the awarding of the contract: *Hanlin v. Independent Dist.*, 66-69.

65. Bounty: One who volunteers before the offer of a bounty is not entitled to the bounty offered although he believed at the time of volunteering that the bounty had already been offered: *Wells v. Scott County*, 36-141.

e. Ratification.

66. Estoppel: Where the parties to a contract mutually recognize it as binding upon them by performing its conditions, as well as by temporary modifications of its terms asked by one party and granted by the other, such acts are sufficient to estop both from setting up want of obligation upon either: *Richmond v. Dubuque & S. C. R. Co.*, 33-422, 491.

See further, ESTOPPEL.

67. Ratification of understanding: Where, in a negotiation between parties, one of them acts under his understanding, although an erroneous one, and the other accepts such understanding and proceeds in accordance therewith, he thereby ratifies the contract as understood by the other party: *Hayes v. Steele*, 82-44.

68. Ratification of act done under duress: If the maker of a note procured by duress afterward accepts the surrender of a prior valid note for the same indebtedness, which prior note is then canceled on the strength of the execution of the second note, he thereby ratifies and confirms the note executed under duress and it becomes binding: *Barile v. Breniger*, 87-139.

69. Ratification of unauthorized acts of agent: The ratification of an unauthorized act of an agent will bind the principal to the same extent as though the agent had had authority: *Berryhill v. Jones*, 85-385.

70. Such a ratification relates back in legal effect to the time when the contract was made: *Herriott v. Kersey*, 69-111.

71. Ratification in part: The principal cannot, of his own mere authority, without consent of the other party, ratify a transaction by his agent in part and repudiate it as to the rest. He must either adopt the whole or none. Therefore, where a ratification is established as to a part, it operates as a confirmation of the whole as to that particular transaction of the agent: *Krider v. Trustees of Western College*, 81-547.

Further as to ratification of unauthorized acts of agent or officer, see AGENCY, V; and MUNICIPAL CORPORATIONS, §§ 62-65 and 834-836.

As to ratification of contract as to purchase of land, see VENDORS, §§ 6, 7.

72. Ratification of change of contract: Where a party without authority assumes to change or release a contract obligation in behalf of another, such change will not be binding upon the person in whose behalf it is made unless acquiesced in by him: *Doyle v. Rutledge*, 22-552.

73. The burden of proof will be on the party relying on such change to show that the party to be bound thereby was made acquainted with the new arrangements and assented thereto: *Ibid.*

74. Partial payment: Where a school board paid to a teacher a sum of money claimed for services rendered under a contract, but at the same time repudiated the contract, *held*, that the payment did not amount to a ratification as to the balance of the contract: *Herrington v. District T'p*, 47-11.

Implied.—Acceptance of services.

IV. IMPLIED CONTRACTS.

a. Acceptance of services.

75. **Voluntary service not accepted:** The performance of labor for another without privity or request, with no voluntary acceptance of the labor shown, affords no cause of action, however meritorious or beneficial it may have been to the party for whom it was performed: *Hathaway v. Winneshiek County*, 30-596.

76. **Promise implied from request or acceptance of services; quantum meruit:** Where one performs services for another at his request or with his consent, without any agreement or understanding as to wages or remuneration, the law implies a promise to pay the reasonable value of the services, and the same may be recovered upon a *quantum meruit*: *Rea v. Flathers*, 81-545.

77. Where a party knowingly and without objection permits another to render services for him of any kind whatever, the law implies a promise to pay what the same are reasonably worth: *Shelton v. Johnson*, 40-84.

78. **Gratuitous services; agreement to repay:** Where one renders services for another gratuitously, and with no expectation of being paid, there is no moral obligation incurred which will support a subsequent promise to pay. Under such circumstances no obligation, either legal or moral, is incurred: *Allen v. Bryson*, 67-591.

79. **Services of member of family:** Ordinarily the law implies a promise to pay for services rendered which are known and accepted; but where the person rendering the service is a member of the family of the person served and receiving support therein, either as child, relative or visitor, the law presumes such services to be gratuitous, and before compensation can be recovered in such cases it must be shown that there was an express promise or a mutual expectation that compensation should be made: *Scully v. Scully*, 28-548; *Harper v. Kissick*, 52-733; *Keegan v. Mulone's Estate*, 62-208.

80. Where plaintiff rendered services as a member of the family of decedent, in the character of a friend, dependent, or protégé, without express contract for payment, or mutual expectation of payment, *held*, that

he could not recover for such services from decedent's estate: *Smith v. Johnson*, 45-308.

81. Services rendered by a daughter, who has attained majority but has continued to live with her parents as a member of the family, do not give rise to a promise to pay any consideration for such services, and if such services are rendered without any express promise by the father to pay for them, his subsequent agreement to pay would not be supported by any legal consideration: *Chadwick v. Devore*, 69-637.

82. Where a son, a widower, took up his abode with his parents, who were old and infirm, and carried on the farm on which they lived, receiving his support therefrom, *held*, that the law did not raise an implied contract for compensation for the services rendered: *Wilson v. Wilson*, 52-44.

83. **Support furnished to member of family** does not give rise to an implied contract to pay for the same in the absence of an agreement or understanding that such support should be paid for; but in a particular case, *held*, that an agreement to pay for such support before it was furnished was sufficiently shown: *Van Sandt v. Cramer*, 60-424.

84. Where plaintiff's mother-in-law, being infirm, requested plaintiff to take care of her, which he did, she being bed-ridden and not rendering any service in return, and expressing her purpose to pay for such services, *held*, that she was not a member of his family, and the circumstances would raise an implied contract on which plaintiff could recover for such services: *Wence v. Wykoff*, 52-644.

85. Where defendant lived with plaintiff, his son-in-law, who was in his employ, and occupied a house belonging to defendant, *held*, that the circumstances were not such as to defeat plaintiff's recovery for defendant's board: *Rogers v. Millard*, 44-466.

86. **Physician's services; quantum meruit:** Where a consulting physician was called by the physician in the case, and rendered services to the patient without notice of an agreement between the attending physician and the patient that such services were to be paid for by the attending physician, *held*, that the patient was liable to the consulting physician upon an implied contract: *Shelton v. Johnson*, 40-84.

Acceptance of services.

87. A physician suing for the value of services rendered has not the burden of proving, when lack of skill and care in the treatment is pleaded as defense, that in such treatment he exercised proper skill and care, but the burden of proving such defense rests upon defendant: *Robinson v. Campbell*, 47-625.

88. The circumstances of a party for whom professional services are rendered by a physician do not constitute an element in fixing the value of such services: *Ibid.*

89. Services of attorney: Where one of several co-defendants employed an attorney to act for all, and such attorney rendered services with the knowledge of other co-defendants without any knowledge on the part of the attorney of a special arrangement between the defendants as to who should be liable for his compensation, *held*, that the attorney might recover for such services from one of the co-defendants, notwithstanding a special agreement with him by the defendant by whom he was employed that the one employing him should bear all the expenses: *McCrory v. Ruddick*, 38-521.

90. Architect's plans furnished at request: Where a committee of the board of directors of a school district instructed an architect to prepare plans to be submitted to the board, the committee not having authority to finally adopt plans, and the architect performed services in the preparation of plans, which were afterward not adopted, *held*, that he might thereby become entitled to compensation from the school district for the expense of preparing such plans: *Driscoll v. Independent School Dist.*, 61-426.

91. Recovering back money paid: Money voluntarily paid cannot be recovered back: *Bailey v. Paullina*, 69-463.

92. Where money has been paid upon an executory agreement which is free from moral turpitude and not prohibited by positive law, but is invalid by reason of the legal incapacity of the party thereto, otherwise capable of contracting, to enter into that particular agreement, the money so paid may, so long as the agreement remains executory, be recovered back by the party paying it, in an action for money had and received: *Jefferson County v. Burlington & M. R. R. Co.*, 66-385, 400.

93. Payment of debt by stranger: Where a person not a party to a note, in the presence of the maker, requested a third person to pay it, and such third person did pay it and hand it to the maker, telling him to pay him the amount of the note some time, *held*, that the request in the presence of the maker without his objection, and his acceptance of the note, raised an implied promise to repay the person who paid it: *Bruguier v. Goewey*, 39-190.

94. Board furnished decedent: In a particular case, *held*, that a claim for board and other services rendered to a decedent during ten years preceding his death, without proof of special contract therefor, it being shown that the services were rendered and no payment received, and it not appearing that they were intended as a gratuity, should be allowed: *Moser v. Crooks*, 32-172.

95. Support of child: In the absence of proof of an agreement to the contrary, the law implies liability on the part of a parent for the support of his child, furnished upon request of such parent: *Carroll v. McCoy*, 40-38.

96. Where, by agreement between plaintiff and defendant, the former had for eight years cared for and supported the child of the latter under an agreement that such care and support should be without charge in consideration of the society and services of the child, and had at the end of that time surrendered the child without objection or claim for compensation, *held*, that an action for compensation for such care and support could not afterward be maintained, although there was evidence tending to show that the original contract provided that plaintiff should have the custody of the child for a longer time: *Young v. Heater*, 68-668.

97. Compensation for wrong done: Whenever a party has derived a pecuniary advantage from a wrong done by him, and it is competent for the party suing thereon to waive the tort and maintain an action upon the promise implied by law, there the obligation to pay is a debt, and this regardless of the form of action in which that obligation is sought to be enforced; but where a wrong is done resulting in no pecuniary advantage to the wrong-doer, and where the action must be in tort, and sound only in

Services beyond, or under abandoned or broken.

damages, there the obligation to pay is not a debt until ascertained by judgment: *Warner v. Cammack*, 37-642.

98. Burden of proof: An implied as well as an express contract should be established by proof in order to authorize recovery thereon, and the burden of proof rests upon the party seeking to establish such contract: *Richardson v. Hoyt*, 60-68.

b. Services beyond contract, or under abandoned or broken contract.

99. Extra services under contract: Where a contractor excavating streets under contract was required by the city, and proceeded under protest, to excavate to a greater depth than was properly contemplated by his contract, and such excavation was more expensive than that contemplated by the contract, *held*, that as to the extra labor involved the contractor was entitled to recover the reasonable value of such labor in addition to the compensation under his contract: *Slusser v. Burlington*, 47-800.

100. But where the terms of the contract involved the removal of material claimed not to have been contemplated by the parties, and to be more expensive than that contemplated, *held*, that the contractor could not recover extra compensation therefor after having performed the work under an agreement with the improvement committee that he should present a claim to the city council for extra compensation: *Slusser v. Burlington*, 42-378.

101. Where a person employed by the week as a man of all work rendered regular service on alternate nights and also upon Sundays in nursing his employer during sickness, and received his regular wages by the week, and also an extra compensation for his services on Sunday, *held*, that a verdict in his favor for extra compensation for his services at night would not be disturbed: *Wilford v. Devin*, 43-559.

102. Extra services of county officer: An implied contract to pay the value of services rendered and accepted does not arise in case of services performed by a county officer for the county, for which no compensation is fixed by law: *Jefferson County v. Wollard*, 1 G. Gr., 430.

103. Acceptance without authority: Restrictions being imposed upon boards of supervisors as to the extent to which they may render the county liable on a contract for the erection of public buildings, the county will not be held liable on *quantum meruit*, upon an implied contract for services rendered or material furnished in the construction of such a building beyond the terms of the contract; and the fact that the building is accepted and used by the county will not make it liable where such acceptance has in no way influenced the act of the other party in making such additional expenditure: *Reichard v. Warren County*, 31-381.

104. Services under abandoned contract; quantum meruit: If a man contracts to work by a certain plan, and that plan be entirely abandoned, so that it is impossible to trace the contract and say to which part of the work it shall be applied, the workman will be permitted to charge for the whole work done by measure and value, as if no such contract had been made; but if the contract can be applied to the work performed it should regulate the charge therefor: *Hummer v. Lockwood*, 3 G. Gr., 90.

105. In a particular case, *held*, that the facts tending to show an abandonment of the contract were insufficient, and there was nothing to justify an instruction looking toward an entire rejection of the contract, so as to allow a recovery without reference to it, and without being bound by it, as far as the work therein provided for had not been changed: *Mather v. Butler County*, 28-253.

106. Where a written contract has been abandoned, a reasonable compensation may be recovered for services rendered: *McAfferty v. Hale*, 24-355.

107. Terms of the contract as regulating compensation: Where by mutual consent there is a material departure from the contract, the party performing services may introduce the contract in evidence to regulate the amount of recovery although the alteration precludes his recovery upon the contract itself: *Stewart v. Cruig*, 3 G. Gr., 505.

108. Where it appeared, in an action for work done, that the work was commenced under a written contract, *held* not error for which the judgment should be reversed that plaintiff was required to produce the contract

 Fraud, mistake, etc., as affecting assent.

and offer it in evidence, though the action was brought on the common counts and the contract ignored by the plaintiff: *Mather v. Butler County*, 28-253.

109. If, by the acts of the other party, the person performing labor under a contract is prevented from completing it, he will be entitled to recover for the labor done in proportion to the stipulated price of the whole job: *McCausland v. Cresap*, 3 G. Gr., 161.

110. If the departure from the original plan is directed or assented to by the person for whom the service is to be performed, such person cannot set off, as against the demand for compensation, any claim for damages resulting from the alteration, nor for delay caused thereby: *Ibid*.

111. Under a *quantum meruit* count, the plaintiff may recover for work done and material furnished under a special contract, where the contract has been abandoned or has been fully performed on his part, and the purpose of the action is to recover the compensation unpaid. But he cannot, in an action of this form, recover for materials or work under a special contract, a compensation larger than or other than the price and value fixed in the contract, though for work done or materials furnished outside of the contract he may recover their reasonable value: *Mather v. Butler County*, 28-253.

As to recovery for part performance, see *infra*, §§ 533-546.

V. FRAUD, MISTAKE, UNDUE INFLUENCE AND DURESS AS AFFECTING ASSENT.

112. Fraud in procuring signature is not to be presumed from testimony of the party that he did not sign the contract, the genuineness of the signature being established: *Jack v. Brown*, 60-271.

113. Where the signatures of directors of a school district as individuals to an order for school books for the use of the district, conditioned that it should be binding whenever signed by a majority of such directors, were procured through the representation that the president of the board had agreed to sign the contract, which representation was false, held, that such false representation would constitute fraud vitiating the contract as to the parties whose signatures were procured thereby: *Mills v. Collins*, 67-164.

114. Where the ratification of a contract by the electors of the county was obtained by fraudulent means, held, that a court of equity would not lend its aid in enforcing it: *Palo Alto County v. Harrison*, 68-81.

115. Failure to read; negligence: The fact that a party signs a paper without reading it, supposing its conditions to be other than they are, constitutes such negligence as to debar him of any relief therefrom in equity: *Glenn v. Statler*, 42-107.

116. A party who has signed a written contract cannot be permitted to allege that he was not aware of its contents. The failure to take ordinary precautions to advise himself of the contents of the instrument will constitute negligence: *McKinney v. Herrick*, 66-414.

117. Where a party, having capacity to read an instrument, signs it without reading and without requesting it to be read, if no device is used to put him off his guard, he is bound by it: *Gullihier v. Chicago, R. I. & P. R. Co.*, 59-416.

And see **BILLS AND NOTES**, § 425.

118. False representations: A party who signs a written contract without reading it, and shows no excuse for relying upon the representations of the opposite party as to its contents, cannot escape liability thereon by showing that such representations were false: *McCormack v. Molburg*, 43-561.

119. A party having ability and opportunity to read an instrument signed by him cannot claim that his signature thereto is procured by fraud, if he affixes such signature without reading or becoming aware of the contents of the instrument signed: *Wallace v. Chicago, St. P., M. & O. R. Co.*, 67-547.

And see **EQUITY**, §§ 137, 138.

120. Evidence of oral representations or inducements, either preceding or contemporaneous with the written contract, cannot be received unless such representations or inducements amount to fraud avoiding the contract: *McKinney v. Herrick*, 66-414.

121. The false representations of one of several persons associated together as parties to a contract on the one part cannot defeat the rights of the other associates under such contract, when made without their authority or without notice to them: *Paddock v. Bartlett*, 68-16.

Fraud, mistake, etc., as affecting assent.

122. Where a party signs a written contract with knowledge of its contents and without being misled or deceived with reference thereto, but under the verbal understanding that it shall not be the measure of the liability between the parties, but shall only be used by one of the parties for the purpose of misrepresenting to third persons what the contract is, the party so signing cannot be relieved therefrom on the ground of fraud: *Hutton v. Maines*, 68-650.

123. The fact that a party signs a paper under a mistaken belief as to his liability does not constitute fraud relieving him from such contract where the mistake is not produced in any manner by the opposite party: *Jarosh v. Easton*, 57-569.

124. Fraud and misrepresentation in the making of a written instrument constitute a good defense to an action at law upon it where they relate to facts material to the interests of the party, and especially where the party relies upon the other party for truthful information as to the facts upon which the contract depends: *Hunt v. Carr*, 3 G. Gr., 581.

125. False representations made in procuring a subscription in aid of a railway, held to be sufficient to invalidate such subscription: *Davis v. Dumont*, 37-47.

126. False and fraudulent representations as to the subject-matter of a contract relied upon by the other party, which operate as an inducement thereto, will defeat recovery by the guilty party even though the fraud was perpetrated prior to the execution of the contract: *Nixon v. Carson*, 38-338.

127. Parol evidence is admissible for the purpose of establishing such representation: *Ibid.*

Fraud and false representations as a defense, see FRAUD.

128. Prior letters: A letter from plaintiff to defendant, written prior to the making of the contract sued on, in which plaintiff represented that it had not made any proposition or arrangement to sell its machines to a certain society doing business within the proposed territory of defendant, when in fact it had made such an arrangement, held admissible, not for the purpose of varying the contract, but as showing false and fraudulent representations of existing conditions:

Wilson Sewing Machine Co. v. Sloan, 50-367.

129. Contract procured by fraud of co-maker: Where a suit against joint defendants was compromised by them by the execution of a note, and in an action upon such note against one of them it appeared that at the time of such execution of the note there was an arrangement between the creditor and the other joint maker, by which the latter was to induce his co-maker to agree to the compromise, and was to be himself released from any liability thereunder, held, that the agreement between the creditor and the co-maker constituted a fraud upon the other maker such as to defeat recovery upon the note: *Mitchell v. Donahey*, 62-376.

130. Party knowing the facts cannot complain: A party who ascertains the facts for himself, or to whom the facts become known before he acts thereon, cannot complain of false representations made with reference thereto by the adverse party: *Burlington, C. R. & M. R. Co. v. Palmer*, 42-222.

131. Mental weakness: It is proper to instruct the jury to consider the mental weakness, or partial or total want of capacity to contract, of a contracting party, and if the want of capacity is even partial, to allow the jury to consider that fact in connection with representations made, if any, for the purpose of determining whether the party was induced to enter into the contract by fraud: *Galpin v. Wilson*, 40-90.

132. A very modified degree of mental incapacity will be sufficient to invalidate a transaction if it is accompanied with imposition or any over-exercise of authority: *Corbit v. Smith*, 7-60.

Further as to mental weakness, see *infra*, VI. b.

133. Mistake of law: Mistake of a party as to the legal effect of a contract entered into by him, where he knows its language and intentionally signs it, will not release him from its enforcement as entered into: *Moorman v. Collier*, 32-138.

134. So where a party knew the terms of a bond which he was signing, and through a mistake of law did not understand the effect of the instrument, held, that he was not entitled to equitable relief therefrom: *Glenn v. Statler*, 42-107.

 Fraud, mistake, etc., as affecting assent.—Capacity of parties.

135. Mutual mistake of fact; defense: Where a material mutual mistake is made by parties in respect to the subject-matter of a contract, the result is that, in contemplation of law, there is no contract. The minds of the parties do not meet. If action be brought on such contract, it is competent for defendant to deny its existence, and in support of the denial he may allege and prove the mistake. Such a defense may be made in an action at law and is not equitable in its nature. But if defendant desires the cancellation of the contract on account of such fraud, or that it shall be reformed in order to express the true agreement of the parties, his relief is to be had by a cross-action and will be equitable in its nature: *Carey v. Gunnison*, 65-702.

136. Mistake of fact: A contract, in a particular case, for the conveyance and transfer of swamp lands and swamp land indemnity by the county to the defendant, *held*, voidable by the county as having been made under mistake of fact, the county not having been aware of the fact, known to the other party at the time, that a large amount of swamp land indemnity had already been allowed to the county: *Montgomery County v. American Emigrant Co.*, 47-91.

Further as to mistake, see EQUITY, §§ 129-138.

137. Undue influence: A contract between a devisee under a will and her brother, who was not recognized in the will, by which, in consideration of his assisting her to secure her share, which was in controversy, she agreed that he should have a share in the estate, *held* not to have been procured by undue influence or fraud: *Adams v. Adams*, 70—.

Further as to undue influence, see CONVEYANCES, §§ 36-42.

138. Guardian and ward: Undue influence on the part of a guardian in contracting with his ward, even after the termination of the guardianship, *held* sufficient to vitiate the contract: *Tucke v. Buchholz*, 43-415.

139. Duress is the actual or threatened violence or restraint of a man's person contrary to law to compel him to enter into a contract or discharge one: *King v. Williams*, 65-167.

140. The fact that money is paid in satis-

faction of a fine, while the party making payment is under arrest, will not be sufficient to show that such payment was under duress: *Bailey v. Paullina*, 69-463.

141. Threats: In order that duress by threats shall avoid the contract, it must appear that it was wholly in consequence of such threats that the contract was made: *Barker v. Brown*, 15-70.

142. Effect: Duress, like fraud, does not make the contract void, only voidable. Therefore it is no defense to a negotiable note in the hands of a *bona fide* holder, acquiring the same before maturity and for a valuable consideration without notice: *Veach v. Thompson*, 15-380.

143. Who may take advantage of: While it may be that the privilege of avoiding a contract on account of duress is personal, and that no one can take advantage of it but the party himself, yet where one person suffers damage by reason of duress inflicted upon another, the person receiving the damage may recover therefor: *Koehler v. Wilson*, 40-183.

144. Facts considered and held not to amount to technical duress at law, but to indicate such imposition and undue advantage as would justify a court of equity in refusing specific enforcement of the contract: *Richardson v. Barrick*, 16-407.

Further as to duress, see MORTGAGES, §§ 5, 6; and CONVEYANCES, §§ 43-45.

VI. CAPACITY OF PARTIES.

a. Infancy.

145. Contract void or voidable: The rule respecting the contract of an infant is, that when the court can pronounce it to be to the infant's prejudice, it is void, and when to his benefit, as for necessities, it is good, and when of uncertain nature, it is voidable at the election of the infant only: *Green v. Wilding*, 59-679.

146. Disaffirmance: At common law the general rule was that the minor was not bound unless by some act he had positively affirmed the contract, but under the statute a disaffirmance within a reasonable time is necessary to release him from obligation. (Code, § 2238): *Wright v. Germain*, 21-535; *Murphy v. Johnson*, 45-57.

Infancy.—Insanity and mental weakness.

147. What will be a reasonable time within which to disaffirm must be determined by the peculiar circumstances of each case: *Stout v. Merrill*, 35-47.

148. As to what is a "reasonable time," see *Jenkins v. Jenkins*, 12-195; *Wright v. Germain*, 21-585; *Weaver v. Carpenter*, 42-343; *Hoover v. Kinsey Plow Co.*, 55-668.

149. Disaffirmance by an action brought three or four years after plaintiff, a female, attained her majority, the only excuse offered for the delay being that she was informed by her mother and neighbors that she could not disaffirm the contract until her minor brother became of age, *held*, not within a reasonable time, especially in view of the further facts that she did not ask legal advice, and delayed at least three months after she was informed that she could disaffirm the contract before bringing action: *Green v. Wilding*, 59-679.

150. In case of the marriage of the minor, a reasonable time for disaffirmance commences to run from the time of such marriage: *Jones v. Jones*, 46-466.

151. The right of an infant to avoid his contracts is absolute and paramount to all equities in favor of third persons, even purchasers without notice: *Jenkins v. Jenkins*, 12-195.

152. The restoration of the fruits of the contract is essential to the disaffirmance thereof: *Stout v. Merrill*, 35-47.

153. Yet the minor is only bound to restore money or property received by virtue of the contract remaining under his control after attaining majority: *Jenkins v. Jenkins*, 12-195.

154. The statute makes no distinction as between property and money remaining under the control of the minor. He may disaffirm without tendering back either property or money under his control unless it is the identical property or money received by him by virtue of the contract: *Hawes v. Burlington, C. R. & N. R. Co.*, 64-315.

155. The agreement of an infant for the repayment of money of which he has had and retains the benefit, not having been disaffirmed within a reasonable time after attaining majority, is binding: *Stucker v. Foder*, 33-177.

156. The minor may disaffirm his contract before attaining majority. (Overruling

Murphy v. Johnson, 45-57); *Childs v. Dobbins*, 55-205.

157. A minor doing business as an adult, and thus misleading others as to his minority, cannot disaffirm a contract thus made. The statute expressly excepts such contracts from the provisions as to disaffirmance. (Code, § 2239): *Oswald v. Broderick*, 1-380.

158. The fact that an infant is engaged in business as an adult does not make his contracts binding unless the party with whom he contracts is thereby deceived and believes that he is of age. If the fact of minority is known to the other party, the minor is not bound: *Beller v. Marchant*, 30-350.

159. The exception here made as to the power of a minor to disaffirm his contracts by reason of his having engaged in business as an adult does not depend upon the extent of his interest or the manner of his connection with the business: *Jaques v. Sax*, 39-367.

160. Therefore, *held*, that a minor who was a member of a partnership, but without capital invested, and rendering his services only, as his contribution to the capital of the firm, was still to be considered as engaged in business as an adult: *Ibid*.

161. The fact that the minor is thus engaged in business as an adult is evidence upon which one dealing with him is authorized to conclude that he is an adult. It is immaterial whether the contract upon which it is thus sought to hold the minor is one relating to the business in which he is engaged or not: *Ibid*.

162. Personal services: If a minor has been paid for services rendered, he cannot again recover therefor in an action by next of kin: *Murphy v. Johnson*, 45-57.

b. Insanity and mental weakness.

163. Imbecility: While mere weakness of intellect is not sufficient ground for setting aside a contract, yet if it appears that an unconscionable advantage has been taken of the imbecility of one party, and he has been led to make a very imprudent disposition of property, the contract will be held void in a court of equity, if the nature of the contract be such as to justify the conclusion that the party did not exercise deliberate judgment, but was imposed upon, circumvented

 Insanity and mental weakness.—Intoxication.

or overcome by cunning or artifice, or undue influence: *Harris v. Wamsley*, 41-871.

164. Insane persons: Persons of unsound mind will be held liable as to executed contracts, where the transaction is in the ordinary course of business, is fair and reasonable, and the mental condition was not known to the other party, and the parties cannot be put *in statu quo*: *Abbott v. Creal*, 56-175; *Behrens v. McKenzie*, 23-833; *Alexander v. Haskins*, 68-73.

165. This rule is not, however, followed by the federal courts in Iowa: *Edwards v. Davenport*, 20 Fed. Rep., 756.

166. While an insane person may be liable on a contract for necessities, or on an agreement made with a person who has no knowledge of his condition, and by which his estate is benefited, he is not bound as surety on a note given by the maker for an antecedent indebtedness to a person without knowledge of his condition, at least in the absence of any showing that credit was granted on the strength of his name: *Van Patton v. Beals*, 46-62.

167. A contract with an insane person made by one having knowledge of the insanity will not be sustained: *Alexander v. Haskins*, 68-73.

168. Where a contract has been entered into (under circumstances which would ordinarily make it binding) by a sane person with one who is insane, and that contract has been adopted and is sought to be enforced by the representatives of the latter, the insanity of such party cannot be set up as a defense by the other: *Allen v. Berryhill*, 27-584.

169. Where a person of unsound mind makes a contract which is beneficial to him, the law supplies or presumes the existence of the requisite capacity, or estops the other party to set up and sustain such an objection: *Ibid*.

170. The courts will not, in general, lend their aid to the execution of a contract, where the party sought to be affected was at the time under mental incapacity, unless it be for necessities; but if the incapacity was unknown and no advantage was taken of it, and the contract is executed so that parties cannot be put *in statu quo*, it will not be set aside. If, however, parties can be placed

in statu quo, it will make little difference whether the question arises upon an executed or an executory contract. A party who is actually at the time insane cannot bind himself civilly: *Corbit v. Smith*, 7-60.

171. Evidence; burden of proof: Where insanity is once shown to have existed, the presumption is in favor of its continued existence till the time of the contract, and the burden of proof is on the party seeking to disprove insanity; but if habitual insanity is not established, the presumption is that the party is like all human creatures, that is, rational, and the fact of a prior period of lunacy will not throw the burden of proof on the party setting up the competency: *Ibid*.

172. If no extraneous influence is exerted, the character of the action itself will go far to show the capacity of the party at the time: *Ibid*.

173. Epilepsy not of long duration is not to be considered as amounting to habitual insanity; and if insensibility or unconsciousness is not shown to have existed at the time, the presumption is that the party had sufficient capacity; but if the paroxysms have been violent and frequent in their return, and have continued any considerable length of time, incapacity to contract might result, and the jury or court might be justified in treating the epileptic as habitually insane: *Ibid*.

174. Evidence in particular cases considered, and held not sufficient to show such insanity on the part of the contracting party as to avoid his acts: *Hubbard v. Hoag*, 60-756; *Baldrick v. Garvey*, 66-14.

As to insane persons, see, also, CONVEYANCES, §§ 9-12.

Further as to evidence of insanity, see EVIDENCE, §§ 81-83, 859, 860.

c. Intoxication.

175. Degree; fraud: To authorize the setting aside of a contract on the ground of intoxication of the party, it is necessary that the drunkenness be of an excessive character; but if it appear that the drunkenness was brought about by the other party for the purpose of procuring an unconscionable advantage, and it is shown that the contract is not fair, it will be avoided for fraud: *Willcox v. Jackson*, 51-208.

Burden of proof as to capacity.—Who may sue; privity.

176. Mere moderate drunkenness will not of itself avoid a deed or contract. To have that effect the intoxication must be so excessive as to deprive the person of the consciousness of what he is doing. Such excessive drunkenness is a defense whether voluntary or procured by the other party: *Mansfield v. Watson*, 2-111.

177. But if there is a contrivance or management on the part of the other party to draw the person in to drink, and thus to take advantage of his intoxication, it may constitute a defense even where the drunkenness is less than excessive: *Ibid*.

178. Voidable, not void: In either event, such intoxication only renders the contract voidable and not void, and the party on recovering his understanding may adopt the same: *Ibid*.

179. Restitution: Whether a party seeking to evade a contract on the ground that he was incompetent to contract on account of drunkenness can be heard to complain without making restitution of the money received under the contract, *quære*: *Hawley v. Howell*, 60-79.

d. Burden of proof as to capacity.

180. It is incumbent upon a party seeking to enforce a contract against a person under disability, on the ground that it is an exceptional contract which such person has authority to make, to show that the case comes within the exception: *Rodemeyer v. Rodman*, 5-426.

Further as to burden of proof in case of disability, see *supra*, §§ 171-174.

VII. WHO MAY SUE; PRIVITY.

By assignee: That action on contract may be brought by assignee in his own name, see ASSIGNMENT, §§ 28-31; and PARTIES, II, a.

181. Capacity to enforce: If a person executes his obligation to another under an agreement that it shall be transferred to any third person who shall do certain labor, the performance of which constitutes the consideration for the agreement, he cannot question the capacity of the person receiving the obligation and doing the labor thereunder to enforce it against him, if such person could

have enforced the contract had it been made with him originally: *Courtright v. Deeds*, 87-503.

182. Privity: Privity of contract must exist between parties to an action thereon. A mere stranger to the contract cannot maintain action upon it: *Davis v. Clinton Water Works*, 54-59.

183. Therefore, where a contract existed between a city and a company agreeing to supply the city with water for the extinguishment of fire, *held*, that a property owner of the city could not maintain an action for damages against the water company for failure to supply water according to the contract with the city, by reason of which failure the property was destroyed by fire: *Ibid*.

184. The application of the doctrine of privity of contract is much less frequent under our law than it was at common law, for the reason that the statute makes nearly every kind of contract assignable, so as to permit an action in the name of the assignee: *Barron v. Easton*, 3-76.

185. A person for whose benefit a contract is made may bring action thereon although he is not a party thereto; *McHose v. Dutton*, 55-728.

186. Where A. has paid the money of B. to C., which C. promises A. to pay to the rightful owner, the law creates a privity between B. and C., and B. may have his action direct against C.: *Johnson v. Collins*, 14-63.

187. As to the consideration in such cases, it is not necessary that it should move directly from the plaintiff to support an *assumpsit*. If it moves from a third person, a stranger even, and is adopted by the plaintiff, it is sufficient: *Ibid*.

188. Action by creditor against new partner: Where an incoming partner agrees with the old partners to assume the debts of the firm, the creditors of the firm may sue upon such contract: *Poole v. Hintrager*, 60-180.

Action upon a mortgage may be brought directly against a party who has purchased the mortgaged premises and assumed payment of the mortgage: See MORTGAGES, §§ 193-204.

189. Bond for performance of contract: A bond given by a contractor for the erection

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of a building, providing for the performance of the work according to the contract, may provide for the protection of third parties who furnish material or labor in the completion of the contract, and action upon the bond may be brought by such parties: *Baker v. Bryan*, 64-561.

190. Where a contractor for a part of the work of constructing a railway agreed by his contract to pay all just claims growing out of such work, whether against him or his subcontractor, by reason of injury to lands, and for provisions and supplies, and board bills of men and teams, and gave a bond for the performance of such contract, *held*, that parties who furnished labor and material for the construction of the work under his subcontractors were entitled to bring action upon the bond: *Jordan v. Kavanaugh*, 63-152.

191. Assignee assuming performance: Upon the assignment of a contract, the assumption by the assignee of a promise for the benefit of the obligor named therein, fixes a direct liability upon such assignee in favor of such third party: *Scott's Adm'rs v. Gill*, 19-187.

192. A party charged by law or agreement with a duty necessary to fix the liability of a third party to the person for whose benefit he is so charged, can, when sued by such person for default, avail himself of any defense available to such third party if he had been sued therefor: *Reed v. Darling-ton*, 19-349.

VIII. CONSIDERATION.

193. Gift: A mere voluntary agreement, contract or covenant to transfer property will not be carried into effect in courts of equity. Want of consideration is a good defense in such case: *Holland v. Hensley*, 4-222.

194. Providing for child: The meritorious consideration of providing for a child has always been held sufficient to authorize the enforcement of an executory contract against the party contracting; but where the contest is between one child and other children of the same ancestor, the meritorious consideration operates on both sides, and being equally balanced, equity will not interfere or lend its aid: *Ibid*.

195. Moral consideration: Something more than a mere moral obligation is necessary to support a contract. The consideration must be such as is esteemed valuable at law: *Nightingale v. Barney*, 4 G. Gr., 106.

196. Where one person renders services for another gratuitously, and with no expectation of being paid therefor, no moral obligation is incurred by the person receiving the services, supporting a subsequent promise to pay. Indeed, a moral obligation alone is not sufficient consideration for a subsequent promise: *Allen v. Bryson*, 67-591.

197. A subsequent promise by a father to a daughter who has attained majority, but remains a member of the family and performs services as such, to pay for such services, is not supported by any legal consideration; but a prior express promise to pay for such services will be binding: *Chadwick v. Devore*, 69-637.

198. Support of parent: The moral obligation of the child to support an indigent parent is not a sufficient consideration for a promise, on the part of the child, to pay for past expenditures made by third persons for the parent: *Dawson v. Dawson*, 12-512.

199. A disposition of property by the owner in behalf of his children, in consideration of an agreement on their part to support the owner during his life, *held* valid, as being both for the consideration of support and for that of love and affection: *Shaw v. Ball*, 55-55.

200. Support of child: The support of offspring, whether legitimate or illegitimate, is a sufficient consideration to support a contract: *Armstrong v. Lester*, 43-159.

201. Past consideration: A subsequent promise to do something not required by previous contract, without new consideration, is not binding, even though it would facilitate the performance of the original contract by the other party: *Handrahan v. O'Regan*, 45-298.

202. Payment of another's debt: Where one person voluntarily pays the debt which another was compellable to pay, he may recover the amount so paid upon proof of an express subsequent promise by the other to repay him, the request to pay being implied from such express promise: *Bruguier v. Goewey*, 89-190.

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203. Where a party signed a note upon the statement of others that the money on which the note was given had been borrowed, but that they must have another name, *held*, that there was a consideration therefor: *State v. Haskell*, 20-276.

204. A subsequent promise to pay for support previously rendered to the promisor as a member of the family of the promisee would be without consideration: *Van Sandt v. Cramer*, 60-424. And see *supra*, §§ 79-85, 187.

205. Indemnity: A promise by one person to another, to indemnify the latter for any liability on an obligation at the time entered into at the request of the former, is not without consideration, and will support a mortgage afterward executed to secure the liability which had in the meantime accrued: *Duncan v. Miller*, 64-223.

206. What constitutes consideration: Whenever injury to the one party or benefit to the other springs from a consideration, it is sufficient to support the contract: *Blake v. Blake*, 7-46.

207. Damage, trouble or inconvenience to the promisee constitutes as good a consideration as does benefit or advantage to the promisor. The service rendered by one party to the other at his request is always a good consideration for a promise: *Gordon v. Dalby*, 30-223.

208. Therefore, *held*, that where one party had a contract for carrying the mails, and entered into an agreement with another to perform the service for him and receive the entire consideration to which the former was entitled from the government under his contract, there was a consideration for the promise on the part of the original contractor to carry out the agreement: *Ibid*.

209. A promise of one person to sell and deliver chattels has a sufficient consideration in the promise of another to buy and pay for them: *Boies v. Vincent*, 24-387.

210. A disadvantage suffered by the promisee will not constitute a consideration for a promise unless it appears that it was suffered at the request, express or implied, of the promisor: *Handrahan v. O'Regan*, 45-208.

211. A promise which is binding upon no one cannot constitute a consideration for

another promise so that the latter may be enforced: *Gray v. McReynolds*, 65-461.

212. Indemnity to garnishee: A contract by the plaintiff in a garnishment proceeding to indemnify a garnishee for any liability arising out of the payment of a judgment is based upon a sufficient consideration, and upon the garnishee being held liable to the original debtor notwithstanding the garnishment, such contract of indemnity may be enforced: *Lucy v. Price*, 39-26.

213. Construction of railroad: An agreement to build a railroad into a certain city is a valuable consideration for a subscription by the citizens thereof, whether the agreement is performed or not. Such consideration would support a note given in substitution for another note which was given for the subscription thus made: *First Nat. Bank v. Hurford*, 29-579.

214. Gold premium: An agreement by a bank, upon return of a certificate of deposit of money payable in gold coin, to pay the sum due on said certificate in currency, adding thereto the premium on gold at that date, *held* binding: *Austin v. Easton*, 25-159.

215. Obligation to make improvements under lease: The obligation in a lease that the lessee shall put certain improvements upon the land during the term of the lease may constitute a consideration for the lease although no rent is reserved, and the lessee will be liable in damages for failure to make the improvements as agreed: *Packer v. Cockayne*, 3 G. Gr., 111.

216. An agreement to marry is a good consideration to support a contract: *Armstrong v. Lester*, 43-159.

217. Seduction: So *held*, where defendant in a prosecution for seduction entered into a bond to marry the prosecutrix and support her and the child: *Ibid*.

218. Other cases: A contract by one person to erect a building on another's land, with the agreement that when the builder shall cease to occupy it the owner of the land shall pay the cost of the lumber used in its erection, is valid: *Stevenson v. Robertson*, 55-689.

219. Certain inducements to enter into a contract, *held* sufficient to constitute a consideration: *Tripp v. Boardman*, 49-410.

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220. Contract of agent to sell real estate: Authority given to a real estate agent conferring upon him the exclusive right to sell certain specified property within a given time, unless such authority be revoked, the compensation being named, is binding upon the person thus employing the agent; and in case the agent is defeated in effecting a sale and securing the specified commission by the act of the owner in making a sale within the time limited and without the revocation of the agreement, the agent will be entitled to compensation for damages sustained. The consideration in such case is the labor and expense of the agent in endeavoring to make a sale of the property: *Attix v. Pelan*, 5-386.

221. Subscriptions: To support an action upon a voluntary subscription it must be shown that money has been advanced or expended in accordance with the terms of the contract and upon the faith of the promise: *University of Des Moines v. Livingston*, 57-307.

222. Where a subscription was taken for the purpose of paying off a mortgage upon college property and thus securing the property from danger of sale under the mortgage, and thereupon large amounts were raised and expended for repairs upon the property on the faith of the subscription to extinguish the mortgage, *held*, that the subscription was binding: *Ibid.*; *S. C.*, 65-202.

223. Where expenses have been incurred on the faith of a voluntary subscription, it becomes binding: *McDonald v. Gray*, 11-508.

224. A subscription becomes a contract when accepted by the beneficiary and acted upon by the incurring of an obligation or expenditure of money: *McCabe v. O'Connor*, 69-134.

225. Where a subscription was taken for a sum to be paid to a needy person to assist her in building a house, *held*, that such subscription must be deemed to have been by way of gift, and that the person for whose aid the subscription was raised could not be enjoined from disposing of the house in the construction of which such subscription had been used: *Ibid.*

226. A borrowing of money to pay a pre-existing indebtedness in reliance upon a subscription constitutes a consideration suffi-

cient to support the contract: *Presbyterian Church v. Baird*, 60-237.

227. A written promise to pay to an educational institution a certain sum per annum for ten years, *held* to be supported by a sufficient consideration: *Burlington University v. Barrett*, 22-60.

228. Subscription upon conditions: Where a subscription was taken upon condition that it should not be payable unless a certain amount was raised by a certain time, and it appeared that such amount was raised, *held*, that defendant, relying upon an averment that a portion of the amount making the requisite total was fraudulently obtained and unenforceable, had the burden of proof to establish such fact: *University of Des Moines v. Livingston*, 65-202.

229. Where it was stipulated in a contract of subscription that the party to whom the subscription was payable should lease specified premises to a third party without rent, *held*, that a contract of lease in which the nominal rent of one dollar per year was reserved was a substantial compliance with the terms of the subscription: *Thompson v. Stewart*, 60-223.

230. An agreement to answer for the debt of another, even though in writing as required by the statute of frauds, is not binding if there is no consideration therefor: *Bumford v. Purcell*, 4 G. Gr., 488.

231. The discharge of a legal obligation cannot be sufficient consideration to support a contract: *Newton v. Chicago, R. I. & P. R. Co.*, 66-432.

232. So where certain contractors had agreed to construct a certain line of railroad, and upon complaint to the company that they were losing money on the contract and would have to abandon it, the company being anxious to secure the completion of the work by the time agreed on, promised to pay whatever the work really cost, *held*, that the promise of the company was without consideration and could not be enforced: *Ayres v. Chicago, R. I. & P. R. Co.*, 52-478.

233. Where plaintiff erected a dam which was washed out, and afterwards built another in its place, under an express contract for compensation, *held*, that even if the first was carried away by reason of its insufficiency there would be no such duty upon the

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plaintiff to replace it as would render an express promise to pay for the second one without consideration: *Hancock v. McFarland*, 17-124.

234. Release: An executory agreement of release without consideration cannot be enforced: *Norris v. Slaughter*, 8 G. Gr., 116.

235. A promise by a person who is already liable on an indebtedness to pay such indebtedness will not constitute a consideration for an agreement to release another party from such indebtedness: *Early v. Burt*, 68-716.

236. Partial payment of an admitted debt will not support a promise to forgive the remainder of the debt: *Bryan v. Brazil*, 52-350.

237. Nor will the payment of a part of a debt support a promise to forbear to sue for or press the collection of the balance: *State ex rel. v. Davenport*, 12-335.

238. An agreement to receive part payment of an indebtedness in full satisfaction, upon consideration of an agreement of the other party to pay expenses which may or may not exceed the balance of such indebtedness, is binding: *Kohn v. Zimmerman*, 34-544.

239. A compromise, even in settlement of a family difficulty, will not be enforced if executory and without consideration: *Norris v. Slaughter*, 8 G. Gr., 116.

240. A compromise of conflicting claims, made for the purpose of reaching a settlement of partnership affairs, is sufficient consideration to support an agreement: *Goode now v. Parkinson*, 67-95.

241. The compromise, among the members of the same family, of disputed claims with reference to family property, has always been regarded by the courts as constituting a valid consideration for the contracts entered into in effecting the settlement: *Adams v. Adams*, 70—.

242. An agreement of compromise between the parties to an action is based upon sufficient consideration and is binding: *Taylor v. Galland*, 3 G. Gr., 17.

243. A contract by way of compromise and settlement of a claim which at the time appears valid, although it subsequently turns out to be groundless, is supported upon sufficient consideration: *Smith v. Cedar Rapids & M. R. R. Co.*, 43-239.

244. An agreement to allow judgment to go by default may be a valid consideration for an agreement by the other party that such judgment shall be satisfied out of certain specified property of the debtor: *Montgomery v. Gibbs*, 40-852.

245. In a particular case, *held*, that a contract entered into by way of compromise was sufficiently supported by a consideration: *Devey v. Life*, 60-361.

246. Under the facts of a particular case, *held*, that there was sufficient matter in dispute, and sufficient uncertainty as to the result, to render a compromise valid: *Mills County v. Burlington & M. R. R. Co.*, 47-66.

247. Where there was an attachment, and creditors were threatening to have it set aside by proceedings in bankruptcy, *held*, that there was sufficient doubt and uncertainty in respect to the respective rights of the parties to the transaction as to render an agreement by one to waive proceedings a sufficient consideration by the other to share the attached property *pro rata*: *Adams v. Morton*, 37-255.

248. The surrender of a claim of interest in real property tending to create a cloud upon the title such as to require the interposition of a court of equity to remove it, is sufficient consideration for an agreement based thereon: *Davies v. Beadle*, 37-390.

249. A compromise of a doubtful title, when procured without fraud, is a sufficient consideration to support a promise: *Richardson v. Barrick*, 16-407.

250. Where a party went into possession of land without right thereto, and commenced improvements, and thereafter a compromise was made between him and the person claiming to be the owner, by which it was agreed that rent should be paid for the use of the land, *held*, that such compromise constituted a sufficient consideration for the payment of rent regardless of whether the person claiming to be the owner had title or not: *Bowditch v. Dubuque*, 38-341.

251. Composition with creditors: Where it was understood that a composition was to be entered into by nearly all the creditors, whereby the secured notes of defendant for fifty per cent. of the indebtedness were to be accepted in full payment, *held*, that the fact that defendant had, by secret agreement,

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paid one of the composition creditors seventy-five per cent. could not be taken advantage of by plaintiff to defeat the composition after having accepted payment of the composition notes with knowledge of the fraudulent agreement: *Bower v. Metz*, 54-394.

252. Alterations or additions made by one party in or to a contract at the request of the other, and upon representation by the other that if not made he would refuse to carry out the original contract, and made without any consideration, the person making them not being in default as to the performance of the original contract, are invalid for want of consideration: *McCarty v. Hampton Building Ass'n*, 61-287.

253. Modifications in a contract not yet executed on either part will be supported by the consideration of the original contract: *Le Grand Quarry Co. v. Reichard*, 40-161.

254. An agreement to pay the consideration in advance instead of on the completion of the contract as originally contemplated, even where the other party has a lien for the amount of the consideration, will support a modification of the contract in other respects: *Baker v. Steamboat Milwaukee*, 14-214.

255. Where the obligation of one party under the contract as modified has been performed, the other cannot object that such modification is without consideration: *Maxwell v. Graves*, 59-613.

256. Extension of time: A contract extending the time of an indebtedness without a new consideration is not binding, and does not suspend the right of action upon the original obligation: *Price v. Price*, 34-404.

257. In the case of a unilateral contract by which the obligor binds himself to pay money on consideration that certain things are performed by the obligee by a certain time, an entry on the back of the written agreement extending the time in which performance may be made, amounts to a new agreement supported by a good and valid consideration: *Burlington & M. R. R. Co. v. Penney*, 38-255.

258. Where an absolute deed was executed by a wife to secure the debt of her husband already due, and a separate defeasance was executed to her providing that upon the payment of certain sums of principal and interest by her the lands should be reconveyed,

held, that this amounted to a binding extension of time, and was a sufficient consideration for the conveyance by the wife: *Lomax v. Smyth*, 50-228.

259. In a particular case, it being specially found by the jury that a valid extension of time was given to a party, held, that the court could not disregard such finding on the ground that there was no consideration, there being an issue as to the consideration and evidence showing that there was such consideration: *Wendling v. Taylor*, 57-354.

260. Implied in written contract: A consideration is implied in a written contract (Code, § 2118), and no consideration need be expressed: *Peddicord v. Whittam*, 9-471.

261. A written contract implies a consideration, and want or failure of consideration must be averred and shown by way of defense: *Goodpaster v. Porter*, 11-161.

262. Such contracts import a consideration in the same manner that sealed instruments formerly did: *Jones v. Berryhill*, 25-289, 297.

263. So held as to a written guaranty: *Sabin v. Harris*, 12-87.

264. A covenant in writing imports a consideration: *Arnold v. Kreutzer*, 67-214.

265. It is not ground of demurrer to a petition on a written instrument, that no consideration is alleged or appears on the face thereof. Such objection must be set up as a defense: *Linder v. Lake*, 6-164; *Towsley v. Olds*, 6-526; *Goodpaster v. Porter*, 11-161; *Henderson v. Booth*, 11-212; *State v. Wright*, 37-522.

266. Parol evidence: The consideration need not appear upon the face of the contract; it may be proved by parol, or inferred from the terms and obvious import of the agreement: *Attix v. Pelan*, 5-336.

267. Parol evidence is admissible to show a consideration other than that expressed on the face of the contract: *Taylor v. Wightman*, 51-411.

268. The consideration of a written contract may be shown by parol, and if such consideration is found in an unwritten agreement it may be proved by oral testimony: *Simpson Centenary College v. Bryan*, 50-293.

269. Want or failure of consideration may be shown: While a written contract im-

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ports a consideration (Code, § 2113), it is competent to aver and prove that there was in fact no consideration: *Briggs v. Downing* 48-550; *Byers v. Harris*, 67-685.

270. Although a written contract imports a consideration, it is competent to show a failure of consideration to defeat the contract, the burden of proof being upon the defendant: *University of Des Moines v. Livingston*, 57-807.

271. The phrase "value received" does not necessarily import a consideration, and evidence is competent to show that no consideration has been in fact received: *Osgood v. Bringolf*, 32-265.

272. Extrinsic evidence of a consideration to a written contract adverse to that expressed upon the face thereof is incompetent: *Gelpcke v. Blake*, 19-263.

273. A defendant relying on want of consideration in a written contract must aver and show not only that he did not receive the consideration specified therein, but also that he did not receive any other consideration: *Taylor v. Wightman*, 51-411.

274. Contracts under seal: By statute (Code, § 2114) the consideration of a contract is inquirable into, and want of consideration is a good defense though the instrument be executed under seal in another state, where the law presumes a consideration: *Williams v. Haines*, 27-251.

275. Adequacy of consideration: Each party may exercise his own discretion as to the adequacy of the consideration, and if the agreement be made *bona fide*, it matters not how insignificant the benefit may be to the promisor, or how slight the inconvenience or damage appears to be to the promisee, provided it be susceptible of legal estimation. If the inadequacy of consideration is so gross as to create a presumption of fraud, the contract founded thereon would not be enforced, but even then it is the fraud which is thereby indicated, and not the inadequacy of consideration, which invalidates the contract: *Blake v. Blake*, 7-46.

276. Illegality: No action can be maintained on a contract, the consideration of which is either wicked in itself or prohibited by law: *Marienthal v. Shafer*, 6-223.

277. An agreement on the part of persons interested in a will, in consideration of the

agreement of others to pay them the amount they would become entitled to under the will, and allow the will to be defeated and set aside in a probate proceeding for the purpose of depriving others, not parties to the contract, of their rights under such will, is illegal, and the parties carrying out the agreement not to maintain the will cannot afterward recover from those at whose instance they acted, the amount to which they would have been entitled under the will: *Gray v. McReynolds*, 65-461.

278. Where defendant became indebted to one B. for intoxicating liquors illegally sold, and in consideration thereof agreed to pay an indebtedness owing plaintiff by said B., to which agreement plaintiff consented, releasing B. and accepting defendant as his debtor, *held*, that the illegality of the transaction between defendant and B. could not be set up as against the plaintiff, it not appearing that plaintiff had any information of the nature of the transaction between defendant and B.: *Bower v. Webber*, 69-286.

Further as to illegality of contracts, see *infra*, IX.

279. Compounding of felony: A contract, the consideration of which is the compounding of a felony, cannot be enforced: *Peed v. McKee*, 42-689.

And see *infra*, §§ 354-5.

280. Failure of consideration: Where an endowment note was given as alleged in consideration of an agreement that the principal of the fund raised should not be diminished, *held*, that the diminution of the fund could not be set up as a failure of consideration in an action on the note: *Simpson Centenary College v. Bryan*, 50-293.

281. The maker of an endowment note to a college, who is entitled to tuition therein upon payment of the note, cannot defend against the note by showing that the college is in the charge of incompetent teachers, and tuition therein would be of no value: *Oskaloosa College v. Hull*, 25-155.

Further as to failure of consideration, see BILLS AND NOTES, §§ 85-87; SALES, §§ 13-16; and CONVEYANCES, §§ 133, 134.

282. Partial failure: Where a note is given under an entire contract for the purchase of two parcels of real property, the failure of title to one parcel will not con-

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stitute a failure of consideration of the note, and the title to the other parcel will constitute a consideration sufficient to support it: *Wadsworth v. Nevin*, 64-64.

283. An agreement by a county to transfer to defendant a certain number of acres of land therein secured at a certain consideration, and further to sell and assign to defendant all the swamp land claim and interest of the county for a further agreed sum, upon the additional consideration that the defendant should save the county harmless from certain contracts theretofore made by it, *held*, not to be a severable contract, so that a conveyance of the specified acres of land could stand while the balance of the contract was void for mistake: *Montgomery County v. American Emigrant Co.*, 47-91.

284. A note given in aid of a railway, alleged to have been made upon representations that the road would be aided by a certain other railway, thereby securing valuable connections, etc., *held*, to be valid, notwithstanding the failure to secure such connections without fault of the company, such matter being an inducement to and not a consideration or condition of the note: *Merrill v. Gamble*, 46-615.

285. But *held*, that it being agreed that capital stock of the company to be aided should be issued in consideration of such note, and it appearing that the capital stock of such company had been illegally increased far beyond the amount the company was authorized to issue, and that such illegal stock was beyond the control of the corporation and could not be distinguished from genuine and had become valueless, the maker of the note was not liable: *Ibid*.

IX. ILLEGALITY.

a. Between belligerents.

286. Citizens of states in rebellion: Contracts between citizens of countries at war with each other are void: *Hill v. Baker*, 32-302.

287. And *held*, that this rule was applicable to contracts between citizens of a state in rebellion and citizens of a loyal state: *Ibid*.

b. In violation of law.

288. Revenue stamp: The fact that a contract had not been stamped, as required by the United States revenue laws, *held* not sufficient to exclude it from admission as evidence where it did not appear that there was any fraudulent intent in the omission to properly stamp the paper. (Overruling *Hugus v. Strickler*, 19-413): *Mitchell v. Home Ins. Co.*, 32-421.

289. An intentional omission to stamp an instrument in conformity to the revenue laws constitutes proof of an intent to evade such laws within the meaning of the statute, and the instrument is not receivable in evidence: *Byington v. Oaks*, 32-488.

290. If an agreement is executed by both parties thereto in duplicate, each party retaining one, it is binding upon the parties, though only one of the duplicates is stamped: *Bondurant v. Crawford*, 22-40.

As to failure to affix revenue stamp, see, also, **BILLS AND NOTES**, §§ 68-75.

291. Act prohibited by law: Any promise, contract, or undertaking, the performance of which would tend to promote, advance, or carry into effect any object or purpose which is unlawful, is in itself void and will not sustain an action. In this respect the law gives no countenance to the old distinction between *malum in se* and *malum prohibitum*, and a contract having for its object the doing of an act repugnant to the general policy of the common law, or contrary to the provisions of a statute, is void and not to be enforced: *Reynolds v. Nichols*, 12-398.

292. Prohibited by statute: Therefore, where a statute expressly prohibited the issuing of paper to circulate as money, *held*, that a trust deed to secure a loan of post notes, which were within the statutory prohibition, could not be enforced: *Ibid*.

293. Act to which penalty is affixed: The fact that a penalty is affixed by statute to the doing of an act implies a prohibition, though there are no prohibitory words in the statute; and a contract to do the prohibited act will be illegal and void unless it appears that it was not intended that the statute should imply a prohibition: *Pangborn v. Westlake*, 36-546.

294. Under a statute making it a criminal

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offense, punishable by fine, to run a threshing machine without having the tumbling-rods boxed, and also subjecting to the same fine any person knowingly permitting his grain to be threshed by such machine, *held*, that a party who had performed services in threshing under a contract for such work to be done with a machine not having its rods boxed, and which was performed by a machine in that condition, could not recover compensation for services performed: *Dillon v. Allen*, 46-299.

295. Under the statutory provision (Code, § 8895) making it a crime in the mortgagor of personal property to wilfully destroy, conceal, sell, or in any manner dispose of the property covered by the mortgage without the consent of the holder of such mortgage, *held*, that a subsequent mortgage given upon the property by the mortgagor was not void: *Tootle v. Taylor*, 64-629.

296. It being by statute required that a plat of a subdivision of land laid out as a city or town or an addition thereto shall be recorded before any conveyances are made thereunder, and a penalty being provided for the failure of the owner to comply with such requirements, *held*, that as the statute imposed no penalty upon the grantee under such circumstances, the conveyance was not void, and might be enforced: *Watrous v. Blair*, 32-58.

297. And the vendor may, in such case, enforce payment of the consideration: *Pangborn v. Westlake*, 36-546.

298. Where an act is absolutely prohibited by statute or is contrary to public policy, contracts in furtherance of such act are null and void; but where the statute fixes a mere penalty, contracts in relation to the matters which subject the maker to the penalty are not on that account invalidated. If not intrinsically wrong the individual is permitted to perform the act upon payment of the penalty: *Hill v. Smith*, Mor., 70.

299. A sale of diseased sheep in violation of statutory provisions is void, so that the purchase price cannot be recovered, even though the buyer knew the sheep were diseased, the statute being for the protection of the public, and not merely for the protection of the purchaser: *Caldwell v. Bridal*, 48-15.

300. Violation of Sunday laws: An express or implied contract made on Sunday for the sale of property, where the parties are not embraced within the exceptions of the statute prohibiting the doing of business upon Sunday (Code, § 4072), will not be enforced by the courts: *Pike v. King*, 16-49.

301. Vendee of property sold on Sunday may retain it without paying the price agreed upon. The law will leave the parties where it finds them: *Ibid.*; *Kinney v. McDermot*, 55-674.

302. If the contract is to pay for property bought and sold on Sunday, the plaintiff cannot recover the value aside from the contract: *Pike v. King*, 16-49.

303. A vendee obtaining possession of property under a Sunday contract may maintain replevin for such property when subsequently taken from him by the vendor by force: *Kinney v. McDermot*, 55-674.

304. The execution of a note on Sunday is within the prohibition of the statute imposing a penalty upon any one engaged "in any labor" on that day, and such note is, as against the maker, void in the hands of the payee or his assignees. And in this respect the laws of another state where the note was executed will be presumed to be the same as those of this state: *Sayre v. Wheeler*, 31-112; *S. C.*, 82-559.

305. The burden of proving that a contract made on Sunday is within one of the provisions of the statute exempting works of necessity and charity, and persons conscientiously observing the seventh day, from its operation, is upon the party claiming under the exemption, which is in the nature of a proviso: *Ibid.*

306. A note signed on Sunday, but not, in fact, delivered until Monday, is not void: *Bell v. Muhin*, 69-408.

307. The defense that a contract is void because made on Sunday must be specially pleaded: *Riech v. Bolch*, 68-526.

308. It does not follow that where the contract only is unlawful, the plaintiff cannot recover upon the original consideration in a proper case: *Sayre v. Wheeler*, 31-112.

309. An action cannot be maintained to recover damages for fraudulent representations made in connection with a Sunday contract: *Gunderson v. Richardson*, 56-56.

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310. Though the contract be void as made on Sunday, the parties may make a valid contract with reference to the same subject-matter on a subsequent week-day, and it would seem that a subsequent ratification of the Sunday contract would be binding: *Harrison v. Colton*, 81-16.

311. To amount to the ratification of a contract of lease executed on Sunday something more than mere occupation of the premises must be shown. Such occupancy might render the tenant liable under an implied promise for a *quantum meruit*, but not for the rent stipulated. To constitute a ratification there must be some new promise to perform the terms of the lease, or something equivalent thereto: *McIntosh v. Lee*, 57-356.

312. A party to a Sunday contract cannot set up the fact of its execution on Sunday to defeat it in the hands of one who is a good faith assignee thereof for value and without notice of the illegality: *Johns v. Bailey*, 45-241.

313. A negotiable note made on Sunday, but dated on another day, and having nothing on its face to indicate its invalidity, is not void in the hands of a *bona fide* holder acquiring it before maturity without notice: *Clinton Nat. Bank v. Graves*, 48-228.

314. The transferee, after maturity, without knowledge of the fact that the note bearing date on a secular day was actually executed on Sunday, may recover thereon. The defense to the note is not an equity which may be set up against one who purchases after maturity: *Leightman v. Kadetska*, 58-676.

315. The admission of a debt such as will take it out of the bar of the statute of limitations is not void because made on Sunday: *Ayres v. Bane*, 39-518.

316. The fact that at the time of receiving an injury for which another would be liable, the person injured is engaged in business in violation of the Sunday law, will not defeat his recovery: *Schmid v. Humphrey*, 48-652.

317. Nor will the fact that a railway train is operated in violation of the Sunday law render the railway company liable for damages accidentally occurring from the operation of such train without fault or negligence

on the part of the company: *Tingle v. Chicago, B. & Q. R. Co.*, 60-333.

As to lotteries, gambling contracts and compounding of felonies, see *infra*, §§ 332-355.

318. Contracts made in another state in violation of the laws of this state: To give effect to contracts made outside of the state is an act of comity due from the courts of the state in which they are sought to be enforced to the state in which they are made, and the rule that a contract, valid where made, may be enforced in another state, although it would not be valid if made in such state, is subject to the following exceptions: (1) That neither the state nor its citizens shall suffer any injury or inconvenience by giving legal effect to the contract which should not in itself, nor in the means used to give it effect, work injury to the state where it is intended to be enforced. (2) That the consideration of the contract be not immoral, and the giving effect to it will not have a bad tendency or exhibit to the citizens of the state an example pernicious and detestable. (3) The contract must not be opposed to the policy and institutions of the state where it is sought to be enforced: *Davis v. Bronson*, 6-410.

319. Contract in violation of liquor laws: Therefore, *held*, that under the state statute providing that no action should be maintained in any court of the state for the value of intoxicating liquors sold in another state or country with intent to enable any person to violate the law prohibiting the sale of such liquors in this state, a contract for the sale of liquors made in another state, with the intent to enable the purchaser to sell them in this state in violation of such law, could not be enforced in the courts of this state: *Ibid*.

320. In case liquors are sold in another state for a resale in this state, mere knowledge that the resale in this state would be in violation of law would not necessarily vitiate or avoid the contract, but it would be a fact from which the jury might infer the existence of an intent to enable the purchaser to violate the law: *Tegler v. Shipman*, 33-194.

See further, INTOXICATING LIQUORS, VIII. Illegal sales, in general, see SALES, §§ 18, 19.

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c. Against public policy.

321. Dismissal of proceeding to establish highway: A proceeding to establish a public highway being in its nature public and for the benefit of the whole public, a contract by the party who has commenced such proceeding, for its abandonment, is contrary to public policy and void: *Jacobs v. Tobiasson*, 65-245

322. Official fees: An agreement by a sheriff to accept a fixed sum in lieu of legal fees for services to be performed will be null and void as against public policy and against the provisions of statute, whether the sum to be paid be greater or less than the legal fees: *Gilman v. Des Moines Valley R. Co.*, 40-200.

323. Omission of official duty: A bond of indemnity given to an officer to secure him against liability for failure to perform his official duty is illegal and cannot be enforced by him: *Cole v. Parker*, 7-187.

324. Champerty and maintenance: While we have no statute prescribing the offenses of maintenance and champerty, and providing punishment therefor, and a contract cannot be declared void and unlawful on that ground, yet a contract of that nature in contravention of public policy, as tending to prevent or interfere with the administration of justice, will be held void on that ground: *Ade v. Hanna*, 47-264.

325. Therefore, *held*, that a bond given by an attorney to his client in which it was agreed that for a compensation the attorney should prosecute the case of his client on appeal, and should save his client harmless from any judgment that might be rendered against him in such case, was void: *Ibid*.

326. In the absence of statutory provisions, a contract of a champertous nature will be declared void as against public policy: *Boardman v. Thompson*, 25-487; *Hyatt v. Burlington, C. R. & N. R. Co.*, 68-662.

327. There is no necessity in this country for enforcing the common law as to champerty and maintenance. The causes which gave rise to the law do not exist here, and as the reason for the law has ceased, the law itself ceases: *Wright v. Meek*, 3 G. Gr., 472.

328. Champerty cannot be predicated upon the assignment of a note or account and an

action thereon, although the assignee gives, as the only consideration therefor, his obligation to pay the net proceeds of the action to the assignor: *Knadler v. Sharp*, 36-232.

329. An agreement by one party, in consideration of release from a note and the payment of a sum of money, to foreclose a mortgage held by him and procure the conveyance to another of the property sold at the foreclosure sale, *held* not champertous: *Cooley v. Osborne*, 50-526.

330. The fact that an action is being prosecuted by attorneys under a champertous contract cannot be set up as a defense therein: *Allison v. Chicago & N. W. R. Co.*, 42-274; *Small v. Chicago, R. I. & P. R. Co.*, 55-582.

331. The fact that a contract by which a cause of action is assigned is champertous can be pleaded only in an action between the parties to such contract, and if not pleaded therein, the contract can be enforced as valid between them. A stranger whose interests or rights are not affected by the contract cannot set up champerty to invalidate it. The defense appertains to the contract itself, and can only be pleaded in an action between the parties to it: *Vimont v. Chicago & N. W. R. Co.*, 69-296.

And further as to champerty, see ATTORNEYS, §§ 94-102.

332. Lottery: A contract contemplating the disposal of property by chance is against public policy and cannot be enforced: *Guenther v. Dewein*, 11-133.

333. Wager; election bets: A wager contract based upon the result of an election is void, as against public policy: *David v. Ransom*, 1 G. Gr., 338.

334. Where, in pursuance of a contract previously made between the parties to a wager, plaintiff delivered to the successful party an article and charged it to the other party to the wager, *held*, that he could not recover from the person so charged the value of the article furnished: *Ibid*.

335. But *held*, that a request by the party charged, and subsequent to the determination of the wager, to deliver the article to the successful party, would render him liable if delivery was made in pursuance of such request: *Ibid*.

336. Recovery of money paid over on wager: Money lost on a wager and paid over

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cannot be recovered back: *Thrift v. Redman*, 18-25.

837. Recovery from stakeholder: A party depositing money or other property with a stakeholder as a wager may recover it back before it is paid over to the winner: *Shannon v. Baumer*, 10-210.

838. An action may be maintained against a stakeholder who has paid over to the winning party money placed in his hands as a wager after he has been notified by the loser not to do so: *Adkins v. Flemming*, 29-122.

839. A demand upon the stakeholder by one of the parties to the wager for the entire amount in his hands, on the ground that he is successful in the wager, is not a revocation of the wager so as to entitle him to recover from such stakeholder the amount deposited by him and afterwards paid over in pursuance of the result of the wager to the opposite party: *Okerson v. Crittenden*, 62-297.

840. Although one who has deposited money with a stakeholder on a wager cannot recover the same back after it is paid over to the winner, yet where a promissory note for an amount greater than the wager was deposited with a stakeholder and by him turned over to the winner, who appropriated it to his own use, *held*, that the original owner might recover from such winner the excess of the value of the note over the amount of the wager: *Shaw v. Gardner*, 80-111.

841. Action upon wagering contract: Action cannot be maintained upon a note showing upon its face that it was given in a betting transaction: *Sipe v. Finarty*, 6-894.

842. And even if the note is given upon an apparent consideration, the agreement between the parties may be such as to make it clearly a wagering contract: *Craig v. Andrews*, 7-17.

843. The statute (Code, § 4029) declaring all notes, contracts, etc., given upon a gambling or wager consideration void, renders them void even in the hands of an innocent purchaser before maturity: *Ibid.*; *Traders' Bank v. Alsop*, 64-97.

844. Where one, in behalf of himself and others, deposited a sum as a wager, *held*, that in an action to recover such sum from the stakeholder, he could only recover the amount actually belonging to him, the con-

tract being absolutely void and plaintiff having therefore no authority to sue for the others thereunder: *Toney v. Snyder*, 50-73.

845. Options: To invalidate a contract on the ground of the illegality of the transaction, as being a gambling or option contract, it must be shown by a preponderance of evidence that on the part of both parties the transaction was with the knowledge and purpose that no actual delivery of the property which was the subject of the sale should be made, or, in other words, that both participated in the intention which renders the contract void. If one of the parties acts in good faith, with the intention and expectation of delivering or receiving the property which is the subject of the sale, the transaction as to him will be valid, and will be a sufficient consideration for a contract in his hands based thereon: *Murry v. Ocheltree*, 59-435.

846. Certain instructions to the effect that instruments purporting to convey the title to grain were void because they were issued to pay losses which might be suffered in the purchase of commodities, wherein it was not the purpose or intention of either of the parties that the purchase or sale should be consummated by the delivery or receipt of the article purchased or sold, but on the contrary it was the purpose of all the parties that the same should be settled by the payment of the difference between the purchase or selling price and the market price at the time of settlement, *held* correct: *Lowe v. Young*, 59-864.

847. The option contracts that are void are such as do not contemplate the actual delivery of the commodity purchased, but rather contemplate that the subject of the contract is not intended to be delivered: *Gregory v. Wattowa*, 58-711.

848. When the parties to an executory contract for the sale of property intend that there shall be no delivery thereof, but that the transaction shall be settled by the payment of the difference between the contract price and the market price of the commodity at the time fixed, the contract is void: *First Nat. Bank v. Oskaloosa Packing Co.*, 66-41.

849. The party seeking to avoid the contract may testify as to the intention with which the contract was made, whether it was

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that the goods contracted for should be delivered or not: *Ibid.*

350. A circumstance tending to indicate that the transaction is an option contract is that the agent through whom the transaction is made, and who attempts to enforce the contract, did not disclose to the other party the names of the persons with whom, in his behalf, the contract was made: *Ibid.*

351. Another circumstance tending to show that delivery of the property to the purchaser was not intended, would be that the amount of the pretended purchase appears to be largely in excess of the means of the purchaser: *Ibid.*

352. If the agent through whom the purchase is made knows that the transaction is an option contract, he cannot recover money advanced by him to one of the parties for the purpose of carrying on the transaction: *Ibid.*

353. While contracts for the sale and delivery of grain in the future, which are virtually bets in relation to the future price of grain, are of a purely gambling and criminal character, and, where their true character is known, the courts should condemn them and hold them void, yet, in the movements of the grain of the country, contracts for future delivery are, to some extent, a necessity, and they are as legitimate as any other, and that, too, though the parties may contemplate a possibility of settlement by the payment of differences. The real intention of the parties must determine the character of the transaction, and in arriving at the intention the court must be governed by the evidence and not by conjectures based upon its knowledge of other contracts: *Tomblin v. Callen*, 69-229.

354. Compounding felony: The defendant in a criminal prosecution, being convicted, executed certain notes to the prosecuting witness and her attorneys, which were to be delivered in the event that prosecutrix should sign an application for defendant's pardon, or in case that on appeal and reversal of the case and a new trial, defendant should be acquitted or discharged. And it was also agreed that a civil action by the prosecutrix for damages was to be discontinued. *Held*, that an agreement for the delivery of the note was void as against public policy, as tending to stifle the prosecution of crime and defeat justice: *Haines v. Lewis*, 54-801.

355. Evidence in a particular case *held* not sufficient to show that a contract was entered into for the purpose of compromising a felony: *Malli v. Willett*, 57-705.

And further, as to compounding felony, see *supra*, § 279; and CRIMINAL LAW, II, 5, b.

356. Restraint of trade; sale of business; good-will: While contracts in general restraint of trade are void, those which are in restraint of trade as to particular persons or places, or for a limited time, are valid if founded upon proper consideration: *Hedge v. Lowe*, 47-137.

357. Therefore, *held*, that an agreement made by a person engaged in the business of selling agricultural implements, in connection with the sale of his business, not to engage in the implement business in the same place, or that vicinity, within five years from that time, either as principal or agent, without the consent of the other party, was valid: *Ibid.*

358. Such a contract is assignable in connection with the sale of the business by the party with whom it is made to another: *Ibid.*

359. A covenant binding a party not to engage in a particular trade within two miles of the premises occupied by him at the time of the contract, is not illegal as in undue restraint of trade: *Arnold v. Kreutzer*, 67-214.

360. The good-will of a trade or business may be the subject of bargain and sale when connected with any particular stock in trade, or with some valuable secret of trade, or with a well-established stand for business. A court of equity will decree specific performance of a contract of sale of the good-will of a business or trade, or the law will give damages for the breach of such a contract: *Moorehead v. Hyde*, 38-382.

361. An agreement in consideration of a sale of land to another to discontinue keeping a tavern upon an adjoining tract of land is not illegal as in improper restraint of trade, the restriction being within a reasonable limit: *Heichew v. Hamilton*, 3 G. Gr., 596.

362. A contract not to engage in the practice of law at a particular place is not against public policy: *Smalley v. Greene*, 52-241.

363. An agreement in a particular case, *held* to amount to the sale of a medical practice, and an agreement not to carry on

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the same business in the same place; but *held*, that such agreement would not prevent defendant, when located in another place, from practicing as a physician in the place where he had formerly been located: *Haldeman v. Simonton*, 55-144.

364. A contract for the sale of business of a physician, in which it was stipulated that the seller reserved the right to practice in special cases, construed: *Powers v. Strout*, 67-341.

As to breach of contract not to carry on business, see *infra*. §§ 569-572.

365. Monopolies: The power of courts to declare a contract void as being in contravention of sound public policy, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. In a particular case, *held*, that a contract for the erection of an elevator, and the handling of all through grain at a terminal point, where it was necessary to handle it, was not a monopoly in such sense as to be void: *Richmond v. Dubuque & S. C. R. Co.*, 26-191.

366. Through transportation: A contract by a railway company with the owner of a warehouse by which such company agreed to deliver to the warehouseman all through grain shipped over its line, and pay a certain amount per bushel for the handling of the same, *held* not void as in contravention of acts of congress intended to secure transportation on through lines without change of cars: *Richmond v. Dubuque & S. C. R. Co.*, 33-422, 498.

367. Construction of railway upon highway: An agreement to do that which is expressly authorized by the law cannot be considered to be against public policy. So *held* as to a contract with a railway company to erect its line along or near a public highway instead of through lands of the contracting parties: *Chicago. R. I. & P. R. Co. v. Spafford*, 41-292.

368. Location of railway depot: Defendant, in consideration of the conveyance of certain lots by plaintiff and others, agreed to construct and maintain on such lots the only depot for its road in a city named, but in violation of such contract erected and maintained a second depot in another part of said city. In an action by plaintiff to recover the value of the property conveyed, *held*,

that the contract was void as against public policy, and plaintiff being *in pari delicto* could not recover: *Williamson v. Chicago, R. I. & P. R. Co.*, 58-126.

369. To recover swamp lands: Where the defendant county entered into a contract with plaintiff, by which the latter was to endeavor to secure certain swamp lands, or indemnity therefor, to the county from the general government, and receive one-half the money so secured as compensation for his services, and plaintiff did secure certain sums for the county through congressional legislation, it not appearing that the use of any improper means was contemplated in the contract, *held*, that it was not void as against public policy: *Denison v. Crawford County*, 48-211.

370. Contract for materials furnished for improper purpose: To render a contract for a sale of lumber for the erection of a building void, on the ground that the building was to be used for a gambling house, it should appear that the seller knew at the time of the sale that the lumber was to be put to an unlawful purpose, and that he sold it for the purpose of having it used for that purpose: *Dorsey v. Langworthy*, 3 G. Gr., 841.

d. Effect of illegality.

371. Method of performance: Where the illegality is not in the thing to be done under the contract, but in the manner of performing it, it is not to be presumed that the parties intended a violation of the law, and the fact that it was performed in an illegal manner, when it might have been performed otherwise, will not defeat the right of recovery. (By Adams, J., in dissenting opinion): *Dillon v. Allen*, 46-299.

372. Partial illegality: Where one makes a contract in part illegal, he will be held to the performance of the legal part if the contract is capable of separation, but if not, then the entire contract is void: *Casady v. Woodbury County*, 13-113.

373. Estoppel: A contract which is void as against public policy cannot be made to operate as an estoppel. It has no validity whatever: *Langan v. Sankey*, 55-52.

374. Parties in pari delicto: The law will leave all persons who share in the guilt of an

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illegal or immoral transaction where it finds them, and will not lend its aid to enforce the contract while executory, nor interfere to rescind it and secure the recovery of the consideration when executed: *Harvey v. Tama County*, 53-228; *Williamson v. Chicago, R. I. & P. R. Co.*, 53-126.

375. That one of the parties to the contract will be benefited by refusing to enforce it, on the ground that it is illegal and the parties are in *pari delicto*, will not prevent the courts from adhering to the rule: *Dillon v. Allen*, 46-299; *Caldwell v. Bridal*, 48-15.

376. The doctrine of *par delictum* is not modified by the degree of guilt of the violators of the law, or the turpitude of the offense, nor does it have respect to the punishment inflicted: *Steever v. Illinois Cent. R. Co.*, 62-371.

X. CONSTRUCTION.

377. **The writing to govern:** The written agreement, unless ambiguous, is to be taken as the fair expression of the agreement of the parties: *Trustees of Oskaloosa College v. Stafford*, 14-152.

As to parol evidence to vary the writing, see EVIDENCE, II, 4.

378. **To be construed by the court:** Where a contract is in writing it is the province and duty of the court to construe it and inform the jury what the rights and duties of the parties in the premises are: *Rohrabacher v. Warc*, 37-85.

And further on this point, see INSTRUCTIONS, §§ 196-208.

379. **All the parts construed together:** An agreement is to be so construed, if possible, as to give effect to all its parts: *Greene v. Day*, 34-328; *Sowers v. Page County*, 32-580.

380. **Surplusage:** The doctrine of surplusage has no application to contracts. Words in a contract, the meaning of which is not inconsistent with words preceding or following, cannot be disregarded: *Decorah v. Kesselmeier*, 45-166.

381. **Inconsistent provisions:** Sometimes in order to construe a contract in accordance with the intention of the parties, it is necessary to disregard words which evidently contradict the spirit of the agreement: *Davis v. Fish*, 2 G. Gr., 447.

382. A contract containing conditions construed, and held that it was not to be taken in a sense which would enable one of the parties to avoid all liability by neglecting to do an act therein contemplated: *Rush v. Carpenter*, 54-132.

383. **Copulative words:** Where a bond provided a penalty for the sale by defendant of liquors "to any intoxicated, card playing, whatsoever person or habitual drunkard," held, that the rules of the language required the supplying of the copulative "and" between "intoxicated" and "card playing:" *Decorah v. Kesselmeier*, 45-166.

384. **General clause:** General language must be held to relate to the rights and interests of the same nature and description with those which have already been mentioned: *Muhaffy v. Muhaffy*, 63-55.

385. **How intent to be ascertained:** The whole contract must be considered in determining the meaning of any of its parts. The first point is to ascertain what the parts mean, and then to put such expression on the contract as to bring it as near their actual meaning as the words the parties saw fit to employ, when properly construed, and the rules of law, will permit. In arriving at this meaning the subject-matter of the contract and the situation of the parties and of the property must be considered: *Jacobs v. Jacobs*, 42-600.

386. **Parts construed together:** Under the rule that all the parts of a contract will be construed in such way as to give force and validity to all of them and to all the language used, if possible, held, that a provision in a lease that "the following rents be paid, to wit: Fifty dollars to be paid in money and fifteen dollars in labor," was only changed as to the money payment by a supplemental agreement that "the provision that does provide to be paid in money is to be paid in grain," etc.: *Emerick v. Clemens*, 26-332.

387. In construing a contract executed contemporaneously with a note and the indorsement thereon, and a mortgage given to secure the same, held, that they should all be taken together; *Elmore v. Higgins*, 20-250.

388. A contract by which an elevator was erected to handle grain for a railway company, construed, taking its terms in their most natural significance as applied to the

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subject-matter, and considering as a whole, two agreements, one of which was subsequent and supplementary to the other, and evidently calculated to supply a deficiency in the prior one: *Richmond v. Dubuque & S. C. R. Co.*, 26-191.

389. To be construed most strongly against the party contracting: Where the language of a writing is ambiguous it should be taken most strongly against the contractor, and especially is this true when a construction of which it is fairly susceptible has been placed upon it, and third parties have been induced to act in the belief that the construction is the correct one: *Hopwood v. Corbin*, 63-218.

390. The language of an agreement drawn by an attorney, between himself and client, is, in case of doubtful meaning, to be given that construction which is least favorable to the attorney: *Schlicht v. Stivers*, 61-746.

391. Sense in which understood by opposite party: Under statutory provision (Code, § 3652), when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it: *Snow v. Flannery*, 10-818; *Stout v. City F. Ins. Co.*, 12-371, 380; *Wilkinson v. Connecticut Mut. L. Ins. Co.*, 30-119, 127.

392. This statutory provision only applies to instruments which arise out of and are the expression of the agreement of two minds: *Pierson v. Armstrong*, 1-282, 287.

393. If the language used by and known to the parties to the contract is ambiguous or fairly admits of more than one construction, that meaning is to be given it in which it is understood by the other party, whether the party so acting has reason to believe it was so understood by the other party or not: *Minnesota Linseed Oil Co. v. Montague*, 65-67.

394. Construction by act of parties: Where there is doubt about the construction of a contract, a previous construction placed upon it by the parties themselves may be considered: *McDaniels v. Whitney*, 38-60.

395. But if the acts of the parties are as consistent with one construction as another, such acts are not to be given any controlling

weight: *Le Grand Quarry Co. v. Reichard*, 40-161.

396. The fact that under a contract to furnish water to a city by which a certain rate of compensation was provided for a specified period, and reduced rates for subsequent periods, the city paid the higher rate for a greater length of time than required by the proper construction of the contract, *held*, not to bind the city to an improper construction of the contract which was insisted on by the opposite party, and in accordance with which the payment by the city at the higher rate was required: *Davenport Water Co. v. Davenport*, 64-55.

397. Understanding of the parties: Where in a contract of sale of a stock of goods it was agreed that the price should be the wholesale price less ten per cent., and in computing the amount five per cent. was added to the actual cost price for carriage, but it appeared that by the custom of merchants the term wholesale price meant the actual cost without carriage, *held*, that the real meaning of the terms used and not their supposed meaning must prevail: *Spencer v. Millisack*, 52-81.

398. Where the question is as to whether certain acts constituted delivery of property under a contract, it is not material what the party's opinion of the effect of his act was at the time, or the intention with which it was done: *Smyth v. Ward's Ex'rs*, 46-339.

399. The understanding or intention of a party making a contract does not constitute the limit of his liability thereunder: *White v. Van Horn*, 19-189.

400. The court will not always construe a contract to mean what the parties to it meant, but will give to it that construction which will bring it as near to the actual meaning of the parties as the words they have seen fit to employ, when properly construed, and the rules of law, will permit: *Field v. Schricher*, 14-119.

401. Understanding of witness as to meaning of terms: The testimony of a witness as to his understanding of the meaning of the terms used in a contract is not admissible, even where the meaning of the terms in any particular business may be shown: *King v. Nelson*, 36-509.

Further as to opinions of witnesses, see EVIDENCE, I, 4.

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402. Surrounding circumstances to show intention: In determining the construction of a contract the subject-matter is to be fully considered. It is equally important to know the situation of the parties and of the property, as also the purpose of the parties in making the contract, for the purpose and intention will be carried into effect so far as the rules of language and law will permit: *Field v. Schricher*, 14-119.

403. In the construction of a written contract, circumstances surrounding its execution may be introduced in evidence for the purpose of aiding the court in construing it, where there is doubt or ambiguity on its face; but where no such doubt exists, the terms and conditions of the writings alone must determine the construction: *Grimes v. Simpson Centenary College*, 42-589.

404. In the interpretation of a contract the intention of the parties must be ascertained and followed. For this purpose may be shown the extrinsic circumstances which surrounded the transaction, the objects in view inducing the contract and the actions of the parties in connection with it: *Corbett v. Berryhill*, 29-157.

405. Custom and usage: The terms of every written instrument are to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject-matter, as by the usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that in the particular instance, and in order to effectuate the immediate intention of the parties, it should be understood in some other peculiar sense: *Willmering v. McGaughey*, 30-205.

406. Therefore, *held*, that evidence was not admissible to show an understanding of stock dealers as to the language of a particular contract in relation to the sale of stock, in which no technical words were used: *Ibid*.

407. The parties are presumed to have intended that the language should have its ordinary and received signification, or the meaning which the law attaches to it, but custom may be shown to affect the construction or to substitute in a particular instance a rule resulting from usage, in place of that which the law, not the contract of the par-

ties, would prescribe. Whether this usage be ancient, universal and well established, or merely the manner of doing a particular thing in a small neighborhood or by a small class of men for a few years, if it falls within the reason of the rule which makes it a part of the contract, it amounts to a custom. If it is so far established, and so far known to the parties, as that it must be supposed that they contracted with reference to it, it comes within the reason of the rule. It may be general or local. If general, then a presumption of knowledge on the part of the contracting parties arises. If local, the knowledge of the parties must be proven before it can avail to affect the contract. If established, the length of its duration is not very material. The characteristics of a good custom are said to be that it shall be established, general, uniform, and known to the parties; *Rindskoff v. Barrett*, 14-101.

408. Where a contract was made for the sale of potatoes of a certain kind, and it appeared that the potatoes offered were not of that kind, but mixed, *held*, that the testimony of a dealer that the potatoes were what, according to custom, would be called the kind required, was not admissible, it not appearing that the custom referred to was either general or within the knowledge of the party sought to be bound: *Woods v. Miller*, 55-168.

409. It is competent for parties to contract with reference to a known usage or custom, and evidence tending to support that custom or usage, if pleaded, is properly admitted in construing the contract: *Hughes v. Stanley*, 45-622.

410. Acts may be interpreted in the light of custom to raise an implied contract, and a contract express or implied may be interpreted in the light of custom for the purpose of determining its nature and extent where they would otherwise be doubtful. This is about the extent of the office of custom: *Doughty v. Paige*, 48-483.

411. A witness engaged in a particular trade may testify as to the meaning of words in a contract as used in that trade to which the contract relates. Such meaning will be adopted by the court in the interpretation of the contract: *Cook Mfg. Co. v. Randall*, 62-244.

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412. Parties to a contract may vary or restrain by an express stipulation certain rules of law so far as they would otherwise apply to or vary their contract. Usage, then, affords the same evidence of intention as the most direct language, and may have the same effect in varying legal rules: *Grinman v. Walker*, 9-426.

413. Parol evidence is admissible for the purpose of showing that in the place where the contract was made the words had, by known and established usage, a different meaning from the general and popular one: *Steyer v. Dwyer*, 81-20.

414. Usage or custom cannot control express language: A custom cannot overcome an express contract, nor defeat an express limitation, nor be received in evidence to change the obvious meaning of words occurring in a written instrument: *Wanless v. McCandless*, 88-20.

415. A contract cannot be controlled by a custom which the parties have expressly excluded by necessary implication; as, for instance, by providing that a thing which custom affects shall be done in a different way: *Randolph v. Halden*, 44-327.

416. Customs are subordinate to contracts, and will not control where the contract contains conditions not in harmony therewith: *Smyth v. Ward's Ex'rs*, 46-839.

417. Where a contract fixes a price, and provides in terms that no extras shall be allowed, a custom to the contrary will not control the express stipulation of the parties: *Phillips v. Starr*, 26-349.

418. It is not competent to defeat the provisions of a contract by proof of the existence of a custom differing therefrom; for instance, as to the place of payment: *Duncan v. Green*, 43-679.

419. Where both parties set up and rely upon a contract, the difference between them being as to the terms thereof, custom cannot be shown to control or vary such contract, it not appearing that the contract was made with reference thereto: *Windland v. Deeds*, 44-98.

420. A warehouse receipt which, by its terms, gives rise to a contract of bailment, cannot be contradicted or varied by evidence of a custom or usage which would require the receipt to be regarded as a contract of

sale: *Marks v. Cass County Mill, etc., Co.*, 43-146.

421. Evidence of custom to explain the meaning of words used in a contract is not admissible, where the contract is expressed in ordinary language, not referring to principles of science or art, nor including technical phraseology, or words used in a technical sense: *Cash v. Hinkle*, 86-623.

422. Therefore, *held*, that under a contract for the sale of "sixty-five head of fat hogs, to weigh two hundred and twenty-five pounds and over," it was not competent to prove a custom among dealers by which such language was understood to mean that the lot should average that weight, but that the contract should be construed as requiring the delivery of that number of hogs, each weighing not less than the amount specified: *Ibid.*

As to evidence of custom, see EVIDENCE, §§ 60-67.

423. Construction in particular cases: In a contract by a railway company agreeing to construct its line through a certain township, and stipulating that it "would erect a depot within one mile of the village of New Hampton in New Hampton township," *held*, that the contract was sufficiently complied with by the erection of a depot within one mile of such village, although the depot was not located within the township, the description with reference to the township being held applicable to the village and not to the depot: *McGregor & S. C. R. Co. v. Foley*, 38-588.

424. Where a note for railway stock was given upon condition "that a depot be established within the present town of Wheaton," *held*, that such stipulation referred to the recorded plat of the town as it existed at the time of the making of the note: *Davenport & St. P. R. Co. v. Rogers*, 39-298.

425. Under a contract for the erection of a mill, in which the parties warranted it to do good work, and to manufacture an amount of flour per day equal to other good mills with an equal number of burrs of similar dimensions, and having the same *quantum* of motive power, *held*, that the warranty was not to be limited to mills constructed upon the same general plan: *Mills v. Mabon*, 9-484.

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426. Where a note provided that it was to be paid "on or before the court-house in and for the county of," etc., "is completed," and in an agreement with reference to this note it was described as "payable when the court-house is completed according to the plans and specifications on file," *held*, that the note itself, and not a recital thereof in the agreement, was to control as to the intention of the parties, and that when the court-house was in good faith accepted by the county supervisors, though it differed from the plans and specifications on file, the note became payable: *Levally v. Harmon's Adm'r*, 20-583.

427. By a contract plaintiff agreed to "cut all the timber now standing upon the said tract of land that can be cut into cord-wood and saw-logs; . . . but this agreement shall not bind the said [plaintiff] to cut and estimate any timber standing upon said land the cutting of which will cost more than fifty per cent. above the customary rates of cutting and chopping." Plaintiff having cut wood and logs from said land, but having left other timber thereon which defendant claimed that he was, under the contract, bound to cut, and it appearing that none of the timber so remaining could be cut at fifty per cent. above the customary rates of cutting, *held*, that plaintiff was under no obligation to cut any of said timber, and was not required by the contract to cut and account for all the timber, provided it could be cut at an average of fifty per cent. above the ordinary rates: *Wadleigh v. Shaw*, 45-585.

428. A contract for furnishing water to a city by a company chartered for that purpose, providing that for a certain period under the charter compensation should be paid at a stipulated rate, and for subsequent periods at reduced rates, construed: *Davenport Water Co. v. Davenport*, 64-55.

429. The members of a partnership having made an agreement by which one was to take the assets and pay the debts, *held*, that the question as to whether the parties intended that what one partner might be owing the firm should be considered as assets, or that each partner should be relieved of any liability to the firm or each other, should be submitted to the jury: *Carl v. Knott*, 16-379.

430. A contract between plaintiff and de-

fendant was that if goods sold by the former to the latter were resold by the latter at or above invoice price, a percentage was to be paid plaintiff in addition to the original price of the goods. It appearing that defendant used due diligence in selling the goods for the highest attainable price, which was less than the invoice price, *held*, that defendant was under no obligation to keep or render account: *Balch v. Ashton*, 54-123.

431. The terms of a contract as to compensation for stone work, construed, in a particular case: *Shulte v. Hennessy*, 40-352.

432. Under a contract for one hundred thousand brick to be "counted and enumerated in the wall according to the custom and rule of brick layers in ascertaining the number of brick in a solid wall, not allowing anything for space occupied by openings in the wall," *held*, that it was to be construed according to its terms, and the number of brick was to be determined for the purpose of the contract without regard to the actual count: *Brown v. Cole*, 45-601.

433. A contract as to the disposition or division of lands acquired under a land grant, construed in a particular case: *Smith v. Cedar Rapids & M. R. R. Co.*, 43-239.

434. A particular contract in relation to water-power, considered and construed: *Adairs v. Wright*, 14-22.

435. A contract as to the grading of a railway, construed: *Fish v. Wolfe*, 50-636.

436. A contract in a particular case, construed: *Whiting v. Root*, 52-292.

437. *Lex loci*: A contract, such as a chattel mortgage, properly executed under the laws of another state, will be regarded as of the same obligation and receive the same interpretation in the courts of this state that it would receive in the courts of the state where it was executed: *Smith v. McLean*, 24-322.

438. The general rule is that the validity, nature, obligation and interpretation of a contract is to be governed by the law of the place of performance, but if the contract is void or illegal by the law of the place where it is made, it is void and illegal everywhere: *McDaniel v. Chicago & N. W. R. Co.*, 24-412.

439. Where an agent takes orders for sale of goods in this state, which are subject to acceptance by the principal in another state,

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the place of acceptance, and not the place of taking the order, is the place of the contract. But if the agreement is completed by the agent in the state where the order is given, that is the place of contract: *Tegler v. Shipman*, 33-194; *Taylor v. Pickett*, 52-467.

440. The common law, or law merchant, where it has received no modification from local custom or statute, will be declared by the courts of this state for themselves, aided by such lights and precedents as may be found in all the authorities and decisions bearing on the question, and the decision of the courts where a contract under the law merchant is made, there being no statutory custom, are not binding upon the courts of this state: *Franklin v. Twogood*, 25-520.

441. Parties in one state making a contract with reference to the law of another must be held to know the laws of the state with reference to which the contract is made: *Huthsing v. Bosquet*, 3 McCrary, 569.

Further as to CONFLICT OF LAWS, see that title.

Contracts of sale: As to construction of contracts relating to sales of land, see VENDORS; and of contracts relating to sales of personal property, see SALES.

XI. PERFORMANCE; BREACH.

a. Time of performance.

442. Reasonable time: Where a contract specifies no time within which performance shall be completed, the law implies that its stipulations shall be performed within a reasonable time, to be determined by the jury in view of the circumstances under which the contract was made and the nature of the subject-matter: *Curtiss v. Waterloo*, 38-266; *Livingston v. Iowa Midland R. Co.*, 35-555.

443. Therefore, where a railway company had contracted with a land owner to construct a cattle pass under its road, *held*, that the company was not liable for breach of the contract until the pass was demanded for the use and convenience of the land owner: *Livingston v. Iowa Midland R. Co.*, 35-555.

444. Where time is fixed: In an action for breach of contract which by its terms is to be performed by a fixed time, it is error to instruct the jury that the party may recover

damages for failure to perform the contract within a reasonable time: *Sturgeon v. Hock*, 43-155.

445. Waiver of time of performance: Where no objection has been made on account of failure to perform a contract within the time fixed, and no injury therefrom has resulted, delay in performance will not constitute a defense: *Hutchinson v. New Sharon, C. V. & E. R. Co.*, 63-727.

446. Burden of proof: Where it was agreed, upon the transfer of a note, that suit thereon should be brought immediately, but time was not made of the essence of the contract, *held*, that the party whose duty it was to bring suit did not become absolutely liable for failure to sue at once, or at any particular time, except on proof of damage resulting from neglect to bring suit within a reasonable time, and that the burden of proof as to that fact was upon the party alleging the damage: *First Nat. Bank v. Haug*, 52-538.

447. Party in default cannot recover: When both parties are at fault in the performance of a contract, the one cannot recover anything against the other by reason of the failure of the latter: *Smith v. Cedar Rapids & M. R. R. Co.*, 43-289.

448. Where one of the parties to a contract for the construction of a railroad agreed to take a certain sum due to the railroad company in stock subscriptions and aid taxes, *held*, that the party taking the subscriptions and taxes could not recover from the railroad company for the performance of the contract without showing an effort to collect such subscriptions and taxes: *Arnold v. River R. Const. Co.*, 35-99.

449. Executed contract of sale: In an action upon a contract to recover the consideration agreed upon for the sale of property, performance being alleged on the part of the plaintiff and denied by the defendant, *held*, that as such contract itself showed a sale to defendant of the property, no evidence on the part of the plaintiff was necessary: *Atkins v. Anderson*, 63-739.

450. Military substitute not mustered in: Under a contract to serve as a military substitute, *held*, that the acceptance and enrollment of the substitute by a local board, and the issuance by said board of a certificate of exemption to the principal, did not entitle

Conditions, etc., to be performed.

the substitute to recover the price agreed upon when he was afterward rejected before final muster into the service: *Rutledge v. Squires*, 23-53.

b. Conditions and other stipulations required to be performed.

451. Performance of conditions must appear: Where the obligations of a contract on the part of one party are made dependent on the performance of conditions on the part of the other party, the performance or offer to perform such conditions must be shown before the obligation of the contract can be enforced: *Courtright v. Deeds*, 37-503; *Wrought Iron Bridge Co. v. Greene*, 53-562.

452. Where defendant agreed upon a subscription to give certain lots and a sum of money in aid of a church building, provided that such building should be erected on his lots, and the building was erected elsewhere, held, that the amount of the subscription could not be collected from him: *Patrick v. Barker*, 33-451.

453. Independent covenants: Where an act is to be done by one party before the consideration act has been done by the other, the covenants to do such acts are independent, and the party suing for breach of contract on the part of the opposite party need not allege the performance or offer to perform the covenants on the part of the plaintiff. An allegation that he is ready and prepared to carry out the agreement on his part is sufficient: *Lucas v. Snyder*, 2 G. Gr., 490.

454. A covenant with a penalty attached will always be considered as independent: *Ibid.*

455. Strict performance; time material: Where the performance of a particular act in a particular time and manner is made the condition precedent to a contract, the party seeking to enforce such contract must show performance of the condition precedent or something discharging him from such performance. The cases where an exact, precise performance will be dispensed with in a court of law, and a substantial performance will be held to suffice, are, in their nature, exceptional, and can never be made to apply to a case where, by a fair construction of the

contract, time is made material: *Burlington & M. R. R. Co. v. Boestler*, 15-555.

456. Therefore, held, that where, in a subscription to a railway company, it was provided that the road was to be constructed to a particular point and put under contract within a year from the date of the subscription, and completed within twenty months after the contract, a completion of the railway, before suit brought, but after the expiration of the time when the road should have been constructed by the terms of the contract, was not a substantial performance such as entitled the company to recover on the subscription: *Ibid.*

457. In a particular case, held, upon the construction of two instruments together, that time was not therein made of the essence of the contract: *Chicago, I. & D. R. Co. v. Cedar Rapids, I. F. & N. W. R. Co.*, 67-324.

Time, when deemed of the essence, see VENDORS, §§ 138-140; and SPECIFIC PERFORMANCE, §§ 51-58.

458. Substantial performance: Where a contract was substantially performed, *held*, that the fact that there was possibly a slight variance would not be considered sufficient to defeat it: *Cedar Falls & M. R. Co. v. Rich*, 33-113.

459. Railroad subscriptions: Under a subscription in aid of a railway payable upon condition that the depot and track should be within one mile from a certain point, *held*, that the location of a side track and a depot, part of which was within the limit, was a sufficient compliance with the terms of the contract: *Ibid.*

460. In an action upon a contract of subscription in aid of a railroad, held, that the condition that the company should build and own the road was sufficiently complied with where the road was operated by the use of rolling stock leased from another road: *Courtright v. Deeds*, 37-503.

461. Held, that a contract to make C. a station was substantially complied with by the location of a depot about one-fourth of a mile from the town plat: *Jenkins v. Burlington & M. R. R. Co.*, 29-255.

462. An agreement by a railroad company to "build or allow but one other depot between E. and P.," held not violated by the establishment of a station at a coal bank,

 Conditions, etc., to be performed.

where trains merely stop to take or leave cars; nor would a "water station" be a violation of the contract: *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28-437.

463. Where, in a contract of subscription to a railway company, it was first provided that its road should be constructed to a point within three-fourths of a mile of the corporate limits of a certain town, and a subsequent agreement with reference to the same matter referred to the completion of the road to such town, *held*, that the completion of the road in accordance with the first contract was a sufficient compliance with the conditions of the last: *Courtwright v. Strickler*, 87-382.

464. In such case, also *held*, that the construction of a depot within three-fourths of a mile of the incorporated limits of the town, measured in a straight line, was a sufficient compliance with the contract, and also that it was not necessary that all the side tracks, etc., be within such limit, if the building was properly situated: *Ibid*.

465. Where a condition of a subscription of stock to a railway company was that the road should be located within the limits of a certain town with a station at the same, *held*, that the condition must be construed as requiring the location of the depot within the limits of the town: *Davenport & St. P. R. Co. v. O'Connor*, 40-477.

466. Where a railway company obtained subscriptions under an agreement to lay its track into a certain city, and also was to be donated land for the erection of machine shops, etc., *held*, that there was not a failure of consideration because the shops, etc., had not been erected at the time the action was brought, when it appeared that the track had been laid as agreed, and there was no time agreed upon for the erection of such improvements: *First Nat. Bank v. Hurford*, 29-579.

467. A railway subscription was payable at a certain date, "provided said company shall have their road built and in operation by the first day of January, 1861;" *held*, that the obligor was not bound to pay either the payee or an assignee, unless the condition was complied with, and a completion of the road four years after the time specified was not a sufficient compliance: *Thompson v. Oliver*, 18-417.

468. Performance of conditions upon which money in aid of a railroad was to become payable, *held* sufficient in a particular case: *Chicago, D. & M. R. Co. v. Schewe*, 45-79.

469. The contract in a particular case for the payment of money in aid of a railway being conditioned upon the completion of the railway to a given point by a certain time, *held*, that such condition was not complied with by the completion of other portions of the railway equally advantageous to the defendant: *Burlington, C. R. & M. R. Co. v. Whitney*, 48-113.

470. A contract of subscription in aid of the construction of a railway in favor of a certain company or any other company which should grade and tie the road, *held*, not to make the entire grading and tying of the road a condition precedent to the subscription becoming payable: *Iowa N. C. R. Co. v. Bliebenes*, 41-267.

471. Where a note given in aid of a railway contained the provision, "the road to be finished by" a certain date to a point named, *held*, that this provision not being preceded by the word *provided*, did not constitute a condition precedent, failure to comply with which would operate as a forfeiture of all the rights of the payee, but that the maker might recoup any damages resulting from the delay in such completion: *Davis v. Cobban*, 39-392.

472. A condition in a note given in aid of the construction of a railroad, providing that the road should be built, etc., within a certain time, and the note be payable within a certain time thereafter, *held*, not to be a condition precedent, so as to render the note void on failure of performance of the contract within the time specified: *Traer v. Stuart*, 46-15.

473. Other cases of conditions or stipulations: Under a contract to convey "when an act of congress shall be passed confirming the title" to the property, etc., "provided the said act shall be passed during the session of congress next ensuing," *held*, that the passing of the act was a condition, and if at the end of the session of congress next ensuing no act such as contemplated by the contract had been passed, the contract was void: *Clark v. Langworthy*, 3-568.

474. Plaintiff contracted to collect money due on sales made by him for defendant, and

Conditions, etc., to be performed.—Waiver.

mortgaged property to secure the performance of the contract. Defendant took possession of the property under the mortgage, claiming that plaintiff had not attempted to collect part of the money due on sales remaining unpaid, and, no reason appearing for not doing so, *held*, that he could not recover: *Scott v. Glaze*, 29-168.

475. Under a contract for publication by defendant of a book for plaintiff, which contract contained the provision that plaintiff should procure a copyright therefor, *held*, that failure on part of plaintiff to take such steps toward procuring a copyright as under the copyright laws should be taken before publication, was a failure of performance and relieved defendant from liability for failure to comply with the contract on his part, and that under such contract it was not the duty of defendant to furnish plaintiff copies of printed title of the book, to be forwarded under the copyright laws: *White v. Day*, 56-248.

476. Where a lease provided for a forfeiture upon failure to perform certain acts, *held*, that as the parties had voluntarily entered into the contract, it was not for the court to inquire into their purpose in introducing the conditions thereunder, or to express the opinion that in this respect the contract was a harsh one: *Patton v. Bond*, 50-508.

477. In an action for damages for failure to perform a contract according to its terms, *held* error to instruct the jury that the deviation from plans and specifications in matters not affecting either the strength, value or convenience of the building to be erected under the contract, would be unimportant. Such an instruction should be limited to slight and unimportant deviations: *Fauble v. Davis*, 48-462.

478. Evidence in relation to construction of a building under contract *held* to show a breach of the terms thereof on account of the failure to substantially comply with the requirements: *Robertson v. King*, 55-725.

479. Where it was provided in a subscription in aid of the erection of a pork-packing house, that a person named and associates should erect such house, with certain capacity, etc., and the provisions of the contract were complied with by the associates of the

person named, he, however, withdrawing from the corporation formed for the purpose of carrying out such contract, *held*, that the contract was sufficiently complied with: *Paddock v. Bartlett*, 68-16.

480. Failure of third party to perform conditions: Where plaintiff had furnished timbers to a third party under the agreement that they should be paid for by orders of such third party upon defendant which defendant agreed to pay, *held*, that without such orders defendant was under no obligation to pay, although the orders were wrongfully withheld by the third party: *Drake v. Hill*, 53-37.

481. Where the mortgagor under a deed of trust sold the property covered thereby to plaintiff, and an agreement was entered into by all the parties that upon the performance of certain things by the plaintiff, the mortgagor should execute other security to the mortgagee under the trust deed and that such trust deed should be released, it being shown by the evidence that plaintiff executed his part of the contract, and that the mortgagor did not execute the other security and release the trust deed, which was subsequently foreclosed by the defendant, who purchased under the foreclosure sale, *held*, in an action by plaintiff to redeem, that he was entitled to no relief against the defendant mortgagee, but the mortgagor was liable in damages to plaintiff for his failure to perform the agreement: *Beeson v. Hunt*, 26-439.

482. Burden of proof: Where it is sought to defeat action upon a contract by proof of a parol condition, the burden of proof is on the defendant to show the failure to comply with the conditions: *Williams v. Niagara F. Ins. Co.*, 50-561.

c. Waiver or alteration of conditions or stipulations.

483. Excuses performance: If the party to a contract, containing a condition upon the performance of which his own responsibility is to arise, dispenses with such performance, or by any act of his prevents it, the other party is excused from showing compliance with its demands: *Attix v. Pelan*, 5-236.

 Waiver or alteration of conditions.¹

484. If, by the terms of a contract of sale, the seller is entitled to a written notice of the failure of the property to correspond with the terms of the contract in order that he may remedy defects therein, the fact that he acts upon notice which does not conform to the requirements of the contract will constitute a waiver of such requirements: *Davis v. Robinson*, 67-855.

485. Where a party intends to require an exact compliance with a contract in respect to notice of breach, etc., he should stand upon the terms of the contract, and any acts indicating his intention not to insist upon such terms will be deemed a waiver thereof: *Davis' Sons v. Butrick*, 68-94.

486. Where, under a contract to construct a house by a particular time, a party procured extra work to be done, *held*, that he thereby waived objection to the failure to complete the house by the time specified: *Sweney v. Davidson*, 68-386.

487. If, before the expiration of the time for performing the conditions of a contract, the opposite party agrees to perform his part without requiring compliance with such conditions, and the other party acts upon or changes his conduct by reason of such declarations, the conditions may be regarded as waived: *Burlington, C. R. & M. R. Co. v. Whitney*, 43-113.

488. Under a contract to convey land upon the performance of certain conditions intended for the benefit of the grantor, *held*, that the execution of a conveyance in pursuance of the contract was a waiver of the condition and that a breach thereof could not afterwards be relied on to defeat such conveyance: *Audubon County v. American Emigrant Co.*, 40-460.

489. Where a note for the payment of money in aid of a railway was placed in the hands of third parties to be delivered to the company upon performance of certain conditions, one of which was the entering into an obligation not to erect another depot within a certain distance of the one provided for in the contract, *held*, that the condition that such obligation must be entered into must be considered waived, in view of the fact that the note was delivered to the company and the construction of its road completed without such condition being insisted

upon, it also appearing that no other depot had in fact been built within the prescribed limit: *Burlington, C. R. & M. R. Co. v. Palmer*, 42-222.

490. Assent to change: Knowledge of change in the method of performing a contract and assent thereto by opposite party will estop him from afterwards objecting to such change: *Garretty v. Brazell*, 84-100.

491. A contract for the sale of a harvesting machine which provided for its return at a certain place, *held* to entitle plaintiff to recover thereon, though at defendant's request the machine was delivered at another place, and additional agreements were made not constituting a new contract but additions to the old one: *Gammar v. Borgain*, 27-369.

492. The bringing of action to recover compensation under a contract waives any breach thereof by the other party, and plaintiff cannot, in addition to compensation, recover damages for such breach: *Bush v. Chapman*, 2 G. Gr., 549.

493. Independent acts: Where covenants bind the parties to a contract to perform independent acts which separately constitute a consideration for the covenants, the acceptance and the performance of one of the independent covenants with knowledge that another has not been performed will constitute a waiver of such performance: *Jordan v. State Ins. Co.*, 64-216.

494. Therefore, *held*, that where an insurance policy was issued in consideration of an agreement on the part of assured to pay certain premiums, coupled with a warranty as to the occupancy of the building, *held*, that the receipt of the premiums with knowledge of the fact that the building was not occupied according to the warranty was a waiver of such breach: *Ibid*.

495. Waiver of time of performance especially provided for in a contract will not affect the other provisions of the contract, and a recovery may be had after performance in the same manner as though performance had been within the time stipulated: *Flynn v. Des Moines & St. L. R. Co.*, 63-490.

496. Consideration for waiver: A party may waive performance of conditions stipulated in a contract without consideration, and cannot afterwards maintain action for

Acceptance of performance.—Excuses for non-performance.

failure to perform such conditions: *Stevens v. Taylor*, 58-664.

497. Mere silence as to the non-performance of conditions will not be sufficient to constitute waiver of their performance within the time specified: *Burlington & M. R. R. Co. v. Boestler*, 15-555.

498. Where a contract of subscription in aid of a railway was conditioned upon the completion of the road to a particular point by a particular time, *held*, that the fact that the subscriber requested other portions to be completed within the time did not constitute a waiver of the particular condition specified: *Burlington, C. R. & M. R. Co. v. Whitney*, 48-118.

d. Acceptance of performance.

499. Effect of: Where a party makes payment under a contract with knowledge of the manner in which it is being performed, and is present during the performance, consenting to such method of performance, and admits he is suited with it when finished and takes possession, these facts may be construed as showing that the contract has been performed as required: *Demoss v. Noble*, 6-530.

500. The ratification of a contract made with full knowledge of all that has been done thereunder will prevent the party ratifying from taking advantage of any previous failure on the part of the other party to comply with all the terms of the contract: *Warren v. Ewing*, 84-168.

501. Where the party for whom work is being performed under a contract is present during its progress giving directions concerning it without making objections to the manner in which it is done, and accepts the work without objection, these facts are proper to be given in evidence to rebut a claim for damages for defective execution of the work; but the party is not to be precluded by such an acceptance from showing that such work was defectively or improperly done: *Mitchell v. Wiscotta Land Co.*, 8-209.

502. The fact that an article manufactured and delivered by contract is delivered after the time when by the terms of the contract it should have been delivered, and is accepted and used by the other party, will not consti-

tute an absolute waiver of the right to recover damages for the delay in completion and delivery: *Hansen v. Kirtley*, 11-565.

503. An acceptance of a house by the owner of the land whereon it is built for him under contract will not prevent him from showing that the work was done in an unworkmanlike manner: *Kilbourne v. Jennings*, 40-478.

504. The owner of property who sees work done thereon under a contract without objection is not prevented from setting up the fact that the work does not comply with the contract: *Smith v. Bristol*, 88-24.

505. A party suing for compensation for services under a contract in erecting a building upon defendant's real property need not show an acceptance by defendant. The improvement attaches to the realty and passes to the owner without the formality of delivery and acceptance: *Crookshank v. Mallory*, 2 G. Gr., 257.

506. An offer to pay for work performed in pursuance of a contract, without objection to the manner of performance, is an admission that the work is performed in accordance with the stipulations of the contract: *Hutton v. Maines*, 68-650.

e. Excuses for non-performance.

507. Act of opposite party: The fact that a party is prevented from completing the performance of a contract on his part by default of the other party will not defeat his right to recover: *Shulte v. Hennessy*, 40-352.

508. Where a contract provided for the delivery of railway ties upon cars at a particular station, *held*, that the failure of the other party to furnish cars would not excuse failure to deliver the ties at a place convenient for loading upon cars: *Council Bluffs Iron Works v. Cuppey*, 41-104.

509. Impossibility of performance; act of God: When a duty is imposed by law, an act of God rendering its discharge impossible will excuse performance, but the performance of a contract will not be excused on that ground. When one binds himself by a solemn agreement to do an act, he is held liable for its performance, though it is rendered impossible by events over which he has no control, provided those events are such

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as that the parties could have provided against them in their contract: *District T'p v. Smith*, 39-9.

510. The fact that the performance of the terms of a contract becomes impossible or is greatly impeded by the weather, no provision being made against such contingencies, will not afford an excuse for non-performance: *Wolf v. Des Moines & Ft. D. R. Co.*, 64-380.

511. When the performance of a contract becomes impossible by the act of God, the obligor is excused and his rights under the contract are not forfeited. This rule contemplates cases of absolute impossibility to perform. But where, by reason of the sickness of assured, under a policy of life insurance, there was a failure to pay the annual premium, which by the terms of the policy worked a forfeiture thereof, *held*, that as such payment might have been made by others for the assured, the impossibility of making it personally would not excuse the failure nor prevent the forfeiture: *Carpenter v. Centennial Mut. L. Ass'n*, 68-453.

512. Mistake: The failure of a party through mistake to perform his contract will constitute no defense, notwithstanding he has used care and diligence in the effort to perform: *Robertson v. SeEVERS*, 3-281.

513. Equity will not relieve a party from performing the stipulations of a contract upon the express terms therein named when the facts with reference to which the contract is made are equally within the knowledge or means of knowledge of both parties and there has been no fraud or concealment in the transaction: *Owens v. Butler County*, 40-190.

514. Therefore, *held*, that, under a contract for the erection of abutments for a bridge to be founded upon the rock, extra compensation could not be recovered by reason of the fact that the rock was deeper below the surface than was expected by the parties: *Ibid*.

515. Sale of property not on hand: In an action upon a contract for the sale of potatoes, which contemplated immediate delivery, *held*, that it was not proper to show that the seller did not have the potatoes on hand but was compelled to collect them before filling the contract, in order to excuse delay

in performance on his part: *Woods v. Miller*, 55-168.

516. Change of circumstances: Where, by acts of congress in aid of the formation of connecting lines of railroad and the construction of a railroad bridge across the Mississippi river, certain services which were to be rendered by an elevator company to a railway company in handling grain at its terminus became useless, *held*, that the railway company was not thereby relieved from liability to pay for services to be rendered under such contract: *Railroad Co. v. Richmond*, 19 Wall., 584.

517. Accidental destruction after completion: Where a contractor undertook to furnish materials for and perform the carpenter work of a building, and after the completion of his contract the building was blown down by a wind storm, *held*, that his contract had been completed and he was entitled to recover payment therefor: *Garretty v. Brazell*, 34-100.

518. Under a contract for the construction of a coffer-dam "sufficient to turn the water of the river into the mill-race, so as to allow the mill to run," payment to be made "when the dam is finished and the water turned effectually into the mill-race, so as to permit of the mill being run," *held*, that if the dam was constructed sufficient to turn the stream into the race so as to supply the mill in the usual stage of water, it was a sufficient compliance with the contract, although it was not sufficient to resist an unusual rise in the stream: *Hancock v. McFarland*, 17-124.

519. Other cases: Where a telegraph company undertook to furnish to plaintiff true market reports, *held*, that it was immaterial whether an error therein was occasioned by the defendant in the transmission of such reports or by a preceding company from whom it was understood such reports were to be obtained: *Turner v. Hawkeye Tel. Co.*, 41-458.

520. Where a contract was made for the sale of a lot of cattle, it being understood that the entire lot was to be got together and delivered at one time, *held*, that it was no defense to an action for breach of the contract by defendant that they could not all be found, it appearing that he did not make diligent effort to find them and did not want to: *Boies v. Vincent*, 24-387.

Demand; tender; offer to perform.

521. Burden of proof: Where defendant set up failure of plaintiff to perform his contract as a defense to an action thereon, *held*, that the burden of showing such failure was upon defendant, but this being shown, the burden of showing a valid excuse for such failure was upon the plaintiff, and it was not for defendant to negative such excuse in the first instance: *Fauble v. Davis*, 48-463.

f. Demand; tender; offer to perform.

522. Demand necessary: Where payment of an obligation was to be made in sawing logs at defendant's saw-mill, *held*, that the fact that such saw-mill was burned before demand for performance of the service, would not excuse demand and render defendant liable to a money judgment: *Davidson v. Overhulser*, 3 G. Gr., 196.

523. Demand unnecessary: Where a debt is payable in personal property to be delivered at a particular time, and the debtor fails to make such delivery, the creditor may sue for the money due without demanding the property: *Crabtree v. Messersmith*, 19-179.

When demand necessary on notes payable in property, see *BILLS AND NOTES*, §§ 177, 178, 183, 184.

524. Refusal to pay in property according to contract: Under a contract to pay for services in property, the party who has performed the services may recover the money value upon the refusal of the other party to pay the property as agreed: *Stewart v. Craig*, 3 G. Gr., 505.

525. Readiness to perform: Under a contract for services to be rendered at a future day, there can be no recovery of substantial damages by the person contracting to render the services, unless he can show that he was ready and willing to perform on his part and notified the other party of that fact. Mere readiness is insufficient and is immaterial, unless the other party had knowledge thereof: *Watson v. Moeller*, 63-161.

526. Effect of tender: In an action upon a promissory note payable in property, proof of an offer to perform by the maker and refusal to receive by the payee is not sufficient to release the maker from the obligation of the contract, but may be shown to defeat

action on the note, and excuse the maker from payment until payee shall demand delivery of the property, and notify the maker that he is willing to receive it: *Williams v. Triplett*, 3-518.

527. Tender of purchase price: In an action for damages for failure to deliver a certain number of sheep of a certain quality according to contract, to be paid for at a specified rate per pound, *held*, that failure of plaintiff to tender the balance of the purchase price at the proper time was not a failure to perform his part of the contract so as to defeat his action, for the reason that the balance of the purchase price could not be determined until the sheep were tendered and weighed: *Aller v. Pennell*, 51-537.

528. Tender, when to be made: Tender of payment in order to discharge the conditions of a contract may be made at any hour of the day fixed for its performance when it would not be unreasonable to require the party to whom the tender is made to accept payment: *McClartey v. Gokey*, 81-505.

529. Therefore, held, that tender of payment of purchase money under a contract to convey made at half past eight in the evening of the day fixed for payment was sufficient: *Ibid*.

530. Tender of stock on stock subscription: Where a note is executed on a subscription for stock under which it is agreed that the certificates of stock shall be delivered when the note is paid, tender of the certificates must be shown in order to support an action upon the note: *Hedge v. Gibson*, 58-656; *Cooper v. McKee*, 49-286; *Courtright v. Deeds*, 37-503; *Lawrence v. Smith*, 50-703.

531. A contract payable in stock cannot be sued on until the stock has been demanded: *Markley v. Rhodes*, 59-57.

532. Contract to teach: Where a teacher employed for a definite time was prevented from completing the service contracted for by a pretended dismissal on the part of the board of directors, and upon appeal to the county superintendent such action was set aside, *held*, that the teacher was excused from performing or offering to perform his duties under the contract during the pendency of the appeal, but that upon the final decision that the discharge was illegal, he should have performed or offered to perform

Part performance.

his duty during the remaining term of the contract, and not having offered to do so, he could not recover for breach of the contract after the time that his discharge was held by the superintendent to be invalid: *Park v. Independent School Dist.*, 65-209.

As to delivery and tender in case of sale of chattels, see SALES, II.

g. Part performance.

As to compensation for services under abandoned or broken contract, see *supra*, §§ 104-111.

533. Divisibility: Where, by the language of the contract, the work consists of several distinct items, and a price is apportioned to each, action may be maintained on the contract for the price of a distinct item of the work: *Dibol v. Minott*, 9-403.

534. As to whether a contract, by virtue of which defendant agreed to transfer to plaintiff his bank business and the best building lot in town, to be selected by plaintiff, provided that plaintiff would build thereon and become a resident of the town, and to sell to plaintiff a farm belonging to defendant at a stated sum per acre, and give up to plaintiff defendant's chance of purchasing a certain other tract, was divisible so that without regard to the residence and building plaintiff could enforce against defendant a transfer of the tract of land which defendant had contemplated purchasing and had subsequently purchased, the court was equally divided: *McDaniels v. Whitney*, 88-80.

535. Under a subscription by a county to the stock of a railway company, by the terms of which certificates of paid up stock were to be issued upon payment of the amounts subscribed, held, that the county was not entitled, after a partial payment of the subscription, to a proportional number of shares of paid up stock, although it had, by adjudication of the courts, been prohibited from making further payment on the ground that the contract was void and without authority: *Wapello County v. Burlington & M. R. R. Co.*, 44-585.

536. Entire contract: A plaintiff suing upon an entire contract and alleging complete performance is not entitled to recover upon proof of partial performance: *Logan v. Tibbott*, 4 G. Gr., 389.

537. Quantum meruit for partial performance: If a job of work is of some use and value to the employer, although it is not properly done, or within the stipulated time, still the workman is entitled to recover as much as the work is reasonably worth, making such allowances as the circumstances may require for failure to comply with the terms of the contract: *Crookshank v. Mallory*, 2 G. Gr., 257; *Davis v. Fish*, 1 G. Gr., 406.

538. If, on failure to perform the whole of a contract, its nature is such that the employer can reject what has been done and refuse to receive any benefit from it, he is entitled so to do, and in such case is not liable to be charged. But where the party receives value, takes and uses the materials, or has advantages from the labor, he is liable to pay the reasonable value of what he receives: *Eyser v. Weissgerber*, 2-463.

539. But in such case the action must be for the value of the services rendered and not under a special contract. If the action be brought upon the special contract, a recovery cannot be had on account of failure to perform: *Ibid.*

540. In an action upon special contract, plaintiff can recover the reasonable value of his work and labor although he has not performed such contract according to its terms, subject, however, to a deduction of the damages sustained by the other party by reason of the violation of the contract: *Freher v. Geeseka*, 5-472.

541. Where a party renders services under an entire contract, but it is broken by his own fault, he can recover for the services performed as upon a quantum meruit, subject to defense on behalf of the other party, based on the breach of the contract, for the purpose of reducing the amount of recovery and deducting what it will reasonably cost to secure a completion of the whole services as well as any damage sustained by reason of the non-fulfillment of the contract: *Pizler v. Nichols*, 8-106; *Byerlee v. Mendel*, 39-382; *McClay v. Hedge*, 18-66; *Wolf v. Gerr*, 43-339.

542. If, in such case, it is found that the damages are equal to or greater than the value of the services rendered, or that the employer, having the right to the performance of the whole contract, has not received

Manner and sufficiency of performance.

any beneficial services, the plaintiff is not entitled to recover. So, also, if it appears that it was expressly agreed that if the employee left the services of the employer before the expiration of the time limited, nothing was to be considered as earned by him, such an agreement would be enforced: *Pisler v. Nichols*, 8-106.

543. An instruction that recovery may be had for services performed, though not according to the contract, is erroneous unless it recognizes the right of defendant to set off the damages occasioned by reason of the breach of contract: *Tait v. Sherman*, 10-60.

544. The measure of recovery for the part performance is to be in accordance with the terms of the special contract: *Byerlee v. Mendel*, 39-382.

And see DAMAGES, §§ 145-147.

545. Where services are rendered in part performance of a contract providing for payment at a specified time in the future, and there is a breach of the contract by failure of such party to complete the services, he should not be allowed recovery even for such partial performance until the time for payment provided for in the contract, even though the amount of the premature recovery is reduced so as to represent the present worth of what may be recovered at the proper time: *Powers v. Wilson*, 47-666.

546. Where a party has paid a sum of money in part performance of a contract, he cannot, upon a breach on his part as to full performance, recover back what he has paid, less the damages which defendant has suffered by the breach. No right of action can accrue in such cases without some fault on defendant's part: *Stevens v. Brown*, 60-403.

h. Manner and sufficiency of performance.

547. By a subcontractor; mail contract: Although a contract for service may be of such nature that the rights and obligations of a party thereunder cannot be assigned, yet the contractor may employ other parties to execute the contract on his part; so held with regard to a contract by the government to carry mails, which by the statute is made non-assignable: *Gordon v. Dalby*, 30-223.

548. A person thus contracting to carry mails may contract with another to perform

the service without the consent of the post-office department, and such contract will not be void between the parties; but if such consent is not obtained, the original contractor and his sureties will be liable for any default in the performance of the contract, while the parties to the second contract must settle the question of damages between themselves: *Pierce v. Walker*, 23-424.

549. Acts not contemplated by the contract: A performance or abrogation of the contract cannot be shown by acts not contemplated by it and done without a purpose or intention to that end: *Wendall v. Osborne*, 63-99.

550. Workmanlike manner; inadequacy of consideration: Where a contract providing for the construction of a building says nothing as to the manner in which the work is to be done, it is presumed that it is to be done in a workmanlike manner. The fact that the consideration is grossly inadequate will not be proper to be considered in determining the quality of the work required by the contract: *Smith v. Bristol*, 33-24.

551. Engineer's estimate: When it was agreed that excavations should be made at so much per cubic yard, to be paid upon the engineer's estimates, held, that such estimates were conclusive between the parties in the absence of fraud, mistake, undue influence or want of good faith: *Mitchell v. Kavanagh*, 38-286.

552. Where a contract for the grading of a railroad contained a provision that the chief engineer of the railroad company should determine the amount and the classification of the work done, and that his decision should be final and conclusive, held, that upon refusal of the engineer to make the estimates and of the railroad company to recognize the contract, the person performing the services under the contract might, in an action therefor, give in evidence the measurements of another competent person to prove the amount of work performed: *Crawford v. Wolf*, 29-567.

553. Where a contract for the purchase and delivery of ties provided for the retention of ten per cent. of all payments becoming due as the work progressed as security for the completion of the contract, and that whenever, in the opinion of the engineer of

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the purchasers, the contract was completely performed, the full sum due should be paid, *held*, that such contract did not prevent the recovery of a *quantum meruit* for the part performance upon failure to complete the contract: *Jemison v. Gray*, 29-537.

554. Person authorized to determine sufficiency: A contract which provides that a certain person shall decide all disputes arising during its performance, and that such decision shall be final and conclusive, will not be construed to constitute such person the final umpire to decide mixed questions of fact and law, and to determine the ultimate question of a right to recover: *Ibid*.

555. Where a contract provides that the person agreed upon shall ascertain and certify the amount due under the provisions of the contract, and he has in fact done so, the other party may then bring suit for such amount: *Flynn v. Des Moines & St. L. R. Co.*, 63-490.

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556. Abuse of discretion, where discretion is given; mining contract: Where defendant entered into an obligation to pay plaintiff a sum of money upon the finding and development of a paying vein of coal, it being provided that defendant should use all reasonable efforts to sell the stock to raise sufficient money to dig a shaft, *held*, that the failure of defendant to sink the shaft and to develop the vein of coal would not render it liable unless it could be shown that it acted in bad faith, or that there was an abuse of discretion on its part in the prosecution of the work: *Oliphant v. Woodburn Coal, etc., Co.*, 68-332.

557. Refusal to receive property tendered in pursuance of a contract is sufficient to constitute a breach thereof: *Buford v. Funk*, 4 G. Gr., 493.

558. By a party putting it out of his power to perform: Plaintiff, in an action for damages for breach of contract for sale of cattle, *held* not obliged to tender the price of the cattle as a condition precedent to recover, after showing a subsequent sale of the cattle by defendant to another person: *Boies v. Vincent*, 24-387.

559. Before time of performance: If a party to a contract disables himself from per-

forming, he may be sued, as for a breach thereof, before the day for performance arrives: *Crabtree v. Messersmith*, 19-179.

560. Renunciation; putting out of power to perform: Where a party to a contract, before the time for performance, puts it out of his power to perform, or renounces or repudiates the contract, the other party may at once maintain action for the breach thereof to recover the damages sustained: *Ibid.*; *McCormick v. Basal*, 46-235; *Richmond v. Dubuque & S. C. R. Co.*, 40-264.

561. Breach of promise of marriage: If, before the time to perform a contract of marriage arrives, the promisor renounces the contract, the promisee may treat this as a breach and at once maintain an action; and a subsequent offer by defendant to execute the contract would not be a defense nor go in mitigation of damages: *Holloway v. Griffith*, 32-409.

See, also, BREACH OF PROMISE.

562. Breach of contract does not terminate it: One of the parties to a contract cannot, by voluntary breach of one or all of its covenants, impose upon the other the necessity of regarding it as wholly abandoned or treating the breach as a total breach, whereby the innocent party would be deprived of benefits or advantages which would otherwise flow from the contract: *Richmond v. Dubuque & S. C. R. Co.*, 33-422; *Richmond v. Dubuque & S. C. R. Co.*, 40-264.

563. And if the contract is not wholly abandoned and the acts of the party do not constitute an entire breach, the prior judgment against such party for prior breaches will not operate to bar subsequent actions for other breaches. The breach of the contract not being considered as entire, the party is liable in a subsequent action for damages accruing after the first judgment: *Ibid*.

564. Divisibility; partial breach: Where a contract between a railway company and the owner of a warehouse provided that the former was to deliver to the latter all through grain of a certain description shipped over their line during a period of years, and pay a certain amount per bushel for the handling of the same, *held*, that such contract was not entire and indivisible, so that, the time of payment not being provided for, payment was to be made only when all the

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services were completed, but that the contract required the performance of successive acts, whereby the services of the owner of the warehouse were to be called into requisition, and for any breach of contract on the part of the railway company the warehouseman could at once maintain an action: *Richmond v. Dubuque & S. C. R. Co.*, 38-422, 492.

565. Collusion or evasion: In such case held, that the railway company could not evade the contract by inducing shippers to bill grain to that point and then rebill it without breaking bulk (the contract with the warehouseman having relation only to through grain), and that the compensation due on through grain could be recovered on grain thus billed: *Ibid.*; *Richmond v. Dubuque & S. C. R. Co.*, 40-264.

566. Assignment does not constitute breach: The act of one party to a contract, in transferring to another the business in connection with which the contract was made, with the stipulation that the assignee shall perform the terms of the contract, does not amount to a breach thereof, terminating his liability for future breaches: *Richmond v. Dubuque & S. C. R. Co.*, 38-422, 497.

567. Partial breach: Where plaintiff sold to defendant ten car loads of barley to correspond with a sample, under an agreement that they should be delivered from time to time and paid for by defendant on delivery, and defendant refused to comply with the contract as to payment on delivery of the first car load, held, that the contract was severable, and that the breach of the contract on defendant's part did not release the plaintiff from the obligation to furnish the other car loads as stipulated, defendant having expressed his intention to comply with the provisions of the contract in the future: *Myer v. Wheeler*, 65-390.

568. A contract for carriage of goods to certain points at certain rates, respectively, but containing the condition that such rates should be the same as the lowest to points named, held, not shown to be broken as to all shipments to both points by proof of lower rates to one of the points: *Murphy v. Creighton*, 45-179.

569. Sale of good-will: Where defendant sold to plaintiff the good-will of his real estate

and law business, agreeing to turn over his list of correspondents, give letters of introduction, etc., and not to engage in the business for three years, held, that after the expiration of that time, it was not a breach of contract to solicit business from his former correspondents: *Hanna v. Andrews*, 50-462.

570. An agreement by one person, upon the sale of the good-will of his business to another, not to carry on the same business, is revoked by the formation of a partnership between such parties for the carrying on of the business, and is not revived by the dissolution of the partnership: *Norris v. Howard*, 41-508.

571. A contract for the sale of the good-will of a business in which a party is engaged does not prevent him from taking employment under other persons already engaged in carrying on the same business, provided he acts in good faith and not for the purpose of establishing a rival business: *Grimm v. Warner*, 45-106.

572. Where, in connection with the sale of land, the grantor bound himself not to carry on the business of keeping a tavern upon adjoining land, held, that such agreement was violated by occasionally keeping travelers for pay, although such grantor did not hold himself out to the world as a tavern-keeper: *Heichew v. Hamilton*, 4 G. Gr., 317.

Further as to sale of good-will, see *supra*, §§ 356-364.

As to measure of damage for breach of contract, see DAMAGES, II, c.

573. Rescission after part performance: Where a party to a contract wrongfully rescinds and places it beyond the power of the other to secure any of the benefits in compensation for services rendered thereunder, the party injured may recover the value of such services: *Barr v. Van Duyn*, 45-228.

574. A party cannot refuse to perform the conditions of a contract on account of violations of conditions by the opposite party, and at the same time consider the contract in existence and sue for further breaches thereof by the other party. If he refuses to perform the conditions on his part on account of breach of the other party, he can only recover damages already occasioned by such breach: *Hall v. Stewart*, 58-631.

Breach.—Rescission.

575. Breach of covenant by assignee: Where one railroad succeeding to the rights of another became bound to pay the indebtedness of the first company, *held*, in an action for damages arising from breach of a covenant to maintain a side-track along certain lots, made by the first company in consideration of land furnished for construction, that the making of the covenant by the new company did not discharge the indebtedness of the old company, and whatever of the covenant was not performed, left so much of the indebtedness of the old company unsatisfied: *Amsden v. Dubuque & S. C. R. Co.*, 28-542.

576. Indemnity; assumption of indebtedness: If a condition or promise be only to indemnify and save harmless a party from some consequence, no action can be maintained until actual damage has been sustained by the plaintiff; but if the covenant or promise be to perform some act for the plaintiff's benefit as well as to indemnify and save him harmless from the consequences of non-performance, the neglect to perform the act is a breach of contract and will give an immediate right of action. Upon an undertaking to pay a debt due a third person, the plaintiff may maintain an action without showing that he has paid the debt: *Stout v. Folger*, 84-71; *Lyon v. Aiken*, 70—.

As to bond of indemnity, see BONDS, §§ 18-20.

577. A failure to pay interest which is by contract payable annually constitutes a breach of contract upon which action may be brought to recover the interest due: *Hershey v. Hershey*, 18-24.

578. Diligence in making collection from third person: Where, under contract, plaintiff was to be paid for his work by the city for whom it was performed when the city collected the cost of it from lot-owners, *held*, that the city was bound to collect the assessment within a reasonable time after the work was done and pay the plaintiff, and a failure so to do would render the city liable to pay the stipulated price. In such case, the burden of proof of diligence would rest upon the city: *Morgan v. Dubuque*, 28-575.

579. Commission for sale of real estate: Where an agent for the sale of land seeks to recover compensation for effecting a sale, the completion of which has been defeated

by the act of the owner in refusing to perform the contract as made, he must show something more than a mere offer to purchase on the part of the proposed purchaser. It must appear that such proposed purchaser was pecuniarily responsible and in a condition to comply with the terms of sale or to respond to an action for damages for failure to perform the contract, if completed: *Iselin v. Griffith*, 62-668.

580. Illegal contract: A contract by an attorney to turn over to another, buying the good-will of his business, all notes in his hands for collection is illegal, and damages for its breach cannot be enforced: *Smalley v. Greene*, 52-241.

XII. RESCISSION; MODIFICATION; SUBSTITUTION; RELEASE.

a. Rescission.

581. Facts authorizing must be shown: Under a contract providing that one party might rescind whenever he became dissatisfied with the manner in which a certain part of it was performed by the other party, *held*, that in order to justify a rescission, he should prove the existence of the facts upon which he relied in so acting: *Barr v. Van Dym*, 45-228.

582. Contract in favor of third person before acceptance: A contract between two persons for the benefit of a third may be canceled or rescinded by agreement between the parties making it at any time before the third person has become aware of, or has accepted, such contract: *Gilbert v. Sanderson*, 56-349.

583. False representations as to the solvency of a party will not be a ground for rescinding a transaction involving a transfer of the notes of such party, if it appears that the maker of such notes was solvent at their maturity, and subsequent to their transfer: *Stanley v. Irwin*, 34-418.

584. Fraud: The party who has been defrauded in a contract is not bound to rescind. He may stand to the bargain and recover damages for the fraud without offering to rescind or giving notice of the fraud: *Coe v. Lindley*, 32-487.

585. Mistake: Where it appeared that the party was induced to enter into the contract

Rescission.

to perform certain labor upon the consideration that work of a particular kind was to be included in the labor to be performed, *held*, that the fact that such particular work was not included was ground for rescission of the contract: *Edmonds v. Cochran*, 12-488.

586. Partial breach: Rescission of a divisible contract will not be allowed for a breach thereof unless such breach goes to the whole of the consideration: *Myer v. Wheeler*, 65-890.

587. Part performance: A party to a contract may not rescind for non-performance, if the failure of the other party be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the party his action for damages for the part not performed, but he must do all that the contract obliges him to do and seek his remedy in damages: *Burge v. Cedar Rapids & M. R. R. Co.*, 32-101.

588. Where plaintiff had partially performed a contract on his part by delivering a portion of the property agreed to be delivered, and offered to perform the balance upon defendant's complying with his part of the contract, which defendant failed to do, *held*, that plaintiff might thereupon treat the contract as rescinded, demand back the portion of the property delivered, and if not returned, recover its value: *Hayden v. Reynolds*, 54-157.

589. Where an order is given to an individual for an article to be manufactured under certain terms constituting a contract, and such order is filled by the successor in business of such individual, the order and conditions become binding as a contract upon the successor filling the order: *Cook Mfg. Co. v. Randall*, 62-244.

590. Reasonable time for performance: Where plaintiff was employed as express-messenger and baggage agent, and afterwards discharged before the completion of the term of service contracted for, *held*, that the employer was bound to give the employee reasonable time and opportunity to become familiar with the business before discharging him for incompetency, the occupation not being one in which it was usual to serve an apprenticeship: *Moore v. Chicago, B. & Q. R. Co.*, 65-505.

591. Duty to refund: Where a contract is rescinded by mutual agreement, the law im-

plies, in the absence of an agreement to the contrary, a promise on the part of one party to refund to the other the money or the value of the property received upon such contract. But an agreement to the contrary need not necessarily be an express one in order to change the rule: *Nason v. Woodward*, 16-216.

592. In the absence of an agreement to the contrary, where a contract is rescinded and the delivery of personal property thereunder is waived, money advanced in payment for such property must be refunded: *Redman v. Malvin*, 28-296.

593. Partial failure of consideration; tendering back consideration received: Where a contract is severable and there is a partial failure of consideration on the part of one party, the other party may tender back the property received under that part of the contract, and rescind the contract to that extent; but, if the contract is not severable, in order to rescind, the other party must be placed *in statu quo*: *Allen v. Pegram*, 16-163.

594. Putting opposite party in statu quo: When there has been partial performance of a contract, a party cannot rescind without putting the opposite party in the position he was in at the time the contract was made: *Moore v. Bare*, 11-198.

595. Equity will not decree the rescission of a contract at the suit of one party thereto on the ground that the other has failed to fulfill his part of the engagement, if the other party cannot be placed *in statu quo*, and injury would result to him by the rescission: *Stringer v. Keokuk, Mt. P. & N. R. Co.*, 59-277.

596. When it is in the power of either party to a contract to rescind it or declare it void, if he does so, he should restore the other party to his former rights by the repayment of money, if money has been paid, or by the return of property, if property has been delivered: *Penny v. Cameron*, 1 G. Gr., 380.

597. So, where a part of the consideration in property had been paid for a conveyance which the other party refused to execute, *held*, that upon such refusal action might be brought against him for the recovery of the consideration without previous demand: *Ibid*.

Rescission.—Modification.

598. Where an agreement to rescind a contract was entered into and never carried out, and was finally abrogated by one of the parties, *held*, that it was the duty of such party to place the other *in statu quo*: *Wood v. Smith*, 51-156.

599. Where it was stipulated in the sale of a machine that, in case it did not correspond with the warranties, or was not made to correspond thereto on notice, the purchaser might return it to the seller, and the latter would then furnish a perfect machine in its place or return the purchase money and notes, *held*, that an unconditional delivery to the seller after the latter had, upon notice, failed to make the machine work satisfactorily, constituted a rescission of the contract, although the vendee afterwards demanded the return of the purchase money and notes without proposing to allow to the seller the election secured him by the contract, the right to make such election being one which the seller must assert for himself: *Davis' Sons v. Butrick*, 63-94.

600. A contract cannot be rescinded by one party thereto, unless both can be restored to the condition they were in before the contract was made, unless the contract was obtained by fraud: *Hendrickson v. Hendrickson*, 51-68.

601. Where there was a contract for exchange of land, and one party, in order to obtain the land which he was to convey, had paid money to a third party, but finally failed to carry out his contract, *held*, that it was not necessary that the other party should pay to him the money so expended before rescinding the contract: *Benson v. Cowell*, 52-137.

602. Repayment of interest: It is not necessary, where a party desires to rescind a contract by the repayment of money paid thereon, that he also pay interest on the amount: *Ibid*.

603. Notice: A party to a contract authorized to rescind it is required to make known to the other his action upon exercising his power to terminate it. So *held* in case of a policy of insurance which the company might, in a certain event, rescind at its option: *Supple v. Iowa State Ins. Co.*, 58-29.

604. Reasonable time: The rule is that the right of rescission on the ground of fraud

or mistake must be exercised at the time of the discovery of the fraud or mistake, or within a reasonable time thereafter: *Rawson v. Harger*, 48-269.

605. Laches: Where plaintiff delayed for two or three years after discovering the alleged fraud in a contract to give notice of any intention to rescind it, but on the contrary recognized its validity by negotiations for his release therefrom, *held*, that not having announced his intention to rescind within a reasonable time, his right to rescind, if any, was waived: *Evans v. Montgomery*, 50-325.

Further as to rescission of contracts, see EQUITY, II, a.

As to rescission of contracts for the sale of land, see VENDORS, IV.

As to rescission of contracts of sales, see SALES, III.

b. Modification.

606. By mutual consent: A party having the authority to contract can consent to a variation of the terms and conditions of a contract previously made: *Slusser v. Burlington*, 42-378.

607. Consideration: A party alleging a subsequent parol modification of a written contract must show that such subsequent verbal contract was entered into, supported by a consideration. A consideration cannot be presumed but must be proved: *Wheeler v. Baker*, 59-86.

608. Proof that a party entitled to monthly payments under a written contract had accepted a less amount per month for a portion of the time in full payment, *held*, not sufficient to prove such subsequent modification: *Ibid*.

609. *Held*, that a promise to pay unconditionally and immediately a certain sum in amounts and to persons not specifically designated might be waived by one of the persons entitled to share therein in consideration of a promise to pay to him specifically a designated sum at a future time or on condition: *Grimes v. Simpson Centenary College*, 48-208.

610. Waiver of conditions: Where a contract was entered into by certain parties to secure advances upon certain conditions, and

Substitution.—Release and discharge.

subsequently, and before the advances were made, certain of such parties executed a bond to indemnify the payee for any loss which he might suffer by a breach of such conditions, *held*, that as to the makers of such bond it operated as a modification of the previous contract and a waiver of its conditions: *First Nat. Bank v. Schlichting*, 40-51.

611. Parol evidence; burden of proof: In attempting to enlarge a written contract by parol evidence, the burden is upon the party seeking to establish such modification, but he should not be required to do so by evidence that is clear, satisfactory and conclusive; a preponderance of evidence in his favor is sufficient: *Holt v. Brown*, 63-819.

That parol evidence of a previous or a contemporaneous agreement or understanding is not admissible to vary the terms of a written contract, see EVIDENCE, II, 4.

c. Substitution; merger; novation.

612. Substitution: Where plaintiff was asserting a claim against defendant and another debtor as jointly liable as partners, and defendant insisted that he and his co-debtor were liable only for one-half each of the indebtedness, and plaintiff accepted from each time-notes for one-half, *held*, that this was a substitution of a new contract and released defendant from any liability beyond the one-half assumed by him: *Drake v. Hill*, 53-37.

613. Merger: The parties may, by agreement, substitute an oral contract for a written one, and such substitution will constitute an abandonment of the written contract and not a mere waiver of its terms: *Aldrich v. Price*, 57-151.

614. Where the parties by agreement enter into a new contract as a compromise of or as a substitution for a former, the new contract being based upon a new consideration, the right of action upon the original contract is lost. It is not necessary for that purpose that it appear that the new contract has been performed. Any action brought must be upon the new contract and not the old one: *Merry v. Allen*, 39-235.

615. A confession of judgment given by one member of a firm for a firm debt is a

merger of the contract debt and it cannot become the subject of another action: *North v. Mudge*, 13-496.

616. Novation: Where A. owes a debt to B. and B. owes a debt to C., and it is mutually agreed between the three parties that A. shall pay to C. the amount due to B., such agreement will operate to discharge B.'s debt to C. to the extent of A.'s indebtedness to B., although there is no special agreement for discharge: *Lester v. Bowman*, 39-611; *Foster v. Paine*, 63-85.

617. But such novation will not release a mortgage given from B. to C. in security of his indebtedness: *Foster v. Paine*, 63-85.

618. Where a railroad company recognizes its liability to a subcontractor for construction work, and undertakes to pay the same by accepted drafts, a subsequent settlement with the principal contractors, and the cancellation of the contract, will not operate to discharge its indebtedness to the subcontractor. A judgment recovered on such drafts will settle the question of liability, and, under a decree providing for the payment of the indebtedness incurred in the construction of a portion of the road, it is immaterial to whom the company was originally liable: *Ney v. Dubuque & S. C. R. Co.*, 20-847.

619. Extension of time: The giving of a valid obligation payable in the future operates to suspend all right of action on the consideration for which it is given until the expiration of the time given, although the obligation in itself is no payment: *Chickasaw County v. Pitcher*, 36-593.

d. Release and discharge.

As to PAYMENT AND DISCHARGE, in general, see that title.

620. By joint contractor: One of two joint contractors can, upon consideration, execute a valid release to the other party of claims for damages arising out of the breach of such contract: *Stapleton v. King*, 33-28.

621. Compromise: An agreement to dismiss an action expressly providing that it shall be a bar to any and all other suits and in compromise and release of all claims and demands of the plaintiff on account of such cause of action, will constitute a defense to any subsequent action thereon unless such

What constitutes conversion.—Execution and delivery.

agreement is in some way avoided, as by showing that the party was not at the time of executing the agreement in full possession of his mental faculties, or had not knowledge of its provisions, or that in some manner he was imposed upon or deceived: *Heironymus v. Heironymus*, 64-81.

CONVERSION.

1. What constitutes: It is not material, in order to constitute conversion, whether the defendant came into possession originally by right or by wrong. Where the circumstances of themselves do not amount to an actual conversion, it will be incumbent upon the plaintiff to give evidence of a demand and refusal prior to the commencement of the action. To exercise dominion over the property is, in law, a conversion, and an offer to return the property at another place will not bar the action: *Cutter v. Fanning*, 2-580.

2. Purchase of a note with notice of the right of another thereto, and collection of the amount due thereon, constitutes a conversion: *Allison v. King*, 25-56.

3. Where a party holding a certificate of deposit as collateral security surrendered it and accepted a note and mortgage in lieu thereof, held, that he was guilty of conversion and liable for the nominal value of the certificate surrendered: *Greenwald v. Metcalf*, 28-363.

4. Evidence: Conversion may be shown either by direct proofs of the fact of conversion, or by proof of demand and refusal, without excuse being shown by defendant: *State v. Bryan*, 40-379.

Measure of damages, see DAMAGES, II, f.

Further as to conversion, see references in INDEX under that title.

CONVEYANCES.

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As to the rule in Shelley's case, see REAL PROPERTY, §§ 10-13.

I. EXECUTION AND DELIVERY.

a. Competency of parties; grantor and grantee.

1. Belligerents: A conveyance between citizens of belligerent nations is void: *Hill v. Baker*, 32-802.

2. So held as to a conveyance of land in Iowa, made during the rebellion by a person within a state in insurrection to a person in a loyal state: *Ibid*.

3. Infants: Where an infant holds title in trust and is compellable to convey, a voluntary conveyance by him will bind him and cannot be disaffirmed: *Prouty v. Edgar*, 6-853.

4. A conveyance by an infant is voidable and not void. If founded on a valuable consideration, it is a valid contract until regularly avoided: *Jenkins v. Jenkins*, 12-195.

Competency of parties; grantor and grantee.

Further as to capacity of minors, see CONTRACTS, VI, a.

5. **Disaffirmance by minor:** A minor is bound by his deed unless he disaffirms it within a reasonable time after he becomes of age. (Code, § 2238): *Weaver v. Carpenter*, 42-343.

6. Where a person, many years after becoming of majority, claimed the right to disaffirm, *held*, that he was not entitled to disaffirm upon showing that the deed was procured by fraud, diligence to discover the fraud not being shown: *Ibid*.

7. That the grantee of a conveyance executed during minority remained insane without lucid intervals for eight years after obtaining majority, *held* sufficient to authorize an action to be brought after that time by his guardian, to set the same aside as being without consideration: *Gates v. Carpenter*, 43-152.

8. That the property has passed into the hands of an innocent purchaser will not prevent disaffirmance: *Ibid*.

9. **Insanity:** An executed conveyance for value to a good faith purchaser will not be set aside in equity on the ground of insanity of which the purchaser had no notice, in case he cannot be put *in statu quo*: *Ashcraft v. De Armond*, 44-229; *Abbott v. Creal*, 56-175; *Alexander v. Haskins*, 68-73.

10. But where the grantee had knowledge of the insanity of the grantor, and the consideration for the conveyance was less than one-third the value of the land, and the grantee had been in possession such length of time that the rents and profits received exceeded the amount paid, *held*, that the conveyance should be set aside: *Alexander v. Haskins*, 68-73.

11. Where it appeared that a conveyance was made by a woman so affected by trouble and distress of mind as to be reduced to a state approaching imbecility, and that the price paid was so grossly inadequate as to shock the conscience, a reconveyance was decreed, the rents received by grantee while in possession being deemed equivalent to the consideration paid: *Perkins v. Scott*, 23-237.

12. The deed of a person who is a mono-

maniac on certain subjects cannot be set aside on account of such fact, where there is no reason to believe that there was not the full exercise of reason and judgment as to its execution: *Burgess v. Pollock*, 58-273.

Further as to capacity of insane persons, see CONTRACTS, VI, b.

13. **Mental weakness:** If the power to contract exists, mere weakness of mind without fraud or undue influence is not sufficient to warrant the setting aside of a conveyance: *Campbell v. Campbell*, 51-713.

14. **Married women:**¹ A married woman may incumber or convey real property owned in her own separate right: *Sanborn v. Casady*, 21-77.

15. The mortgage of a married woman upon her separate property, to secure her husband's debt, if executed for a valuable consideration, would be binding: *Green v. Scranage*, 19-461.

16. Previous to the present statutory provision (Code, § 2206) declaring that a conveyance, transfer or lien executed by either husband or wife in favor of the other shall be valid to the same extent as between other persons, it was held that a conveyance from wife to husband in connection with an agreement to separate, for the relinquishment of dower, would be upheld, if supported by a consideration and free from fraud: *Robertson v. Robertson*, 25-850.

17. But it was also held that aside from an agreement to separate, neither husband nor wife had any interest in the property of the other which could be the subject of conveyance between them: *McKee v. Reynolds*, 26-578.

18. And by statute (Code, § 2203), any agreement between husband and wife, relative to any contingent interest of either in the property of the other, is void: *Linton v. Crosby*, 54-478.

19. The power of a married woman to acquire by purchase, and contract with reference to real property, discussed and previous cases cited: *Shields v. Keys*, 24-298.

20. For the history of previous legislation as to the power of a married woman to convey, and the method of executing instru-

¹ Code, § 1935. A married woman may convey or incumber any real estate or interest therein belonging to her, and may control the same, or contract with reference thereto, to the same extent and in the same manner as other persons.

Grantor and grantee.—Effect of fraud, etc.

ments in such cases, see *Simms v. Hervey*, 19-273.

21. Where husband and wife agreed to sell the wife's interest in certain real estate, after which the husband alone executed, without delivering, a deed thereto, and received payment of the consideration with the wife's knowledge and consent, and she, after the husband's death, voluntarily executed and delivered the deed, *held*, that the wife's title was thereby divested: *Pursley v. Hayes*, 22-11.

22. Where the title is in the wife, and she joins her husband in a warranty deed conveying it, the addition of a clause releasing her right of dower will not limit the estate conveyed by her to her dower interest: *Grapengether v. Fejervary*, 9-163.

23. A wife joining with her husband in a conveyance of his property merely to relinquish her dower right does not become bound by the covenants of such deed: *Childs v. McChesney*, 20-481, 486; *Lyon v. Metcalf*, 12-93.

24. And, therefore, an after-acquired title of the wife does not inure to the grantee in a previous deed of the husband without title, in which deed the wife has simply joined to relinquish dower: *Childs v. McChesney*, 20-481; *O'Neil v. Vanderburg*, 25-104; *Thompson v. Merrill*, 58-419; *Edwards v. Davenport*, 4 McCrary, 84.

As to relinquishment of dower, see ESTATES OF DECEDENTS, §§ 306-321.

25. Corporations: A limitation upon the power to sell operates also as a limitation upon the power to convey: *Middleton Savings Bank v. Dubuque*, 15-394.

26. By officers of corporation: Where a conveyance, duly authorized by the stockholders of a corporation, was made by officers not having authority to make conveyances, and acquiesced in for years by the stockholders with knowledge thereof, *held*, that such conveyance would not be set aside in equity, whatever might be the rights of the corporation in an action at law: *Marshall County High School Co. v. Iowa Evangelical Synod*, 28-360.

See further as to conveyances by corporations or their officers, CORPORATIONS, §§ 76-79.

27. Power of attorney: It is incumbent upon a party offering in evidence a deed

purporting to be made by power of attorney, to produce the authority by which the deed was made, in order to lay the foundation for the introduction of it as evidence: *Hughes v. Holliday*, 3 G. Gr., 30.

28. The mere fact that a power of attorney is, in itself, declared irrevocable does not prohibit its revocation, nor render a sale by the agent in his own interest and in fraud of the title of his principal, valid: *MacGregor v. Gardner*, 14-326.

A conveyance by attorney with intent to defraud his principal may be set aside: See EQUITY, § 121.

29. Charitable uses: Grants, devises, or dedications to public, pious or religious uses, from the necessity of the case, form an exception to the rule applicable to private grants, requiring a grantee as well as a grantor. It is not necessary, in such a case, that the beneficiary should at the time of the grant be clothed with the power or capacity of taking the benefit of the donor's bounty, but the intention of the donor will be executed if this capacity arises within a reasonable time thereafter: *Miller v. Chittenden*, 2-315, 376.

30. Where the property is in the hands of a trustee, and the object and purpose of the grant look to a future grantee, it will be held in abeyance; and it is not necessary that the trustee shall have the power to create the beneficiary or proceed with the execution of the trust before such creation in order to sustain and uphold such a grant or devise: *Ibid.*

31. In a particular case, where the conveyance was in trust for a church not yet organized, *held*, that the organization of a church entitled to take the benefit of the trust within seven years, was sufficient: *Ibid.*

And in general, see TRUSTS.

b. *Effect of fraud, mistake, undue influence, or duress.*

32. Mistake; negligence: Where a wife sought to avoid the effect of her signature to a trust deed conveying the homestead on the ground of misrepresentations, made to her by her husband when he presented the deed to her for signature, as to the property described therein, *held*, that as between herself and an innocent purchaser she could not take ad-

Effect of fraud, mistake, undue influence or duress.

vantage of her own mistake or negligence, but, in the absence of fraud, was presumed to have acted voluntarily and with knowledge of all the facts: *McHenry v. Day*, 13-445.

As to correction of mistake, see EQUITY, II, a.

33. Fraud: Where an uncle procured a conveyance of property from his nephew, who was in the habit of looking to him for counsel and advice, by means of the suggestion that it was necessary to make such conveyance in order to prevent the property being taken by other parties claiming it as heirs, *held*, that such conveyance could be set aside: *Williams v. Collins*, 67-413.

34. In the facts of a particular case, *held*, that the conveyance from a person afterwards adjudicated of unsound mind was obtained with knowledge of his condition and with an intent to defraud him of his property, and therefore should be set aside: *Seerley v. Sater*, 68-375.

35. In particular cases, *held*, that conveyances were void for fraud: *Sully v. Wilson*, 44-394; *Harper v. Kissick*, 52-733.

As to conveyances in fraud of creditors, see FRAUDULENT CONVEYANCES.

36. Undue influence: A conveyance, made by an heir, for an inadequate consideration, of all her interest in certain property, without knowledge of the extent of such interest, and to a step-brother, who, with herself, was a member of the family of a step-mother with whom she resided, *held*, to be made under undue influence, and therefore voidable, although no fraudulent representations on the part of vendee were shown: *Davis v. Dunne*, 46-684.

37. Where it appeared that the grantee of premises did not pay a consideration for the property, and acquired such conveyance by reason of the exercise of undue influence over the grantor, who was a man of weak intellect, by representations and promises, which were false and made for the purpose of playing upon the grantor's fears and inducing him to make the conveyance, it should be set aside: *Oakey v. Ritchie*, 69-69.

38. A conveyance made to a woman by reason of the influence which she exercises through unlawful cohabitation is made under undue influence and she cannot derive

any benefit therefrom. In such case the burden of proof is upon the grantee to show that the transaction does not grow out of the confidential relations arising from such conduct: *Leighton v. Orr*, 44-679.

39. Influence obtained by immoral conduct and adulterous relations is regarded in law as undue influence, and when such relations exist, the burden is upon the one claiming under a conveyance executed by the other party to the unlawful relation, to show that it was not procured by undue influence. The unlawful influence will be presumed in the absence of proof of lawful consideration: *Hanna v. Wilcox*, 53-547.

40. Evidence considered, and *held* not sufficient to show such weakness of intellect on the part of grantor and undue influence over him by others as to render a conveyance by him invalid: *Marmon v. Marmon*, 47-121; *Jones v. Farris*. 70 —.

41. The fact that a conveyance in trust was executed at the urgent solicitation of relatives, *held* not to render it void as being executed under undue influence, where the influence was exercised wholly with a view to the best interest of the grantor: *Riddle v. Cutter*, 49-547.

42. Where a conveyance was executed by a father to his children just before his remarriage, and it appeared that it was done with great reluctance and as the result of persistent endeavor on the part of such children, but it did not appear that he was not in the possession of his powers and able to control his own affairs, and it further appeared that he took legal advice and was told that he was under no obligation to make a conveyance, *held*, there was no evidence of undue influence or duress such as to render the conveyance invalid: *Hamilton v. Smith*, 57-15.

Further as to undue influence, see CONTRACTS, §§ 137, 138.

43. Duress: A deed obtained by duress is not only voidable but void, as there is no consent: *Arnold v. Grimes*, 2-1.

44. A mortgage executed by a wife from fear excited by threats, made to her by the mortgagee, of an illegal criminal prosecution against her husband, is invalid; otherwise, if the criminal accusation was well founded, or, upon reasonable grounds, believed to be

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so by the mortgagee: *Green v. Scranage*, 19-461.

45. Plaintiff's husband being guilty of the larceny of goods from defendants, some of which were used towards improving the homestead, as a means of securing his immunity from punishment and saving herself and children from disgrace, plaintiff executed to the defendants a conveyance of the homestead; *held*, that the conveyance was obtained under such circumstances of oppression as to preclude the idea of a free and voluntary act, but it being apparent that plaintiff was willing to secure to defendants whatever was due them by reason of the larceny of her husband, it was held that defendants might keep the property and pay her the value of it above their due, or she might take the property by paying them the amount due: *Gohagan v. Leach*, 24-509.

Further as to duress, see CONTRACTS, §§ 189-144.

c. Execution.

46. Separate instruments which are executed as parts of the same transaction are to be taken together, although they are not contemporaneous in point of time, and parol evidence is admissible to show that the instrument subsequently executed is made in pursuance of an arrangement entered into at the time of the execution of the previous conveyance: *Clapp v. Forster*, 67-49.

47. By married women: Since the enactment of the Code of '51, conveyances by married women are to be executed as in other cases, and acknowledgment is not necessary to their validity: *Simms v. Hervey*, 19-273.

48. Evidence of execution: Where the evidence as to the execution of a deed claimed to be lost was conflicting, *held*, that the circumstances were such as to support the party alleging its execution: *Cameron v. Hovey*, 38-598.

As to denial of signature of written instrument, see PLEADING, V, d.

49. Execution in another state: Under Rev. Stat. of '43, a conveyance executed in accordance with the laws of the state where executed was valid in this state: *Cady v. Eighmey*, 54-615.

50. The presumption as to the date of execution of a conveyance, in the absence of

evidence as to the true time, is that it was executed as of the date of the instrument, but this presumption may be rebutted by evidence as to when in fact it was executed. To overcome the presumption in favor of the date, and prove that it was made at a time different from that at which it purports to have been executed, when the rights of third parties are involved, the evidence should be clear and satisfactory: *Vance v. Anderson*, 39-426.

51. An unacknowledged deed made to a minor by his father and produced from the possession of his grandfather, who was his guardian, without other proof of the time of execution than the date given in the deed, *held* not sufficient to show title in the minor so as to enable him to redeem from a tax sale made subsequently to the date of the deed: *Walker v. Sargent*, 47-448.

52. The presumption of law, there being nothing in the particular case to repel or rebut it, is that a deed was executed and delivered at its date and upon the consideration recited therein, and this applies as against creditors claiming under the grantor; certainly as against creditors not shown to be such at the time of the deed: *Savery v. Browning*, 18-246.

53. Acknowledgment as evidence of date: The date of an acknowledgment will be accepted as that of the execution of an instrument: *Henry County v. Bradshaw*, 20-855.

54. A strong presumption exists in favor of the certificate of acknowledgment as indicating the date of the execution of an instrument: *Bird v. Adams*, 50-292.

55. In a particular case, *held*, that the date of the certificate of acknowledgment should prevail over oral evidence of loose and random conversations and admissions in determining the date of the execution: *Ibid*.

56. Effect of blanks: Under the statute of this state, as at common law, a grantor and grantee, and the thing to be granted, must all be described in a deed, and an instrument in which any of these are wanting at delivery is invalid: *Simms v. Hervey*, 19-273.

57. Blank as to name of grantor: Where a wife signed with her husband a blank mortgage which was delivered to the husband, who inserted therein a description of real estate owned by the wife, and then de-

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livered the paper to a third party with instructions to negotiate it and insert the name of the mortgagee when negotiated, *held*, that the instrument was not binding upon the wife: *Ibid*.

58. Whether a grantor may empower his agent by parol to fill a material blank in a conveyance otherwise duly executed, *quære*: *Ibid*.

59. Where it appeared that a conveyance was executed and acknowledged in blank, and filled up subsequent to the trial merely for the purpose of making title to plaintiff in the case on which to base an action, *held*, that it was not receivable in evidence: *Byington v. Oaks*, 32-488.

60. A deed executed with a blank as to the name of the grantee, which blank is afterward filled up without the consent of the grantor, will not vest in the party whose claim is thus asserted a legal title; but if, by the contract, the party whose name is inserted is entitled to the land, he has the equitable title, which will prevail over any subsequent purchaser with constructive notice of such conveyance: *Clark v. Allen*, 34-190.

61. Plaintiff and wife executed a deed to defendant, leaving the space for the grantee's name blank, because they did not know the full name, and delivered it to him with authority to insert his own name, which he did; *held*, that the deed was valid and complete, whether it was sought to enforce or to avoid it: *Davin v. Himer*, 29-297.

62. Where one sent a deed to his agent with blanks left to be filled up, with full authority to act for him and fill up the blanks and deliver it, *held*, that when this was done the deed was perfect, and it was not necessary that the possession of the deed by the grantee should be simultaneous with the assent of the grantor. In such case the assent, when given in person or by agent, imparts validity to the deed: *Owen v. Perry*, 25-412.

63. Authority may be conferred by parol in express terms to insert the name of the grantee in a deed, perfect in all other respects, and it may also be implied from the acts and conduct of the grantor, as between him and the purchaser in good faith; and the fact that the agent authorized to fill the blank caused it to be done by another will

not render the conveyance void: *Swartz v. Ballou*, 47-188; *McClain v. McClain*, 52-272.

64. In order that a deed executed in blank shall operate under the law in Iowa as a conveyance of the property described in it, the blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named: *Allen v. Withrow*, 110 U. S., 119.

65. Insertion of description: Where an instrument described the land as having been bought from a certain person, and its location with reference to the town, and directed the insertion of the description by numbers as soon as such description could be obtained, *held*, that an insertion thereof, made by the county recorder in pursuance of such authority, was valid: *Harshey v. Blackmarr*, 20-161.

d. Seal.

66. Essential: Where an instrument of conveyance, executed prior to the statute abolishing the use of seals, was made without seal, *held*, that it would neither constitute a deed nor a covenant to stand seized to the use of the grantee, and that a defective conveyance would not be construed as such a covenant unless it was sufficient in its formal particulars to constitute a deed: *Switzer v. Knapps*, 10-72.

67. But *held*, that such an instrument would constitute a contract to convey: *Ibid*.

By statute the use of private seals is abolished, and is no longer necessary in conveyances: See Code, § 2112; and CONTRACTS, § 262.

e. Delivery.

68. Essential: The delivery of a deed is essential to its validity, though the parties may have complied with all other requisites: *Day v. Griffith*, 15-104; *Smith v. Smith*, 68-608.

69. Intent to deliver: The question of delivery is always one of intention of the parties. If the deed passes into the hands of the grantee without an intention on the part of the grantor that it shall become operative and be used for the purposes intended, it is not a delivery: *Steel v. Miller*, 40-402.

70. Where a deed was executed by all the grantors but one, and left with the notary

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for him to sign, and the remaining grantor refused to deliver it, *held*, that there was no delivery as to any of the grantors: *Overman v. Kerr*, 17-485.

71. Where a deed was not sufficiently delivered to be valid as a conveyance, *held*, that it could not be treated as sufficiently delivered to operate as a completed contract: *Ibid*.

72. Presumption from possession: A deed being in the custody of the grantee will be presumed, in the absence of proof to the contrary, to have been delivered and accepted: *Wolverton v. Collins*, 84-238; *Craven v. Winter*, 38-471.

73. Where it appeared from the evidence that all the parties were present at the execution of the conveyance; that immediately thereafter it passed into the hands of the grantees and remained in their possession or control, and that at the time of the execution it was the grantor's intention to deliver it, *held*, that there was sufficient delivery: *Mercer v. Mercer*, 29-557.

74. Where it appeared that deceased had executed a deed to his children for certain property, reserving to himself a life estate therein, which was in the possession of grantees at the time of the trial, *held*, that failure to record the instrument was not sufficient to overcome the presumption of delivery arising from such possession: *Blair v. Howell*, 68-619.

75. Presumption from recording: The presumption is that a deed, beneficial to the grantee, properly acknowledged and recorded, has been delivered, and the knowledge and assent necessary to a valid delivery will be presumed in the absence of a negative showing: *Robinson v. Gould*, 26-89.

76. In such a case the burden of proof is upon the party claiming non-delivery, to clearly rebut the presumption arising from the acknowledgment and recording: *Craven v. Winter*, 38-471.

77. Therefore, *held*, that delivery of a deed of voluntary conveyance to the wife of grantee, who was a son of grantor, would be presumed to be a delivery to the son: *Ibid*.

78. While the recording of a conveyance is not proof of its delivery, yet execution of the instrument, and delivery to the recorder in good faith and at the instance of the

grantee, may constitute a delivery; but the presumption of delivery would not arise from the fact that the instrument is found recorded, if the grantee has done no act recognizing its existence or validity: *Foley v. Howard*, 8-56.

79. The fact that the grantor in a deed delivers it to the recorder for record may be a circumstance, with others, tending to show fraud, but does not, of itself, as matter of law, make the deed fraudulent or void: *Ward v. Wehman*, 27-279.

80. Date of delivery: An instrument being in custody of grantee is presumed to have been delivered and accepted at the date of its execution: *Craven v. Winter*, 38-471.

As to presumption of date of delivery from acknowledgment and recording, see *supra*, §§ 50-55.

81. Neglect to deliver: Where a deed was executed before a notary public, and the grantee directed the notary to send it to the county recorder for record, which was not done, through the negligence of the notary, *held*, that the delivery dated from the time of the execution: *Adams v. Ryan*, 61-783.

82. Recording without grantee's knowledge: Assent of the grantee to the conveyance will not relate back to the delivery of the deed to the recorder for record where it was without the knowledge of the grantee, and without previous agreement to execute a conveyance of the property referred to: *Day v. Griffith*, 15-104.

83. Subsequent acceptance by the grantee of an instrument delivered to the recorder without his knowledge will not relate back to such delivery so as to cut out the rights of an intervening attaching creditor: *Ibid*.

84. Acceptance: Allegation of delivery of a deed necessarily implies acceptance thereof: *Davenport v. Whisler*, 46-287.

85. Acceptance presumed: Where a husband procured a conveyance to be made by a third person to his wife which was plainly for her benefit, and had the deed delivered to himself, *held*, that such delivery completed the conveyance of the title to the wife. In such case the acceptance of the grant by the wife would be presumed: *Parker v. Parker*, 56-111.

86. Where a deed to a child is absolute in form and beneficial in effect, and the grantor

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and father causes it to be recorded, there is a sufficient delivery to the infant and the title will pass thereby. In such case manual delivery and formal acceptance are not necessary: *Cecil v. Beaver*, 28-241; *Palmer v. Palmer*, 62-204.

87. Where the conveyance from the father to the son was filed by the father for record, and after being recorded was taken from the recorder's office by the son, he being a minor, *held*, that there was sufficient evidence of delivery: *Palmer v. Palmer*, 62-204.

88. Where the assignment of a contract of purchase of land was made to a minor under two years of age, and afterwards, before he was ten years of age, placed in the hands of an attorney for the assignor, who was a parent of the minor and appointed his guardian, such attorney being employed to protect the rights of the minor under the contract, *held*, that there was sufficient delivery to the minor to support the assignment: *Byington v. Moore*, 62-470.

89. Gift to child: *Held*, that the evidence in a particular case was not sufficient to establish the delivery of certain notes and mortgages executed by plaintiff's father to him as a gift: *McKenna v. Kelso*, 52-727.

90. Delivery after grantor's death: Delivery to the grantee after the death of the grantor is not sufficient to constitute a conveyance: *Otto v. Doty*, 61-28.

91. Implied delivery to child before death: Where a father died, leaving among his papers a deed of land duly executed in form to one of his children, *held*, that the law would give effect to the same if there was anything indicating the intention of the intestate that it should become effective, as for instance the conveying to other children of an equal portion of his real estate, and that a court of equity would, in such case, declare the deed valid in order to effectuate justice. A delivery will be implied or not, according to the intent of the grantor and the surrounding circumstances of the case: *Stow v. Miller*, 16-460.

92. Where one who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing either, and it appears that he manifested an unequivocal intention within a very short time of his death to have this

deed operate as a disposition of his property, it will be given effect without formal delivery: *Newton v. Bealer*, 41-334.

93. Escrow: The mere fact that a deed properly executed is, in pursuance of an agreement to sell, placed in the hands of a third person to hold until the purchase money is paid, does not of itself constitute delivery and entitle the purchaser to possession thereof on payment of the money. There must be some distinct word or act of the grantor, independent of the original agreement, showing an intention thereby to part with control of the deed and lodge it in the hands of a third person, subject to the grantee's control upon performing the agreement on his part: *Logsdon v. Newton*, 54-448.

94. An innocent purchaser from a grantee in possession under a deed held as an escrow and improperly delivered to the grantee will be protected, it appearing that the original grantor had knowledge of the delivery of the escrow to the grantee and made no effort to deprive him of the possession: *Haven v. Kramer*, 41-382.

f. Ratification.

95. What sufficient: A recognition which shall have the effect of making valid a deed which, without such ratification, would be ineffectual to pass the title as against the party or subsequent incumbrancers, should be clear and express, or be implied from circumstances equally clear and undisputed: *Haynes v. Seachrest*, 13-455.

96. The ratification by a grantee of the unauthorized acts of an agent in accepting a conveyance of real estate in payment of a debt, when made before any liens in favor of other creditors attach, renders the conveyance complete and valid: *Lampson v. Arnold*, 19-479.

97. In case of conveyance by agent: Failure to object, with knowledge of the execution of a conveyance by an agent claiming the right to convey, will constitute a ratification of the conveyance: *Alexander v. Jones*, 64-207.

98. In a particular case, *held*, that the grantor in a conveyance had, by his conduct, bound himself by a ratification of the act of

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his agent in making the same: *Burdick v. Seymour*, 39-452.

99. Where deeds were taken by a grantee from the agent of the grantor under a claim that the contract under which they were to be delivered was different from that stated by the agent, and with the agreement that if the grantor did not approve of the contract as stated by the grantee the deeds would be returned, and after being notified that the grantor did not agree to the grantee's version of the contract, the grantee failed to return the deeds but put them on record, *held*, that he thereby ratified the contract and became bound: *Meredith v. Callanan*, 33-590.

g. Cancellation.

100. By destruction before delivery:

Where a father makes a voluntary conveyance in form to a minor child, retaining the possession of the instrument, it is competent for him, at any time before actual delivery to the child or to some one for the use of the child, to destroy the deed or make any other disposition of the property: *Stow v. Miller*, 16-460.

101. Redelivery and cancellation: The cancellation of a deed does not revest property which has passed under it by a transmutation of possession; but where at the time a conveyance was executed a portion of the purchase money remained unpaid, and the conveyance, not being put on record, was afterwards surrendered by the grantee by agreement with the grantor, an equivalent of the purchase money received by the grantor being returned, *held*, that the grantee had thereafter nothing but the naked legal title, and that a judgment creditor levying thereon and buying in the property at a sale under such levy, acquired no title as against the original grantor holding the equitable title: *Blaney v. Hanks*, 14-400.

As to rescission for fraud or mistake, see EQUITY, II, a.

h. Illegality in execution.

102. Failure to stamp: A deed of conveyance without a revenue stamp such as was required by United States revenue law, *held*, inadmissible as evidence to prove title: *Barney v. Ivins*, 22-163.

103. When it was proposed to prove, in an action for the purchase money under a contract to convey, that the vendor tendered the vendee a proper deed, and that several revenue stamps were inclosed therewith which the vendor was to affix and cancel if the vendee would accept the deed, *held*, that the deed was receivable in evidence without being stamped as required by the revenue laws: *Harker v. Cochrane*, 86-390.

104. Swamp lands: Under the statute (Rev., § 959) providing that no swamp lands shall be sold at less than \$1.25 per acre, *held*, that a conveyance for a gross sum of all the swamp land owned by the county and not conveyed or disposed of, it being conceded that the amount of such land exceeded the number of acres which could properly be conveyed for the sum named, was void: *Savery v. Moore*, 61-505.

105. The covenants contained in a deed made by a county and conveying certain swamp lands cannot have the effect of making valid the deed itself, nor the contract evidenced thereby, nor give the deed itself any force by way of estoppel, where the contract itself is forbidden by statute; and the fact that the disability of the county is afterwards removed by repeal of the statute forbidding the contract, and the title to the lands contracted for (to which the county had had no title), is perfected in the county, will not vest the after-acquired title in the grantee: *Robinson v. Bailey*, 26 Fed. Rep., 219.

II. CONSIDERATION.

106. Stipulation may be: A stipulation contained in a deed will be considered as a part of the consideration for the conveyance: *Hull v. Chicago, B. & P. R. Co.*, 65-713.

107. Presumption: A deed is sufficient *prima facie* evidence of a good consideration, and throws the burden of proof upon the opposite party to impeach it on that ground: *Carson v. Foley*, 1-524; *Wolverton v. Collins*, 34-238.

108. Parol evidence: While a deed is *prima facie* evidence of the consideration paid, yet for any purpose short of affecting the title, the consideration clause is not conclusive that the money has been paid, and is only *prima facie* evidence of the amount,

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which may by parol proof be shown to be greater or less than the amount mentioned in the deed: *Trayer v. Reeder*, 45-272.

109. The consideration of a deed, when it is itself the contract between the parties, may be shown to be different from that expressed in it: *Puttman v. Haltey*, 24-425.

110. The clause in a deed acknowledging the receipt of a sum of money as consideration is open to explanation by parol proof: *Swafford v. Whipple*, 3 G. Gr., 261.

111. A variance between the allegations and the proof as to the consideration will not be fatal. The sum named in the deed is not conclusive: *Jones v. Smith*, 6-229.

112. The fact that the consideration named in the deed is greater than that actually paid is not sufficient of itself to set the sale aside: *Culbertson v. Luckey*, 13-12.

113. In an action upon a warranty in a deed it is competent to show that the consideration was greater than the amount named in the deed: *Harper v. Perry*, 28-57; *Lawton v. Buckingham*, 15-22.

114. Parol evidence as to consideration not allowed to defeat the deed: While for some purposes the consideration of the conveyance may be shown to be different from that expressed, the rule is that this cannot be allowed for the purpose of avoiding the deed or varying its effect: *Dunbar v. Stickler*, 45-384.

115. The grantor, having acknowledged the consideration of the deed to be paid, cannot be permitted to contradict that fact by proof, so as to avoid his own solemn act, unless by competent proof of fraud: *Rymear v. Neilin*, 3 G. Gr., 310.

116. It seems that parol evidence is admissible to prove that the real consideration is other than that stated in the deed, but as to whether parol evidence is admissible to contradict the deed by showing a want of consideration, *quære*: *Day v. Loun*, 51-364.

Further as to parol evidence of consideration in a written instrument, see EVIDENCE, §§ 742-749.

117. Burden of proof: As a conveyance imports a consideration, the burden of proof is upon the party denying the consideration to establish such denial: *Mansfield v. Watson*, 2-111.

Recitals of the deed: The recitals of the deed are not evidence of the payment of consideration as against one not a party to the deed, and the grantee claiming as a purchaser for valuable consideration without notice of prior unrecorded instruments has the burden of proving by other evidence the payment of a consideration: See RECORDING ACTS, §§ 102-109.

118. Consideration payable at option of grantor: A conveyance in consideration of an agreement to pay specified sums at specified times if demanded, held not to be voidable as being voluntary and improvident: *Dunbar v. Stickler*, 45-384.

119. Agreement to support as consideration: Where no interests of creditors are involved, the owner of property may convey it in consideration of future support, if done in good faith and without fraud: *Dubuque County v. Reynolds*, 41-454.

120. A conveyance in a certain case by a father to his son, in consideration of his own support, etc., held not an unreasonable contract under the expectancy of life of the father at the time and other circumstances: *Johnson v. Johnson*, 52-586.

121. Where a mother resides with her daughter without any express agreement to compensate such daughter for such care and support, there is no moral obligation upon the mother to make such compensation, which will support a conveyance voluntarily made to such daughter but not perfectly executed: *Else v. Kennedy*, 67-376.

122. Love and affection: A consideration of love and affection is sufficient to support a conveyance of an inheritable estate: *Piereson v. Armstrong*, 1-282.

123. A conveyance made in consideration of blood, or natural love and affection, is good as between the parties, and all others except subsequent purchasers without notice and creditors: *Mercer v. Mercer*, 29-537.

124. So held as to a deed from husband to wife: *Burgess v. Pollock*, 53-273.

125. A voluntary executory contract between parent and child will not be enforced in a contest between one child and other children of the same ancestor, though it will be enforced against the party contracting; but where the contract is executed, as in the case of a conveyance, it will not be disturbed

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for want of valuable consideration: *Mercer v. Mercer*, 29-557.

126. In an action to set aside plaintiff's conveyance for the reason that it was made in consideration of love and affection on representations which were untrue, etc., *held*, that under the circumstances it appeared that the consideration was in fact the settlement of the rights of parties in a dispute and not for love and affection: *Bostwick v. Bostwick*, 52-721.

127. A release by a father of all his interest as heir in the estate of a deceased son, made to the decedent's widow, *held* sufficient to convey the interest of the grantor in the real property of decedent although there was no pecuniary consideration for such conveyance, relationship of the parties being a sufficient consideration: *Thornton v. Mulquinne*, 12-549.

Further as to fraudulent and voluntary conveyances, see FRAUDULENT CONVEYANCES.

128. Gift to child: As between the parties a conveyance by a father to a child will be held as being founded upon a meritorious consideration; but an executory agreement to convey existing only in parol, unassisted by the fact of possession and permanent improvements, will not be enforced by a court of equity: *Moore v. Pierson*, 6-279.

129. But where a promise is clearly, definitely and conclusively established, and the child upon faith of it has entered into possession and made valuable improvements, the agreement will be enforced: *Ibid*.

Further as to GIFTS, see that title.

130. Advancement by a parent to a child is a good consideration and will support a contract except as against other children, and creditors and subsequent purchasers without notice: *Patterson v. Mills*, 69-755.

131. The presumption in the case of conveyance to a child without consideration is that it is intended as an advancement; and where the agreement for an advancement had not been carried out, and the child took a distributive share of the estate without regard to such advancement, *held*, that he could not retain the property claimed to have been given to him by the parent, although he had made improvements thereon: *McMahill v. McMahonill*, 69-115.

132. An advancement is a gift, by anticipation, from a parent to a child, of a whole

or a part of what it is supposed such child would inherit upon the death of the parent. If the child accepts and appropriates a full distributive share of the balance of the estate without regard to the advancement, equity will not enforce the agreement of the parent to make such advancement: *Ibid*.

Further as to advancements, see ESTATES OF DECEDENTS, §§ 268-272, and GIFTS, § 7.

133. Failure of consideration: Failure to pay the consideration upon which a conveyance is made does not render the conveyance void but furnishes grantor the right of action for the stipulated consideration: *Lake v. Gray*, 35-459.

134. Where a deed was made in consideration of a promise to deliver certain fruit trees, *held*, that the promise being a sufficient consideration, the title passed to the grantee and through him to his grantees, although the consideration was never paid and the subsequent grantees of the purchaser knew that fact and that the purchaser was worthless: *Gray v. Lake*, 48-505.

135. Unlawful consideration: The fact that a voluntary conveyance of property is made to a woman with whom grantor is unlawfully cohabiting will not be considered as based upon such cohabitation as a consideration unless such fact is made to appear: *Leighton v. Orr*, 44-679.

136. Want of consideration: A written instrument of the same date as of the conveyance but in fact subsequently executed, and purporting to render the conveyance conditional, *held* not binding for want of consideration; but *held* also, that the circumstances showed that the original conveyance was in fact a mortgage and might be foreclosed as such and the consideration named therein recovered: *Ingalls v. Atwood*, 53-283.

Further as to construing absolute deeds as mortgages, see MORTGAGES, II.

137. Inadequacy of consideration in a particular case, *held* not sufficient to warrant the setting aside of the conveyance: *Audubon County v. American Emigration Co.*, 40-460.

138. Setting aside conveyance: Where an action to set aside for want of consideration a conveyance executed during minority of grantor and while he was insane was brought

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eight years after majority was attained, no lucid interval having intervened, *held*, that the action was not too late: *Gates v. Carpenter*, 43-152.

139. Recovery back of consideration: Where a conveyance is rescinded in an action by the grantor, the resulting obligation of such grantor to repay the consideration inures to the benefit of a subsequent grantee: *Deere v. Young*, 39-588.

Purchaser for valuable consideration: As to who is deemed a purchaser for valuable consideration, and within the protection of the recording laws, see RECORDING ACTS, III, b.

III. FORM, CONSTRUCTION AND EFFECT.

a. *Form.*

140. Not material: It is not essential that a deed of conveyance should follow any exact or prescribed form of words. If the intention to convey is unmistakably expressed, that intention will not be defeated by the fact that the instrument also partakes of the nature of a contract: *American Emigrant Co. v. Clark*, 62-182.

141. Grant: The words "have given and granted" are sufficient to constitute a conveyance: *Pierson v. Armstrong*, 1-282.

142. Release: Although at common law a release was not effectual to convey title, unless the releasee had a former estate in possession, yet the true principle of construction now adopted is that all instruments shall be so construed as to pass the estate when such was the intention of the parties. Therefore, *held*, that a release by a father to the widow of a deceased son of all the rights of such father as heir in the estate of the son would transfer to the widow the title of the grantor in the real estate of decedent: *Thornton v. Mulquinne*, 12-549.

143. Interest of grantor: The granting clause in a deed was as follows: "do hereby sell and convey unto said M. the following premises, to wit: all our right, title and interest in and to" a certain lot described; *held*, to be a grant of the right, title and interest possessed by the grantor, and that the general covenant of warranty following had no application beyond such right and title: *McNear v. McComber*, 18-12.

144. Where there is a grant of certain real property described, although accompanied with the explanation that the grantor means thereby only to convey his right, title and interest in the premises, followed with a general warranty of title, a breach of the covenant occurs upon the failure of the title to and eviction from the property; but when the grant is simply of the right, title and interest of the estate sold and conveyed, the covenant is limited to the interest the grantor had in the premises, and a failure of such title does not constitute a breach of warranty: *Ibid*.

145. Life estate: Conveyance in a particular case *held* by reason of the terms of its premises to be a conveyance of a life estate: *Davis v. Iowa State Ins. Co.*, 67-494.

146. Quitclaim: A conveyance in which the grantor purports to sell and convey, as well as quitclaim, is not a mere quitclaim deed: *Sibley v. Bullis*, 40-429.

147. The mere fact that a deed contains the words "bargain and sell" does not make it any the less a quitclaim. It is a quitclaim if it conveys, not the property, but the grantor's right, title, interest, and estate, therein: *Wightman v. Spofford*, 56-145.

148. So, a deed containing the following granting clause: "have bargained, sold and quitclaimed, and by these presents do bargain, sell and quitclaim, all our right, title and interest," etc., etc., *held* to be more than a mere quitclaim: *Wilson v. Irish*, 62-260.

149. A quitclaim deed to a person who knows that his grantor has no title to or interest in the property does not confer upon grantee any right whatever: *Curtis v. Smith*, 42-665.

That a grantee by quitclaim is not protected as a *bona fide* purchaser, see NOTICE, I, g.

150. Uncertainty as to grantee: Where a contract is made by the owner of land with another for the conveyance of title, and the consideration is furnished by the latter, he will be considered as the grantee although not expressly named as such. The conveyance will not be void for uncertainty as to the grantee: *American Emigrant Co. v. Clark*, 62-182.

151. Under the facts in a particular case, *held*, that a conveyance of land purchased by the son with money of the father and intended for the father, the name inserted as

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grantee being one common to father and son, who were not accustomed to use any marks of distinction to indicate which was intended, should be considered as a conveyance made to the father: *Balwerk v. Durger*, 63-358.

b. Construction.

152. Circumstances and intention: The intention of a party to a conveyance may be ascertained from the entire transaction, and extrinsic circumstances to aid in the construction of the instrument, the situation of the parties and the objects in view in the execution of the instrument may be considered: *Craven v. Winter*, 38-471.

153. In ascertaining the intent of the parties, the court will always consider the then particular situation, the circumstances attending the transaction, the state of the country, and the thing granted at the time of the grant: *Schotte v. Rosiers*, 4-328.

As to when a deed absolute in form will be construed as a mortgage, see MORTGAGES, II.

154. Punctuation: While punctuation is a most fallible standard by which to interpret language, yet it may be resorted to when all other means fail. However, if from the instrument it is apparent what the true meaning is, punctuation will not be sufficient to change it: *Schotte v. Rosiers*, 4-328.

155. Copulative: A deed in a particular case construed with reference to punctuation and the use of the copulative: *Ibid.*

156. All the parts and ceremonies necessary to complete a conveyance are to be taken together as one act and operate from the substantial part by relation. Therefore, *held*, that where a title, evidenced by a certificate of purchase of land from the government, had been conveyed and a patent subsequently issued to the original holder of such certificate, the patent would inure to the person to whom the title had been conveyed: *Cavender v. Smith*, 3 G. Gr., 349.

157. Construction favorable to grantee: If there is ambiguity on the face of a deed, such construction must be given it as will be most favorable to the grantee: *Marshall v. McLean*, 3 G. Gr., 363.

158. That construction will be followed which would support, rather than that which would defeat, the conveyance: *Barlow v. Chicago, R. I. & P. R. Co.*, 29-276.

159. While it is true that exceptions and reservations in conveyances are to be construed most strictly against the grantor, that is, the party in whose favor they are inserted, yet if it can be fairly ascertained from the language of the instrument what the parties thereto intended, their intention will be given effect: *Wiley v. Sirdorus*, 41-224.

160. Testamentary disposition; revocation: The test to determine whether the instrument is a deed or testamentary paper, revocable at the will of the maker, is this: If the instrument passes a present interest, although the right to its possession and enjoyment may not occur until some future time, it is a deed or contract; but if the instrument does not pass an interest or right until the death of the maker, it is a will or testamentary paper: *Craven v. Winter*, 38-471.

161. Therefore, held, that a conveyance by a father to his son, reserving a life estate so himself and his wife, the mother of grantee, was not revocable at will of grantor: *Ibid.*

162. A deed referring to and incorporating a will is good even if the disposition of the property is to take effect in futuro; and when a deed is to convey land for such uses as are set out in a will, then the will is not revocable, if no power of revocation is reserved in the deed: *Ibid.*

163. Where a conveyance of an estate of land contained, in addition to the usual words of conveyance, the provision, "to commence after the death of both of said grantors," held, that it was of a testamentary character and subject to revocation prior to the death of the grantors, even though made upon a valuable consideration: *Leaver v. Gauss*, 62-314.

Further as to testamentary dispositions, see WILLS.

c. Conditions and limitations.

164. The statute de donis is not in force in this state as a part of the common law. Therefore, where a conveyance was made to a married woman and the heirs of her body begotten by her present husband, to have and to hold unto her and said heirs, *held*, that the grantee took a fee-simple estate and had

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a full right to convey: *Pierson v. Lane*, 60-60.

165. Inconsistent conditions: Where a conveyance is in fee-simple absolute, but contains a condition in conflict therewith, the conveyance will be upheld and the condition considered as void. Therefore, held, that a conveyance in fee-simple with the condition that any portion of the premises held by the grantee at the time of her death should revert to the grantor or his heirs, conveyed an absolute fee-simple estate, and any portion of the premises held by the grantee at her death did not revert to the grantor but passed to her heirs: *Case v. Dwire*, 60-449.

166. A condition inconsistent with an express grant is void, and such a condition will not be inferred from doubtful and uncertain language: *Hurd v. Hurd*, 64-414.

167. Restraint of alienation: Where a conveyance is of a fee-simple estate, without reservation of any reversionary interest of grantor, a condition in restraint of alienation is void. So held where the grant was in the words following: "do give my son, J. M., all my interest in the following lands, . . . to have the above described lands his life-time and to go to his children at his death, but if he dies without children, then the above described land to go to his brother, G. M., and at his death," etc., etc., with the further provision, "It is expressly understood that he shall not part with it nor sell it, nor shall any person sell it for him or for debts whatsoever:" *McCleary v. Ellis*, 54-311.

168. Reservation of life estate: A conveyance with reservation of life estate from year to year, containing a further provision that the right of the grantor to possession under such life estate must be requested in writing before the first day in March in each and every year, reserves to the grantor a full life estate, and the second provision does not create a limitation upon such estate, but relates merely to possession thereunder: *Hurd v. Hurd*, 64-414.

169. A condition subsequent is not so rigidly construed as a condition precedent; and held, that a conveyance upon condition of defeasance in case the grantee should die without children living at her death was not defeated where the grantee left one child surviving: *Pierson v. Armstrong*, 1-282.

170. Where conditions inserted in a deed by way of covenants are not conditions precedent to be performed before the title to the land vests in the grantee, and before it is to be appropriated and used, the title will not be set aside in equity for failure to perform the same: *Stringer v. Keokuk, Mt. P. & N. R. Co.*, 59-277.

171. Where a vacation of an alley by the city was procured upon representations of an adjoining owner that he would erect thereon a building of a certain description at a certain cost, and the building erected did not correspond with the representations, held, that the condition of the vacation of the alley was a condition subsequent, and not a condition precedent, and that a court of equity would not declare the vacation void and order the alley reopened: *Marshalltown v. Forney*, 61-578.

172. Condition precedent; performance: Where a conveyance was delivered in escrow, to take effect when a depot was located as agreed, held, that the mere platting of an addition to the town upon which certain ground was marked depot ground, did not amount to such location as contemplated, nor did a subsequent location of a depot on that spot, made by another company, not succeeding to the rights of the grantee in the deed: *Sioux City & I. F. Town Lot, etc., Co. v. Wilson*, 50-422.

173. Certain conditions to be performed by a purchaser of swamp lands, held, in a particular case, not to be in the nature of conditions precedent to the conveyance: *Page County v. American Emigrant Co.*, 41-115.

174. A conveyance upon condition precedent does not take effect until performance of the condition: *In re Smith*, 56-270.

175. Conditions and stipulations in conveyances to railway companies: Where a part of the consideration of a conveyance to a railway company of land for depot grounds was expressed to be the permanent location of the depot on the grounds conveyed, held, that such provision was not a promissory undertaking on the part of the grantee to permanently maintain a depot on the land conveyed, and such grantee was not liable for failure to comply with such provision further than to the forfeiture of the right conveyed, for the reason that such provision was a condition

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subsequent, and not a personal obligation: *Close v. Burlington, C. R. & N. R. Co.*, 64-149.

176. Where a deed of a right of way to a railway company contained a provision as to the location of a depot, such proviso was construed to be a condition precedent, the breach of which could be taken advantage of by the grantor (he having remained in possession) without formal entry, by an action to have damages assessed as though no deed had ever been made: *Taylor v. Cedar Rapids & St. P. R. Co.*, 25-371.

177. Where a conveyance granted the right to use a certain side-track "as now located," and afterwards the grantor relaid such side-track in a somewhat different location, *held*, that the right to use the side-track, as relaid, existed in the grantee: *Fellows v. Webb*, 43-133.

178. A conveyance of a right of way to a railway company "as located or to be located by the engineers of said company," *held* not to be defeated by the fact that the engineer of an assignee of said company located the road, there being no manifest intention to rely on the personal qualifications of a particular engineer: *Barlow v. Chicago, R. I. & P. R. Co.*, 29-276.

179. A conveyance to a railway company granted a strip of land one hundred feet wide through a certain tract as located by the line of road "for the construction of the second division of said railroad," and with a provision "that in case such railroad company do not construct their road through said tract, or shall, after construction, permanently abandon the road through said tract of land, the same shall revert to and become the property of the grantors, their heirs or assigns;" *held*, that, taking into consideration the situation of the parties at the time the deed was made and the subject-matter, together with the language of the deed and the intention of the parties, the legal effect of the instrument was no more than a conveyance of a right of way: *Ibid.*

180. Limitation of covenants: A deed contained covenants "that we are lawfully seized of said premises; that they are free from incumbrances; that we have good right and lawful authority to sell the same, and that we do hereby covenant to warrant and defend the said premises against the lawful

claims of all persons whomsoever *claiming through or under us*," the words in italics being written, the others printed; *held*, that the words in italics appeared from the evidence and the language to have been intended to limit and restrain all the preceding covenants, special as well as general, and that the grantor was not bound to protect the property against incumbrances other than his own and those of persons claiming under him: *Crum v. Loud*, 23-219.

181. Perpetuity: Where a conveyance is made to the trustees of a religious society without giving the power to alienate and invest the proceeds, the grant is not objectionable on the ground of creating a perpetuity: *Miller v. Chittenden*, 2-315, 362.

182. Under a statute (Code, § 1920) declaring every disposition of property void which suspends the absolute power of controlling the same for a longer period than the lives of persons then in being and for twenty-one years thereafter, *held*, that a lease for nine hundred and ninety-nine years was not invalid: *Todhunter v. Des Moines, I. & M. R. Co.*, 58-205.

183. Adverse possession: Even apart from a statutory provision that adverse possession shall not prevent conveyance, by the owner, of his interest, it is doubtful whether the common law rule, which prohibited a sale of property in the adverse possession of another, should longer apply, things in action being now assignable: *Foster v. Young*, 35-27, 40.

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184. A conveyance by a bankrupt to his assignee will pass the legal title so as *prima facie* to authorize such assignee to bring action to quiet title: *Lewis v. Soule*, 52-11.

185. License; revocation: Where an improvement is made under a parol license, an interest is acquired thereby which cannot be revoked either by the licensor or his grantee with notice. So *held* with regard to a partition wall erected partly upon land of another by parol license of the owner: *Wickersham v. Orr*, 9-253.

186. Where money or labor has been expended on the land of another upon the faith of a promise given by him, the owner shall not assert his legal right to the soil so as to

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interfere with the use or enjoyment of the building or structure erected as the result of such promise by the money and labor of the licensee: *Ibid*.

187. **Conveyance as mortgage:** In a particular case, *held*, that under the terms of a conveyance which was in fact a mortgage, the grantor was entitled to the possession of the property until sold to third persons in accordance with provisions therein: *Radford v. Folsom*, 58-473.

188. **Unexpired lease:** A conveyance of land with all appurtenant thereto carries with it all the rights of the grantor under an unexpired lease of the premises: *Hatfield v. Lockwood*, 18-296.

189. **Unaccrued rent:** Rent reserved by lease, and not accrued at the time of conveyance, passes by the conveyance to the grantee: *Winn v. Murehead*, 52-64; *Van Wagner v. Van Nostrand*, 19-422.

190. In such case, action against the tenant to recover such rent may be brought by the grantee in his own name: *Abercrombie v. Redpath*, 1-111.

191. The grantor has no right to receive such rent, but his liability to the grantee, if he should collect the rent, would be for money had and received, and not for a breach of the covenants of his deed: *Van Wagner v. Van Nostrand*, 19-422.

192. **Reservation of easement:** Where a father executed to his children by way of gift a conveyance for certain property, coupled with an oral understanding as to the use of certain portions of such property, constituting an easement in the father over such property appurtenant to other property owned by him, and afterwards such children united in executing an instrument to the father, conveying to him such easement for the mutual benefit of all the parties, *held*, that such conveyance was valid, to create an easement in the father: *Clapp v. Forster*, 67-49.

193. A parol reservation of unaccrued rent would be of no validity as against the conveyance: *Winn v. Murehead*, 52-64.

194. Whether a parol reservation of growing crops at the time of sale or conveyance of the land can be shown in a controversy between the grantor and grantee respecting them, *quære*: *Johnson v. Tantlinger*, 81-500.

195. But where it was alleged that grantor had remained in possession under such parol agreement, and with consent of the grantee cultivated such crops which were the produce of his toil and labor, *held*, that those facts were properly provable in defense to, or reduction of, a claim by the grantee for the value of such crops: *Ibid*.

196. A parol reservation of standing timber cannot be shown for the purpose of varying the effect of a conveyance of the property: *Davis v. Hull*, 67-479.

197. **Crops:** The rule that growing crops follow the title of the land is not applicable to grain which is matured and ready for harvest. It then possesses the character of personal chattels, and is not to be regarded as a part of the realty. Such is the rule, at least, where the question is between the purchaser at foreclosure sale and the tenant of the mortgaged premises: *Hecht v. Dettman*, 56-679.

198. Crops standing upon land at the time of a sheriff's deed, but already fully matured, do not pass to the purchaser under such deed: *Everingham v. Braden*, 58-183.

199. Where a landlord who was entitled to a share of the crops upon the leased premises conveyed the same after the maturity of the crops and after a portion thereof had been gathered, reserving to the tenant the right to get off his crops, *held*, that the interest of the landlord in the crops, harvested and unharvested, did not pass to the grantee: *Moffett v. Armstrong*, 40-484.

200. **Personal property upon the land:** A conveyance of real property does not carry with it personal property, such as rails cut and piled upon the land: *Robertson v. Phillips*, 8 G. Gr., 220.

201. **Personal property attached:** A conveyance of land, unless exceptions and reservations be therein made, includes not only the earth, but everything attached to it, whether by nature, as herbage, trees, etc., or artificially, by man, as fences, buildings, and the like: *Van Wagner v. Van Nostrand*, 19-422.

202. **Fences:** A fence standing upon land is part of the realty, and passes with a conveyance thereof, even though constructed thereon by mistake by a person having no interest in the property: *Burlerson v. Teeple*, 2 G. Gr., 542.

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203. Appurtenances are things belonging to another thing as principal, and which pass as incident to the principal thing. The term as used in conveyances covers nothing but land and such things as belong thereto and are part of the realty; and *held*, that the term could not be construed to cover fixtures which would not otherwise pass by the deed: *Ottumwa Woolen Mills v. Hawley*, 44-57.

204. Unexecuted power of attorney: The execution of a power of attorney authorizing a person therein named to convey lands to another upon certain conditions and for certain purposes, does not vest any interest in the land in the person to whom such conveyance is authorized to be made: *Tharp v. Brennehan*, 41-251.

205. Conveyance to husband and wife jointly creates a tenancy in common and not a joint tenancy, or an estate in entirety: *Hoffman v. Stigers*, 38-302.

206. "Heirs," or other technical words of inheritance, are by statute declared not necessary to convey an estate in fee-simple. (Code, § 1929): *Barlow v. Chicago, R. I. & P. R. Co.*, 29-276.

207. What interest passes: A conveyance passes any equitable interest the grantor may have in the land, although he have no legal interest: *White v. Butt*, 32-335, 345.

208. The dower interest of a wife is relinquished by a deed in which she joins with her husband in the granting clause and covenants, although there is no express relinquishment of dower: *Edwards v. Sullivan*, 20-502; *Jones v. Des Moines*, 43-209.

209. Inurement of after-acquired title;¹ **estoppel:** The statutory provision as to after-acquired title does not apply where a deed conveys the estate which the grantor at the time actually possessed, and he subsequently acquires a greater estate: *Collamer v. Kelley*, 12-319, 326.

210. In order that a conveyance may operate to pass an after-acquired title, it must be so executed that it would have passed such title at the time of execution if the grantor had then had such title: *Heaton v. Fryberger*, 38-185.

211. Where the wife simply joins with the

husband in a conveyance for the purpose of relinquishing her dower, an interest afterward acquired by her will not inure to the benefit of the grantee in such conveyance: *Childs v. McChesney*, 20-431; *O'Neil v. Vanderburg*, 25-104; *Edwards v. Davenport*, 4 McCrary, 34.

212. Where A. conveyed property to B. without having title thereto, and subsequently C., the owner of the title, conveyed to A., taking from him a mortgage for a part of the purchase money, *held*, that although the title thus conveyed to A. vested at once in B., nevertheless C. would be allowed to enforce his mortgage against the property in B.'s hands: *Morgan v. Graham*, 35-213.

213. A mortgage will attach to an after-acquired title: *Rice v. Kelso*, 57-115.

214. If a warranty deed be executed and duly recorded while the grantor has no title to the land, and full title be subsequently acquired by him, it inures to the benefit of the grantee. The registry also protects him against all subsequent purchasers. But this would not be true of a quitclaim deed, for under such deed a subsequent title does not inure: *Warburton v. Mattox*, Mor., 367.

215. The statutory provision above referred to, applied: *Van Orman v. McGregor*, 23-300; *Rogers v. Hussey*, 36-664; *Bellows v. Todd*, 39-209, 217; *Prouty v. Tallman*, 65-354.

216. Estoppel: A conveyance with covenants by the owner of property will estop his heirs from claiming any interest hostile to the rights of the grantee under such conveyance, but will not estop those claiming as heirs of the wife of such grantor from asserting her rights in the property by reason of her dower interest not relinquished in such prior conveyance: *Dunlap v. Thomas*, 69-358.

217. Where the father of a minor, acting for him without authority, partitioned a piece of land in which the minor had an interest and conveyed the portion set apart to the minor, and upon coming of age the minor ratified such sale by executing a quitclaim deed, *held*, that he was estopped from asserting any interest in the part conveyed by the

¹ Code, § 1931. Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee.

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father to the other joint owner: *Drake v. Wise*, 36-476.

218. Where a party executed a mortgage in which his father and mother joined, *held*, that the mother was not estopped from setting up the mental incapacity of the son to execute the mortgage, upon afterward acquiring the title to the mortgaged property: *Edwards v. Davenport*, 4 McCrary, 34.

IV. DESCRIPTION.

219. By government survey; judicial notice: Where land is described by the government survey, the court will take judicial notice of its location: *Hypfner v. Walsh*, 3 G. Gr., 509.

220. Thus, where the numbers of township and range are given, and also the county in which the property is situated, the court will take judicial notice that there could be but one such township in the county, and the description will be sufficient: *Stoddard v. Sloan*, 65-680.

221. Where the description was of a portion of a government subdivision of a certain section of "township 84, range 26," *held*, that it was sufficiently specific although the name of the state was not given, it appearing that such description would not apply to any other piece of land covered by government surveys: *Beal v. Blair*, 38-318.

222. The abbreviations in common use to designate the fractional parts of a section according to the government survey are sufficiently definite: *Jenkins v. McTigue*, 22 Fed. Rep., 148.

223. Plat and field-notes: In construing a grant of land which is described by the number of the section, or legal fraction of a section, and the township and range, courts will look to the plat and field-notes made and returned by the government surveyors to the surveyor-general's office in order to locate the boundaries of the land: *Ufford v. Wilkins*, 33-110.

224. The lines actually run upon the ground by the original surveyor become the true external boundaries if they can be ascertained by the monuments erected by the surveyor, and to these monuments, when they exist, courses, distances, and measurements must all yield: *Ibid*.

225. Where, by mistake, the plat does not represent the survey, the survey will govern: *Bradstreet v. Dunham*, 65-248.

Further as to government survey, see PUBLIC LANDS.

226. General description: A description embracing all the land inuring to the grantor under a certain contract or deed is a sufficiently definite description: *American Emigrant Co. v. Clark*, 62-182.

227. A conveyance by general description will not be held inoperative in equity in the absence of fraud or of evidence that grantor has acted in ignorance of his rights: *Thorn-ton v. Mulquinne*, 12-549.

228. Therefore, *held*, that a conveyance by an heir of all his right to the estate of decedent was sufficient to cover his interest in the real property of such decedent: *Ibid*.

229. General description not controlled by particular: A certain and particular description should never control a general one which is in itself clear and unambiguous, unless the object of the particular description is to render that which is general and uncertain more specific, definite and certain. Such particular description ought never to limit a grant made certain by a general description, unless it can be clearly ascertained from all the words of the grant that it was the intention of the parties to restrict the grant by the particular description: *Marshall v. McLean*, 3 G. Gr., 363.

230. So where the description by reference to fractional subdivisions of the quarter-section, clearly and unmistakably indicated the boundary of the land and its exact quantity, *held*, that such description would not be varied by a reference to a city addition: *Cummings v. Browne*, 61-385.

231. But where the general description is indefinite and uncertain, and reference to the particular description must be had in order to ascertain with certainty the subject of the grant, the rule as to the particular not limiting the general does not apply, but the whole language will be taken together, and though it may be ambiguous or even contradictory, if upon the whole instrument there is sufficient to manifest the intention of the parties with reasonable certainty, that will suffice: *Barney v. Miller*, 18-480; *Barney v. Ivins*, 22-163.

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232. Surplusage: A description complete in itself and free from ambiguity is not to be affected by a subsequent restrictive and disjunctive clause, which may be treated as surplusage: *Wright v. Cochran*, 8 G. Gr., 507.

233. Where several particulars are given in a grant, all of which are necessary to ascertain the location of the land intended to be conveyed, nothing but what will correspond with all these particulars will pass by the grant; but if there be certain particulars sufficiently ascertained to locate the grant, the addition of a false or mistaken particular or boundary may be rejected: *Sayers v. Lyons*, 10-249.

234. Repugnant calls: If there shall be in the instrument a repugnant call, which by the other descriptive terms clearly appears to have been made through mistake, the conveyance is not rendered void by reason thereof: *Glenn v. Maloney*, 4-314.

235. Where the description in the instrument, as applied to its subject-matter, is found to be true in part, but not true in every part, so much of it as is false will be rejected; and it will take effect if sufficient is known to ascertain its application: *Ibid.*

236. Description of an undefined portion: A deed purporting to convey "forty feet of" a certain lot and block, held fatally defective for uncertainty: *Bosworth v. Farenholz*, 8-84.

237. Where a grant of any given number of acres is made out of the corner of a tract of land, the premises should be surveyed in a square: *Fitzgerald v. Britt*, 43-498; *Imme-gart v. Gorgas*, 41-439; *Morris' Adm'rs v. Stuart's Adm'rs*, 1 G. Gr., 375.

238. Where a given number of acres are sold off a given side of a government subdivision, the premises are to be surveyed into an oblong square: *Morris' Adm'rs v. Stuart's Adm'rs*, 1 G. Gr., 375.

239. Incorporating reference from another deed: Although the description in a deed be vague and insufficient, yet, if it refers to another deed in which the land is described with certainty, such reference will render the description certain and sufficient: *Nightingale v. Walker*, 3 G. Gr., 96.

240. The land included in a guardian's proceeding for sale was previously surveyed and platted into lots, a copy of the plat being

part of the record. One deed described, by metes and bounds, one and a quarter acres in "lot one in the survey of said land, being a part of the southeast quarter," etc.; another deed referred to the same survey by date, and conveyed all of said lot one, after excepting, by metes and bounds, the parcel previously conveyed; held, that the description of the premises was sufficiently certain: *Pursley v. Hayes*, 22-11.

241. Acts of the parties as affecting the construction: Where the description in a deed started from a point forty feet west of the east line of a certain out-lot, but the original plat of the out-lot fixed such east line forty feet east of the same line as fixed in subsequent plats, held, that the fact that the grantee was, by the original owner, allowed for eleven years to remain in possession of and cultivate the tract covered by the deed according to the subsequent plats of the out-lot, was sufficient to show that it was this property which was intended to be conveyed: *Foley v. Kane*, 53-64.

242. Courses and distances governed by fixed monuments: It is a general rule of construction that courses and distances must give way to natural or artificial monuments or objects: *Sayers v. Lyons*, 10-249; *Gaveny v. Hinton*, 2 G. Gr., 344; *Sargent v. Herod*, 3-145; *Sanders v. Eldridge*, 46-34.

243. Thus a corner of a lot may constitute a fixed monument governing courses and distances: *Sayers v. Lyons*, 10-249.

244. The lines actually run upon the ground by the original surveyor become the true external boundaries if they can be ascertained by the monuments, and to these monuments, when they exist, courses, distances and measurements must all yield: *Ufford v. Wilkins*, 33-110.

245. In establishing a lost survey courses and distances must yield to fixed monuments: *Moreland v. Page*, 2-139.

246. When a general boundary is merely directory and uncertain it must yield to special or locative calls based upon visible objects: *Morrison v. Langworthy*, 4 G. Gr., 177.

247. Where the parties to a conveyance stipulated that a house and certain other buildings upon a certain portion of the premises described as "a strip ten yards wide and one

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hundred yards long," at the west side thereof, should be reserved to the grantor, and it appeared that by mistake of the parties the description did not include the house intended to be reserved, *held*, that the description must give way to the monuments established, to carry out the intention of the parties, and that the house referred to would be included in the reservation although not on the strip of land specifically described: *Gaveny v. Hinton*, 2 G. Gr., 344.

248. Monuments or stakes pointed out by the seller to the buyer as indicating the corners of the land are not to be considered as higher evidence of the true corners than the boundaries ascertained by a survey though made long afterwards, when such monuments have not been established as fixed monuments with reference to which the property is described: *Messer v. Reginnitter*, 32-312.

249. Bounded by stream or highway: As a general rule a grant of land bounded by a stream or highway covers the fee in the stream or highway to its center, provided that the grantor at the time owned to the center and there are no words or specifications or descriptions to show a contrary intent: *Dubuque v. Maloney*, 9-450.

250. If lots are sold by their number on the plat, upon which they are represented as bounded by a street or highway, that circumstance raises a strong presumption of intent to pass the title to the center of the street or highway, and it will so pass accordingly unless the highway be clearly excluded: *Ibid*.

251. But where the call in a deed was "up the west bank" of a certain stream, *held*, that it could not be construed so that the tract would extend to the middle of the stream: *Murphy v. Copeland*, 51-515.

252. Low water in a stream marks a permanent and fixed line which can be determined with greater certainty than the line of any other stage of water; and where by conveyance a party acquires title to land bounded by a water-course (which is not navigable), the boundary of his land is the line of low water: *Murphy v. Copeland*, 58-409.

Where a navigable stream forms the boundary line, the title of the riparian owner ex-

tends only to high water mark: See *WATERS*, II.

253. Distances and quantity: The rule that distances control quantity, in the description in a deed, will not prevail where the intention is clearly expressed that a specified quantity is to be conveyed and no more: *Sanders v. Godding*, 45-468.

254. Construction: "links:" So *held* where the land conveyed was, by the very terms of the deed, to be of the area of one acre, and the description could be made to conform to the quantity by interpreting "links" in the description as hundredths of a rod instead of hundredths of a chain: *Ibid*.

255. Quantity: Where the quantity of land is mentioned in the deed as part of the description, it will be rejected if inconsistent with the actual area of the premises described by known monuments or other certain description: *Ufford v. Wilkins*, 33-110.

256. Therefore, *held*, that a conveyance of the sixteenth of a section by government subdivision, passed title to the entire government subdivision, although it was fractional and contained more than forty acres, the amount mentioned in the deed: *Ibid*.

257. "More or less:" The words "more or less" in a conveyance are only intended to cover a reasonable excess or deficit. If the difference between the real and supposed quantity is very great, both parties will be deemed to have acted under an obvious mistake, which it will be the duty of a court of equity to correct: *Hosleton v. Dickinson*, 51-244.

258. Evidence is admissible to show that the grantor read the conveyance and referred to the fact that the words "more or less" were omitted, and that the grantee informed him that such omission would make no difference; such evidence being admissible as bearing on the question whether the words were omitted by mistake: *Sweezey v. Collins*, 40-540.

259. Mistake in survey; restoring lost corners: Where the whole length between remote corners is found to be variant from the length called for, the intermediate lost corners are to be restored by distributing the whole difference in length proportionally between the different parts of the whole line, and it is not proper to throw the entire de-

Covenants.— Object and effect.

deficiency or excess upon that portion which, as originally surveyed, was intended to embrace the balance of the tract: *Moreland v. Page*, 2-139; *Newcomb v. Lewis*, 81-488.

As to correction of description, see EQUITY, II, a.

V. COVENANTS.

a. Object and effect.

260. The title without covenants, at grantee's risk: The general rule is that if the deed contains no covenants, then, in the absence of fraud, all questions of title are at the risk of the grantee. If it does contain covenants, the grantee must have recourse to them: *Allen v. Pegram*, 16-168.

261. The right of the grantee to relief either in law or equity on account of defects in or incumbrances on the title, in the absence of fraud, depends solely upon the covenants for title which he has received. If he has received no covenant which covers the defect or incumbrance, he can neither detain the purchase money, nor recover it back if already paid. The exception in the case of fraud is the only one recognized to the well-settled rule that the purchaser's right to relief after the execution of the deed depends solely upon the covenants for title which the deed contains: *Brandt v. Foster*, 5-287.

262. Warranty not implied: By common law, the words "grant, bargain and sell," in the creation of a freehold, imply no warranty whatever, and the conveyance of a fee does not *ipso facto* imply any warranty: *Funk v. Creswell*, 5-62.

263. Liability of grantor for fraud: Where grantor, with deliberate intent of defeating a prior conveyance by him, executes a subsequent conveyance, which prevails over the prior one by reason of a defect in the recording, the grantor is liable to his first grantee for the damages occasioned by such fraudulent act, the measure of damage being the value of the land at the time the prior title was defeated: *Burdick v. Seymour*, 39-452.

264. General warranty: The general covenant of warranty specified in the statutory form for a warranty deed includes and implies the usual covenants in a deed of con-

veyance in fee-simple, including one against incumbrances. (Code, § 1970): *Funk v. Creswell*, 5-62.

265. Under this covenant the grantee has all the rights he would have had if the conveyance had contained express covenants of seizin, freedom from incumbrance, right to convey, and the like: *Van Wagner v. Van Nostrand*, 19-422.

266. Parol warranty: Whether a warranty not expressed in the deed may be proved by parol, *quære*: *Clark v. Ralls*, 50-275.

267. The covenant to warrant and defend the title against all persons whomsoever implies all the usual covenants in deeds of conveyance in fee-simple: *Richards v. Iowa Homestead Co.*, 44-304.

268. Under a statute providing that the words "grant, bargain and sell," in all conveyances, should be construed as expressing certain covenants, held, that the addition thereto in the instrument of the further covenant "to warrant and defend the title to the same property against the claims of all and every person whatsoever from or under him," did not limit the general covenant of warranty implied by statute from the words of the deed, even though a special covenant was unnecessary in view of the general covenant: *Brown v. Tomlinson*, 2 G. Gr., 525.

269. Covenant of seizin: The covenant that the grantor was seized in fee was, at common law, regarded as a covenant for title in contradistinction to the covenant for quiet enjoyment, which was called a covenant for the possession. So, in the United States, the weight of authority inclines to the rule that a covenant that one is seized means seized of an indefeasible estate; and a covenant for seizin is regarded as a covenant of title, the word being used as synonymous with right: *Brandt v. Foster*, 5-287.

270. Conveyance of grantor's title with covenants: Where a party conveys all his right, title and interest in the lands described, and covenants to warrant and defend the premises against all lawful claims arising under him, the covenant refers to the land described and not to the right and title of the grantor, and he becomes liable thereunder if there are incumbrances against the land: *Funk v. Creswell*, 5-62.

Covenants.—Breach.

271. Where one undertook to convey a settler's or claimant's title, using the words "sell, convey and quitclaim" in the granting clause, and covenanted to "warrant and defend the premises," etc., *held*, that the grantor was liable for a failure of title: *Williamson v. Test*, 24-138.

272. Exception of incumbrances: Where there was inserted after the usual covenants of warranty the clause, "except a mortgage for \$800 to C. H. B.," *held*, that this exception was intended by the parties to limit the conditions of the covenant against incumbrances: *Morrison v. Morrison*, 38-73.

273. Agreement for other assurances: The fact that grantor has covenanted to afterwards make other assurances of title which may be required of him will not vitiate the conveyance executed if it is in itself sufficient to pass title: *Dussaume v. Burnett*, 5-95.

b. *Breach; remedies.*

274. Eviction: The covenant of warranty is intended to assure to the purchaser the possession of the premises conveyed, and is only broken by eviction: *Brandt v. Foster*, 5-287.

275. Actual or constructive: This eviction may be either actual or constructive, and the purchaser may consider himself evicted by buying in the paramount title when it shall have been hostilely asserted: *Ibid.*

276. The ouster or eviction necessary to constitute a breach of the covenant of warranty need not be by process of law. The grantee may surrender the possession when the hostile title is asserted, but if he does so, he assumes the burden of proving that the title to which he surrenders without contest is actually paramount to that of the grantor: *Ibid.*; *Funk v. Creswell*, 5-62, 86; *Thomas v. Stickle*, 32-71.

277. A vendee in possession under title bond is protected in the same way in regard to the purchase of an outstanding title as though he were a grantee with covenants of warranty: *Thomas v. Stickle*, 32-71.

278. It is sufficient to constitute a breach of the covenant of seizin, or that against incumbrances, that an adverse claim or incumbrance exists, whether asserted or not; but

to constitute a breach of the covenant of warranty it is necessary that the adverse claim be hostilely asserted. It need not, however, be asserted by judgment or suit: *Funk v. Creswell*, 5-62, 89.

279. Sale under subsequent judgment: A warranty in a deed of conveyance is not broken by sale of the property under a judgment subsequently recovered; as for instance where the property is subjected to such judgment on account of the conveyance being in fraud of creditors: *Small v. Somerville*, 58-362.

280. Covenant of seizin: Where at the time of conveyance the grantor has no title, the covenant of seizin is broken on the delivery of the deed, and it is not necessary to show ouster or eviction to entitle the grantee to recover for the breach: *Zent v. Picken*, 54-535.

281. Equitable title: The mere fact of the existence of an equitable title in a third person cannot be set up in an action at law as a breach of any of the usual covenants of a deed conveying the legal title: *Wilson v. Irish*, 57-184.

282. Substantial breach; nominal damages: Until some substantial injury occurs to the grantee in a deed with covenants, no recovery can be had for breach of the covenant of seizin except for nominal damages: *Hencke v. Johnson*, 62-555.

283. Removal of fixtures: The removal of a stable, standing upon land at the date of a conveyance of the same, by a tenant having the right of removal, no reservation thereof having been made in the deed, is a breach of the covenant of seizin; and this, too, although the covenantee knew at the time of the conveyance that the stable was the property of the tenant, and that he had the right of removal: *Van Wagner v. Van Nostrand*, 19-422.

284. A covenant against incumbrances is broken upon the making of the conveyance, if an incumbrance then exists: *Knadler v. Sharp*, 36-232.

285. Nominal damages: Therefore the grantee may then maintain an action and recover nominal damages although he has not paid off the incumbrances; but such an action to recover would not prevent another action by that grantee or his grantee how-

Covenants.—Breach; remedies.

ever remote, when and after either has been required to discharge the incumbrance in order to protect the title: *Ibid*.

286. A right of way: Where, in pursuance of an agreement between owners of adjoining buildings, a stairway was erected upon the premises of one of them to be used in common, and such premises were afterward conveyed to a third person with covenants of warranty, *held*, that the right of the owner of the adjoining building to the use of the stairway constituted an incumbrance, and was a breach of the covenant against incumbrances: *McGowen v. Myers*, 60-256.

287. The right of way for a railroad is an incumbrance and a breach of the covenant against incumbrances: *Barlow v. McKinley*, 24-69; *Gerald v. Elley*, 45-322.

288. But the fact that a railroad company is in the use and exercise of ownership of a right of way over land does not establish a right nor raise a presumption of a right thereto, and does not of itself constitute an incumbrance: *Jerald v. Elly*, 51-321.

289. One who conveys with covenants against any incumbrances by himself does not become liable on his warranty for conveyance of a right of way by a former owner: *Brown v. Young*, 69-625.

290. Lease: The existence of a valid lease upon the premises at the time of the execution of a deed, conveying the same with general covenant of warranty, is a breach of such warranty, and entitles the grantee to recover at least nominal damages: *Van Wagner v. Van Nostrand*, 19-422.

291. Where the grantee undertakes orally to pay the incumbrance at the time of the sale he cannot afterward recover for a breach of the covenant against incumbrances on account of such incumbrance: *Wachendorf v. Lancaster*, 66-458.

292. So also where the covenantor furnished the covenantee sufficient money to discharge the incumbrance, and the covenantee undertook to discharge it, *held*, that the covenant was satisfied: *Blood v. Wilkins*, 43-565.

293. Acquisition of incumbrance by grantor; estoppel: The grantor of premises subject to a mortgage, such mortgage not being excepted from the covenants of the deed, is estopped from afterwards setting the

mortgage up against his grantee or any one holding under him. The acquisition of the mortgage by the grantor will amount to a satisfaction thereof: *Johnson v. Walter*, 60-315.

294. Mortgage excepted from covenants: A party who purchases with notice of a mortgage which is expressly excepted in the covenant of the deed against incumbrances has no right of action against his grantor and no right of subrogation against other security held by the mortgagee in the event of a foreclosure of such mortgage: *Morrison v. Morrison*, 38-73.

295. Technical incumbrance; nominal damages: Where in the foreclosure of a mortgage the lessee of the premises whose lease was subsequent to the mortgage was not made a party, *held*, that the purchaser at the foreclosure sale acquired all the rights of the mortgagor as against the lessee, and that upon conveyance by such purchaser with warranty, his grantee acquired all his rights, and that the existence of such lease constituted, thereafter, but a technical breach of warranty entitling the grantee of the execution purchaser to nominal damages only: *Downard v. Groff*, 40-597.

296. Knowledge by grantee of existence of incumbrance: The fact that the grantee has knowledge of the existence of an incumbrance does not defeat his right to recover damages for such incumbrances in an action for breach of covenant against incumbrances: *Van Wagner v. Van Nostrand*, 19-422; *Barlow v. McKinley*, 24-69; *McGowen v. Myers*, 60-256; *Myers v. Munson*, 65-423.

297. So held in regard to right of way for a railway: *Barlow v. McKinley*, 24-69; *Gerald v. Elley*, 45-322.

298. Detaining purchase money: If covenants of seizin or covenants of warranty have been broken, the purchaser may detain the purchase money in sufficient amount to make good any damages sustained by the breach. He will not be turned over for his indemnity to a separate action on the covenants of the deed when the rights of both parties may be determined in the same action: *Brandt v. Foster*, 5-287.

299. The party will be allowed in such case to make his defense at law, and if he has had no opportunity to do so, a court of equity

Covenants.—Breach; remedies.

will not hesitate to grant relief according to the circumstances of the case: *Ibid*.

300. If there are no covenants in the deed, then there would be no failure of consideration by reason of any failure or defect in the vendor's title. But if the covenants are general and unlimited, reaching to title as well as to possession, the consideration of the purchase is the present transfer of the vendor's interest, and the covenants of title contained in the deed: *Ibid*.

301. Breach of warranty may be set up as a defense to an action to recover the purchase money: *Ruddick v. Lloyd*, 15-441.

302. A purely technical defect in the title will not entitle the grantee, upon foreclosure of a mortgage for the purchase money, to a rebate of interest until a correction of the same, where he has remained in the undisturbed possession and use of the premises: *Gifford v. Fetguson*, 19-166.

303. Failure of grantee to pay a portion of the purchase money due will not excuse the grantor for failure to pay off an incumbrance on the premises against which he is bound by his covenants: *McCrory v. Deming*, 38-527.

And further see VENDORS, §§ 66-80.

304. Set-off: In an action for breach of covenant, the grantor cannot set off the amount of an indebtedness on the premises which grantee has undertaken to pay, under an agreement by which the grantor would be liable to the grantee for the amount paid: *Ibid*.

305. Pleading: In an action upon breach of covenant of seizin, it is sufficient to negative the words of the covenant, and it is not necessary to show wherein the grantor was not lawfully seized: *Socum v. Haun*, 36-138.

306. Burden of proof of seizin: Where defendant, in an action for breach of covenant of seizin, avers seizin at the time of conveyance, the burden of proof is cast upon him to establish the same: *Schofield v. Iowa Homestead Co.*, 32-317; *Barker v. Kuhn*, 38-392; *Blackshire v. Iowa Homestead Co.*, 39-624; *Boon v. McHenry*, 55-202; *Swafford v. Whipple*, 3 G. Gr., 261.

307. So, if plaintiff alleges that defendant was not seized and was not the lawful owner, which allegation is put in issue by a denial, the burden rests upon defendant to show seizin. Such answer amounts to an affirma-

tive averment of title: *Jerald v. Elly*, 51-321.

308. Where the vendee sued to recover damages for breach of warranty, and alleged a specific breach in that when he attempted to take possession of the land he found another in possession under a prior purchase from the defendant, and defendant simply denied the allegation of the petition, the burden of proving the fact constituting the breach of warranty was held to be upon the plaintiff: *Wilson v. Irish*, 62-260.

309. Burden of proof as to incumbrance: Where plaintiff alleges the existence of an incumbrance, which is denied by defendant, the burden of proof is upon plaintiff: *Jerald v. Elly*, 51-321.

310. Parol evidence of satisfaction: A party cannot, by parol, engraft an exception upon the terms of a covenant in order to show that the damages arising from a breach thereof have been settled and discharged by an assignment, even if, as averred, the contract and assignment are parts of the same transaction: *Myers v. Munson*, 65-423.

311. Effect of verdict: When action for the use of premises is brought against an occupant, who gives notice to his grantor with warranty to defend, the latter will be bound by any verdict rendered, and therefore is entitled to bring suit to enjoin the action and have the title determined: *Gardner v. Cole*, 21-205.

312. Notice to grantor to remove the cloud: Where the legal title at the time of conveyance is in a third person holding the same by fraud, while such facts constitute a breach of covenant, yet the grantee before bringing action against such third person to quiet title, with the intention of holding his grantor liable on his covenants, should give notice to such grantee in order that he may, if he sees fit, bring such action or secure the removal of the cloud upon the title: *Yokum v. Thomas*, 15-67.

313. Judgment as evidence: The judgment in an action for breach of warranty against a covenantor, of which action the prior covenantor has notice, may be introduced as evidence in a subsequent action against such prior covenantor, to establish the existence of a breach of covenant and for the purpose of determining the amount of

Measure of damages for breach of covenant.

damages, which may be different from that recovered in the first action: *Myers v. Munson*, 65-423.

314. Estoppel: Certain facts held not sufficient to estop plaintiff from suing for breach of covenant of warranty: *Ballard v. Burrows*, 51-81.

315. Correction of mistake: In an action at law for the breach of a covenant in a deed, the deed must govern; but if by mistake, accident or fraud, it does not correctly recite the contract between the parties, it may be corrected by a court of equity: *Van Wagner v. Van Nostrand*, 19-422.

Pleading: As to how breach of covenant is pleaded, see PLEADINGS, §§ 99-101.

c. Measure of damages.

316. Nominal damages: There can be no recovery for breach of covenant of seizin beyond nominal damages, until some substantial loss occurs: *Boon v. McHenry*, 55-202.

317. Where there is a breach of the covenant of seizin by reason of failure of title resulting from an informality in the execution of the deed, which could be corrected at the expense of the grantor, and which does not cause a disturbance of the purchaser's possession, the damages for such breach are limited to nominal damages only: *Nosler v. Hunt*, 18-212.

318. Where there has been only a technical breach of warranty, grantee will be entitled to only nominal damages: *Downard v. Groff*, 40-597.

319. Where the grantee does not show any actual or threatened disturbance of possession, and does not offer to return the land so as to become entitled to recover the consideration paid, the recovery for breach of covenants of warranty can be for only nominal damages: *Norman v. Winch*, 65-263.

320. Expense of perfecting title: Any expenditure which the grantee has reasonably incurred in procuring his title, not exceeding the purchase money and interest, may be recovered from the grantor: *Knaßler v. Sharp*, 36-232.

321. Where the grantee in a warranty deed afterward, to prevent eviction, buys in a paramount title, he may recover from his grantor in the deed for breach of warranty,

and his damages will be the amount actually paid out for such paramount title, not exceeding, however, the consideration mentioned in the original deed. He cannot in any event recover more than the amount necessarily paid in perfecting the title: *Richards v. Iowa Homestead Co.*, 44-304; *Brandt v. Foster*, 5-287.

322. The vendee has a right to yield to and acquire the superior title, and having done so, he may resort to the covenants of warranty for the recovery of the amounts expended, not exceeding the consideration money and interest received by the person under whom he claims title: *Royer v. Foster*, 62-321.

323. The amount necessarily expended in perfecting the title is the amount which may be deducted by the grantee from the purchase money, if not already paid: *Brandt v. Foster*, 5-287.

324. But where the breach of covenant of seizin is interposed as showing partial want of consideration by way of defense to a purchase money note drawing a higher rate of interest than six per cent., the damage resulting from the breach should be deducted from the face of the note and interest allowed only on the balance: *Zent v. Picken*, 54-535.

325. The same measure of damages is applicable in case of a vendee in possession under a title bond: *Baker v. Corbett*, 28-317.

326. The proof that the expenditure in perfecting the title was reasonable must come from the grantee seeking to recover: *Fawcett v. Woods*, 5-400.

327. In case of breach of covenant against incumbrances, the grantee should only be allowed to recover the amount reasonably paid to remove the incumbrance: *Guthrie v. Russell*, 46-269.

328. The measure of damages in such case is not the amount of the incumbrance but the amount actually paid: *Swartz v. Ballou*, 47-188.

329. The grantee has the right to discharge an incumbrance and set off the amount against the purchase money notes; and it seems that when the purchase money is not all paid, it is the duty of the purchaser to discharge a lien rather than let the property go to sale: *Harper v. Dotson*, 48-232.

330. Under the covenant against incum-

Measure of damages for breach of covenant.

brances, the grantor must pay a sum of money sufficient to put the grantee in as good a state as if the grantor had kept his covenant: *Funk v. Creswell*, 5-62; *Kostenbuder v. Pierce*, 37-645.

331. If the incumbrance is not extinguished, the grantee can recover nominal damages only, but he is not required to wait until he is evicted before suing on the covenant: *Funk v. Creswell*, 5-62.

332. Easement: In determining the amount of damages where the breach of covenant consists in the existence of a permanent easement, the covenantee becomes entitled immediately to receive from the covenantor such a sum of money as would be a just compensation for the injury, in determining which the reduction in the value of the property by reason of the easement should be considered. The general market value of the property should be estimated and the estimate should be made as of the time of the breach, legal interest being added to the damages from that time: *Myers v. Munson*, 65-423.

333. Where the incumbrance consists of a permanent easement for a stairway, etc., the damages resulting should be substantially in proportion to the value of the property thus occupied: *Ibid.*

334. In case of successive conveyances, with a covenant against incumbrances, and a breach of the covenant by reason of a permanent easement, the second covenantee would be entitled to recover more than the first, if the property had increased in value: *Ibid.*

335. Right of way: Where action was brought for damages resulting from a breach of covenant by reason of the existence of a right of way for a railway over the premises, *held*, that in determining the damage to be allowed, the relative value of the land as it would have been without the right of way, and what it was with the right of way, should be taken into account in determining what proportion of the actual purchase price should be allowed as damages: *Koestenbuder v. Pearce*, 41-204.

336. Further, *held*, that in estimating the damage suffered, all benefit to the land by reason of the construction of the railroad over such right of way should be excluded: *Ibid.*

337. Consideration money: In an action for damages for breach of warranty, the measure of recovery is the consideration money actually paid and the legal interest thereon: *Swafford v. Whipple*, 3 G. Gr., 261.

338. The mere fact that there was an outstanding superior title at the time of the conveyance, which has never been hostilely asserted, will not authorize the recovery of the consideration money: *Wilson v. Irish*, 62-260.

339. The real consideration may be shown to prove the damages, even in contradiction to the deed, but it cannot be shown that the consideration was not wholly or in part received by the covenantor or for his use: *Bloom v. Wolfe*, 50-286.

340. If the consideration of the conveyance is personal property, in determining the recovery for breach of warranty regard should be had to the value of the consideration as fixed upon by the parties at the time of the trade, rather than its actual value: *Williamson v. Test*, 24-138.

341. In an action by subsequent transferee: As between the original parties to the deed, the damages for breach of covenant are limited to the actual consideration paid, and parol proof is admissible to contradict the statement of consideration in the deed; but such evidence is not admissible in an action by a subsequent transferee from the grantee, and the measure of damages in an action by such transferee is the value of the land with six per cent. interest from the time of purchase from his grantor, the consideration mentioned in the original deed being taken as a conclusive admission by the grantor therein that such is the value: *Short-hill v. Ferguson*, 44-249.

342. Proportional recovery: Where plaintiff, being the grantee of certain property, sought to recover for breach of warranty against incumbrances and of title from the grantor of his grantor, and it appeared that the property involved was only a portion of the property conveyed by defendant to plaintiff's immediate grantor, *held*, that plaintiff could recover only such proportion of the entire consideration received by defendant as plaintiff's portion bore to the whole property, and that the burden of proof was upon plaintiff to show what that amount was: *Mischke v. Baughn*, 52-528.

 Measure of damages.—Covenants running with the land.

843. Where, subsequently to a conveyance of property in a city, the city established its right to a portion of the premises as a street, *held*, that the measure of damage was the proportion of the purchase price which the part taken bore to the entire tract, the grantee having been allowed to remove the improvements from the part taken to the other portion, and that he might recover also the expense of such removal and the deterioration of the improvements by reason thereof: *McDunn v. Des Moines*, 39-286.

844. Partial failure of title: In an action for breach of warranty in a deed conveying land purchased from the county as swamp land, and which appeared not to have been certified by the United States land office as swamp, *held*, that although title might be perfected by proof of the actual swampy character of the land, nevertheless plaintiff had a right under the covenants to a title not subject to such contingency, and might recover the same damages to which he would have been entitled if the failure of title had been absolute: *Shorthill v. Ferguson*, 44-249.

845. Attorneys' fees: A party recovering damages for breach of warranty is only entitled to recover attorneys' fees incurred in defending an action to maintain his title where he shows the amount of such fees actually paid, or which he is under obligation to pay. That he shows a certain sum would be reasonable is not sufficient: *Swartz v. Ballou*, 47-188.

846. In an action by a covenantor against his covenantor to recover for breach of contract by reason of which the covenantor has already, in a prior action, been deprived of his possession of the premises, of which action the covenantor had notice, it may be that the covenantor should be allowed to recover for attorneys' fees expended in defending the former action. But where the prior action was not for possession, but merely for damages, the recovery in the subsequent action should not include attorneys' fees expended in defending the prior action, even though the covenantor had knowledge of such action: *Myers v. Munson*, 65-423.

Contract to convey, measure of damages for breach of covenant in, see VENDORS, § 114.

d. Covenants running with the land.

847. Seizin: In this state, the English rule has been recognized that the covenant of seizin runs with the land and is for the benefit of the party who may be the owner when a substantial breach occurs: *Boon v. McHenry*, 55-202.

848. A covenant of seizin runs with the land, and a recovery for a breach thereof may be had by the assignee of the grantee: *Schofield v. Iowa Homestead Co.*, 32-317.

849. Such a covenant does not become barred by the statute of limitations until the expiration of the period of limitation after the breach: *Wood v. Dubuque & S. C. R. Co.*, 28 Fed. Rep., 910.

850. Liability to subsequent grantees: Where, by agreement between the grantor and the grantee, the former conveyed the premises to a third person as security for a debt of the grantee, and such third person upon payment of the debt conveyed to the original grantee, *held*, that the original grantor was bound to such last grantee by the covenants contained in the deed to the third person: *Barker v. Kuhn*, 38-392.

851. A grantor who becomes liable on covenants running with the land is charged with notice of subsequent conveyances or incumbrances of record, and cannot, by settlement with his immediate grantee, cut off the claims of subsequent parties: *Devin v. Hendershott*, 32-192.

852. Proportional recovery: Covenants running with the land are susceptible of division, so that if the land be conveyed to several persons, each may maintain an action to recover for the land in which he has an interest: *Schofield v. Iowa Homestead Co.*, 32-317.

853. Conveyance of trustee: Where a deed is executed to one other than the purchaser to secure the purchase money, he holds the title in trust for the purchaser, who has the equitable title, and the covenants of warranty may be canceled or enforced by the grantee in the deed: *Harper v. Perry*, 28-57.

854. The grantee in a trust deed holds the legal title and may recover for breach of covenant running with the land. The mortgagee is entitled to the benefit of covenants in the

Who liable on covenants.

mortgagor's deed: *Devin v. Hendershott*, 82-192.

355. Mortgagee: And the same is true of a mortgagee: *Rose v. Schaffner*, 50-488.

356. A mortgagee who has foreclosed and bid in the property for the full amount of his judgment cannot, in an action on the covenants in the mortgage, recover money paid to release the property from a prior incumbrance: *Todd v. Johnson*, 51-192.

e. Who liable on covenants.

357. A married woman is liable for a breach of warranty in a sale of her own land as if single: *Richmond v. Tibbles*, 26-474.

358. Where it appears that a deed, executed by husband and wife jointly, was intended by the parties as a deed of the husband, in which the wife joined to relinquish dower, she will not be bound by the covenants thereof: *Schaffner v. Grutzmacher*, 4-137.

359. The statutory provision (Code, § 1937) that where husband or wife joins in conveyance of property owned by the other, the party so joining shall not be bound by the covenants unless it is expressly so stated, applies where the person purporting to convey the title has no title, as well as where he is in fact the owner but his title is subject to incumbrances in violation of his covenants. In either case the husband or wife so joining is not estopped from relying upon an outstanding title or incumbrance inconsistent with the conveyance in which he or she joins: *Thompson v. Merrill*, 58-419.

360. The fact that the land conveyed is not owned by the husband does not render the wife liable to any greater extent under the covenants of the deed than if it had been owned by him, in case the title is not in her, and such covenants will not work an estoppel as to her: *Ibid*.

361. Trustees: A trustee in conveying land which is the subject of the trust cannot be required to enter into any covenant except against his own acts; but if he binds himself by a personal covenant, even if he describes himself as trustee, he is liable to the same extent as if the property were held and conveyed in his own right: *Bloom v. Wolfe*, 50-286.

362. Guardian: Where the guardian of a minor, by proper leave of court first obtained, executed a conveyance in which she covenanted for herself, her heirs, etc., that she was authorized, etc., held, that she was bound by such covenants personally and thereby estopped from asserting any claim to the property inconsistent with her grant: *Foster v. Young*, 35-27.

363. An administrator conveying land in pursuance of a judicial sale thereof by order of court cannot bind the estate by covenants in the deed. The rule of *caveat emptor* applies to such sale: *Hale v. Marquette*, 69-376.

364. Covenants on part of grantee become binding upon him by acceptance of the deed although he does not sign it: *Close v. Burlington, C. R. & N. R. Co.*, 64-149.

CORONER.

See MUNICIPAL CORPORATIONS, §§ 968-974.

CORPORATIONS.

I. NATURE; CHARTER; ORGANIZATION.

- a. *Kinds of.*
- b. *Charter; organization, etc.*
- c. *Corporate name.*
- d. *Place of doing business.*

II. STOCK.

- a. *Subscriptions.*
- b. *Transfer.*
- c. *Assessment.*
- d. *Attachment.*

III. OFFICERS.

- a. *Election.*
- b. *Powers and acts.*
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IV. CORPORATE ACTS AND LIABILITIES.

- a. *Powers.*
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V. LIABILITY OF STOCKHOLDERS.

VI. RENEWAL; DISSOLUTION; FORFEITURE.

As to unincorporated associations, see ASSOCIATIONS.

As to BANKS, see that title.

Nature; charter; organization.

I. NATURE; CHARTER; ORGANIZATION.

a. *Kinds of.*

1. **Public or private; bank:** An incorporated bank, the stock of which is owned by individuals, is a private corporation in which the public has no interest, and over which it has no control except to exercise a supervisory power and to annul its charter when the franchise granted is misused or abused: *Miners' Bank v. United States*, 1 G. Gr., 553.

2. **Agricultural society:** The main distinction between public and private corporations is that the general assembly has the exclusive and unrestricted control of the former, while it can in no manner interfere with the right of property in the latter. Thus, though the objects of an agricultural society are public, it is essentially a private corporation. The fact that it is not organized for pecuniary profit does not change its character: *Thompson v. Lambert*, 44-239.

3. **The state university** is not a corporation. The act creating it did not make it a public corporation, but its property belongs to the state and is simply appropriated for the purpose specified. It is not, therefore, subject to be sued, and a judgment cannot be rendered against it: *Weary v. State University*, 42-335.

4. **Trustees of public institutions:** Where by statute provision was made for a normal school under trustees to be appointed by public authority, and it was provided that certain portions of the income of the state university should be applied to the support of such school, *held*, that such trustees did not constitute a corporation and could not be sued as such: *Drake v. Board of Trustees*, 11-54.

5. **Voluntary associations:** It is the exclusive prerogative of government to create a corporation and invest it with power to sue in its own name, and courts cannot recognize an association not authorized by charter to act as a corporation: *Pipe v. Bateman*, 1-369.

b. *Charter; organization, etc.*

6. **Vested rights:** The charter of a private corporation cannot be repealed by the legislature unless such right of repeal is stipulated

for in the charter itself: *Miners' Bank v. United States ex rel.*, Mor., 482.

7. **Foreign:** Corporations operating railways within the state are subject to the jurisdiction of our courts the same as any person resident within the state: *Mooney v. Union Pacific R. Co.*, 60-846.

8. When two corporations, one organized under the laws of the state of Iowa, and the other under the laws of the state of Missouri, consolidated in the state of Iowa, *held*, that the corporation thus formed would be regarded as an Iowa corporation: *Muller v. Dows*, 94 U. S., 444.

9. **Acts of incorporation,** in a particular case, *held* sufficient to constitute a corporation authorized to receive, hold and convey land granted for the purpose of the incorporation: *Hervey v. Buchanan*, 47-588.

10. **Failure to publish notice:** It seems that acts of a corporation will not be valid as corporate acts unless publication of notice of the organization is made as required by law: *Eisfeld v. Kenworthy*, 50-889.

That failure to take the requisite steps for organization will render the corporators liable, see *infra*, §§ 172, 173.

11. **Persons dealing with estopped from setting up defects:** The execution of a note to a corporation is an admission of its existence: *Franklin v. Twogood*, 18-515.

12. Under a statute (Code, § 1089) providing that want of legal organization cannot be set up as a defense either by the corporation, or by a person against whom suit is brought by such corporation, on a contract made with it, or for an injury to its property, or a wrong done to its interest, *held*, that a party contracting with a corporation could not deny its corporate existence, nor defeat recovery thereon, by proof of violation of the laws of the state in the conduct of its business: *Howe Machine Co. v. Snow*, 82-433; *Courtright v. Deeds*, 37-508.

13. Also *held*, that a person sued upon a contract with a corporation could not set up want of legal organization: *Washington College v. Duke*, 14-14.

14. When a corporation seeks to enforce the bequest in a will, duly admitted to probate, its claim cannot be resisted on the ground that it has not been legally organized. Such objection can be taken only by a

 Charter; organization, etc.—Corporate name.

proceeding by *quo warranto*: *Quinn v. Shields*, 62-129.

15. Corporation estopped: Among acts which would constitute acting as a corporation, such as by statute would prevent the corporation from denying its legal existence, would be the adoption and use of a corporate seal, the taking of subscriptions and the issue of certificates of stock; but the acts of persons as members of a religious society in holding business meetings, and acquiring property, receiving and paying out money, appointing agents to make settlements, etc., *held* not sufficient to constitute such "acting as a corporation;" also *held*, that the passage of by-laws is not an assumption of distinctive corporate powers; nor is the attempt to incorporate: *Kirkpatrick v. United Presb. Church*, 63-372.

16. Where the corporation has assumed to make a contract authorized by its amended articles, and has received the consideration therefor, it cannot escape liability upon the ground that such amended articles had not been recorded: *Humphrey v. Patrons', etc., Ass'n*, 50-607.

17. The fact that a member of the board of directors has been irregularly elected constitutes no defense in an action against the corporation for indebtedness created: *Carrothers v. Newton Mineral Spring Co.*, 61-681.

18. The estoppel provided for by statute certainly applies only to a body of men acting as a corporation for pecuniary profit. Whether the section can be applied to persons acting as a corporation other than for pecuniary profit, *quære*: *Kirkpatrick v. United Presb. Church*, 63-372.

19. Renewal of charter: Whether the provisions of statute as to renewal of charter are applicable to corporations not organized for pecuniary profit, *quære*: *Byers v. McCartney*, 62-339.

20. Binding upon stockholders not assenting: A change in the articles of incorporation made in the manner provided for therein, and properly recorded and published, is as binding upon the stockholders who do not as upon those who do consent thereto: *Burlington & M. R. R. Co. v. White*, 5-409.

21. Change of business; effect upon subscription to stock: If a corporation procures an alteration to be made in its charter by

which a new and different business is superadded to that originally contemplated, such of the stockholders as do not assent to the alteration will be absolved from liability on their subscriptions to the capital stock: *Ibid*.

22. But where a change in the charter merely related to the time of payment of instalments of subscriptions to stock, *held*, that by the subscription under the charter the subscriber assented to the change afterward made in pursuance of such provisions: *Ibid*.

23. A material or radical change in the objects of a corporation will release the subscriber of stock from liability thereon, but immaterial changes which cannot possibly prejudice such subscriber will not affect him: *Union Agl., etc., Ass'r v. Neill*, 31-95.

24. An amendment to a charter not materially changing the original purposes of the corporation, *held* not sufficient to excuse stockholder from liability for stock subscribed: *Peoria & R. I. R. Co. v. Preston*, 35-115.

25. Amendments to the articles of incorporation of a college in accordance with provisions made therein for amendment, affecting the method in which trustees were to be appointed, but not the general purposes and objects of the corporation, *held* not sufficient to release the maker of a scholarship note from his liability thereon: *Washington College v. Duke*, 14-14.

c. Corporate name.

26. A variance from the true style of a corporation will not have the effect to defeat its contract if it appears that the corporation was intended to be bound by and described in the instrument: *Athearn v. Independent Dist.*, 33-105.

27. Where a note was made payable to the order of "The Equitable Life Insurance Company of Iowa at its office," and was dated at the "Office of the Equitable Life Insurance Company, Des Moines, Iowa," *held*, that although the two names were not identical, yet it was reasonably apparent that they referred to the same corporation: *Equitable L. Ins. Co. v. Gleason*, 56-47.

28. Where the name of the corporation consists of a number of words, the omission,

Place of doing business.—Stock.

alteration, or transposition of any of the words in the name used, if the words in the name used are synonymous with the true name of the corporation, it is not a misnomer: *Martin v. Central Iowa R. Co.*, 59-411.

29. The use of the word "railroad" instead of "railway" in naming a corporation in an indictment for embezzling the funds of such corporation, *held* not to be material: *State v. Goode*, 68-593.

30. A railroad company cannot, in a legal proceeding, be properly designated by the initial letters of the words constituting its name, even though it may be possible to show that it is popularly known by its initial letters: *Accola v. Chicago, B. & Q. R. Co.*, 70—.

31. Change of name: Where a note given in aid of a corporation operating a college provided that upon the payment of a proportion of the note a scholarship in the college should be issued, and afterward the corporate name of the institution was changed, *held*, that the new corporation succeeding to the rights of the old might sue upon such note, and the maker would be entitled to a scholarship therein according to the same terms: *Trustees of Northwestern College v. Schwagler*, 37-577.

32. The corporate name is that which is adopted in the articles of incorporation. If the name is changed it must be done by changing the articles, and the best evidence as to the contents of the articles is the articles themselves; therefore, *held*, that parol evidence of a change of name was not sufficient: *Chicago, D. & M. R. Co. v. Keisel*, 48-39.

d. Place of doing business.

33. Office outside of state: Even though the articles of incorporation require the office of the company to be kept in the state where it is incorporated, yet if it violates this requirement and keeps its office in another state, presentment there for payment of a note of the company will be sufficient: *Merrick v. Burlington, etc., Plank Road Co.*, 11-74.

34. Acts outside of state: The fact that a certificate of stock of a corporation organized under the laws of this state appears to have been issued at a place outside of the

state, will not necessarily render it invalid: *Courtright v. Deeds*, 37-503.

35. While a private corporation whose charter has been granted by one state cannot hold meetings, pass votes, and exercise powers in another state, yet the persons intrusted with the management of its affairs may make a valid contract in a state other than that of its creation, and a conveyance thus made by the agents of the corporation will be valid: *Bellows v. Todd*, 39-209.

36. Jurisdiction over: A corporation organized under the laws of the United States, and engaged in the operation of a line of railway extending from a point within this state into another state, is a citizen of Iowa in such sense that it is subject to the jurisdiction of the courts of this state: *Mooney v. Union Pacific R. Co.*, 60-346.

37. Foreign: While every state has power to reserve control over its own corporations, the fact that it does so does not prevent the prosecution within the state of all ordinary business by foreign corporations: *Dodge v. Council Bluffs*, 57-560.

38. Where a statute confers upon a corporation organized for a particular purpose the right to take private property for that purpose, such authority may be exercised by a foreign as well as a domestic corporation unless expressly limited by statute: *Ibid.*

39. The right of a corporation to do business and acquire property outside of the limits of the state where it is created may exist without any express grant from the legislature of such state: *Ibid.*

40. Where the articles of incorporation of a foreign corporation authorized it to construct water-works, without expressly limiting such power to any particular state, *held*, that the court could not by construction so limit such power: *Ibid.*

II. STOCK.

a. Subscriptions.

41. What sufficient to constitute: A written subscription for stock implies a promise to pay therefor, although no express promise is contained in the subscription: *Nulton v. Clayton*, 54-425.

42. Therefore, *held*, that a written instrument purporting to declare that "the number

 Stock.—Subscription.

of shares held by each [of the stockholders] are as follows," amounted to a valid subscription: *Ibid*.

43. A subscription for stock subject to the by-laws, rules and articles of the corporation, renders the subscriber liable in accordance with the provisions of such by-laws, etc., although the subscription does not contain an express promise to pay: *Waukon & M. R. Co. v. Dwyer*, 49-121.

44. In parol: In the absence of any provisions in the charter of the corporation or the statutes of the state as to the manner in which such subscriptions to stock may be entered into, the corporation may contract by parol for the disposal of its capital stock: *Colfax Hotel Co. v. Lyon*, 69-683.

45. Repayment not necessary: A subscriber to stock in a corporation becomes a stockholder therein before payment is made unless there is a provision requiring prepayment as a condition of membership: nor is it necessary that the certificate of stock shall first issue: *Waukon & M. R. Co. v. Dwyer*, 49-121.

46. Sale below par: The officers of a corporation cannot, without express authority, sell the stock of the corporation at a less rate than its par value as fixed by the charter: *Oliphant v. Woodburn Coal, etc., Co.*, 63-332.

47. A creditor who accepts stock issued to him by the officers of the corporation below par in payment of his debt holds the same as unpaid stock to the extent that its par value exceeds his claim: *Jackson v. Traer*, 64-469.

48. The public has a right to assume, where the stock of a company has all been issued as full-paid stock, that it has been paid for in full, either in money or in property at a fair value; but while the fact that full-paid stock has been issued upon a partial payment of its face might be ground for proceeding in the interest of the public to wind up the company, it is not a ground upon which the stockholder who has received paid-up stock can object to the validity of the contract for the purchase of such stock: *Goff v. Hawkeye Pump, etc., Co.*, 62-691.

49. The officers of the company cannot accept payment of a subscription to stock in property at a price largely in excess of its real value and thereupon issue certificates

showing the stock fully paid, thus releasing the stockholder from further liability to the corporation or its creditors: *Osgood v. King*, 42-478.

Further as to liability of stockholder for unpaid stock, see *infra*, §§ 177-185.

50. Release of subscriber: A railroad corporation may make, if acting in good faith, a valid and binding contract, releasing a stockholder from liability upon his subscription to the stock of the corporation, either with or without the consent of the creditors and stockholders: *Gelpcke v. Blake*, 19-263.

51. Stock note; tender of stock: In an action by a corporation upon a note executed in payment for a subscription of shares of stock under an agreement in pursuance of which certificates are to be issued when the note is paid, it must appear that tender of the stock was made before the action was brought: *Hedge v. Gibson*, 58-656; *Cooper v. McKee*, 49-286; *Courtright v. Deeds*, 37-503; *Lawrence v. Smith*, 50-703.

52. Overissue or mismanagement as a defense: Where it does not appear that an overissue of stock cannot be distinguished from that legally issued, or that the stock when issued to the subscriber will not be legal, or where an overissue of stock has been canceled before the subscriber becomes entitled to stock under his subscription, such facts will not constitute a defense in an action on his subscription, nor will the fact that the affairs of the company are mismanaged be such defense: *Merrill v. Reaver*, 50-404.

53. But if the stock has been illegally increased and the certificates thus issued are beyond the control of the corporation, and the illegal stock cannot be distinguished from the genuine, and all the stock is thus rendered valueless, these facts will constitute a defense to a note given for stock which has not been delivered: *Merrill v. Gamble*, 46-615; *Merrill v. Beaver*, 46-646.

54. Conditional subscription: Where the articles provided that the corporation should commence as soon as \$20,000 of stock was subscribed, and it appeared that \$3,000 of stock had been subscribed upon condition, and it was not shown that such subscription had become absolute, and without this stock the requisite amount had not been sub-

 Stock.—Transfer.—Assessment.

scribed, *held*, that an action on other subscriptions could not be maintained: *Oskaloosa Agl. Works v. Parkhurst*, 54-357.

55. When subscriptions of stock in a railroad company were made under a special agreement that the proceeds should be applied to a specific object, *held*, that as the application of the proceeds as agreed could be made, the payment of the subscriptions might be enforced, although the whole capital stock fixed by the articles had not been subscribed: *Iowa & M. R. Co. v. Perkins*, 28-281.

56. **False representations:** Where the subscription of stock was made upon the representation that a certain sum was to be invested in the business as working capital, *held*, that the fact that such sum was not invested would not entitle the subscriber to relief against his contract of subscription: *Goff v. Hawkeye Pump, etc., Co.*, 62-691.

57. **Estoppel:** Where a subscriber executed a note and mortgage for corporate stock, *held*, that he was estopped from setting up, as a defense to such note, that the charter of the corporation required a cash payment upon each share subscribed: *Franklin v. Twogood*, 18-515.

b. Transfer.

58. **Provisions of by-laws:** Shares in the capital stock of the corporation are the property of and under the control of the shareholder. Even though the by-laws of the association require that in order to constitute a valid transfer the same must be entered upon the stock-book, yet this does not limit the absolute right of sale and alienation by the stockholder: *Hershire v. First Nat. Bank*, 35-272.

59. **The written assignment and delivery** of the certificates of stock, coupled with authority to transfer the same upon the books of the company, is sufficient to vest in the transferee the right to the stock: *Courtright v. Deeds*, 37-503.

60. **The transfer of stock on the books** of a corporation upon surrender of a previous certificate, without the issuance of a stock certificate in conformity therewith, is sufficient to bind the corporation and third persons to such transfer: *First Nat. Bank v. Gifford*, 47-575.

61. **Statute provisions:** The provision of statute as to the transfer of shares is intended as a protection to the company, and only applies where the sale or transfer in some way conflicts with the interests of the corporation: *Moor v. Walker*, 46-164.

62. A provision of the by-laws of a corporation, that no transfer of stock shall be valid unless approved by the board of directors, may be enforced to protect the rights of the corporation, but cannot be used to defeat the rights of others and operate as a restraint upon the disposition of the stock. The transferee may hold the stock and enforce a transfer thereof in proper form in the absence of any right or lien of the company to or upon such stock: *Farmers', etc., Bank v. Wasson*, 48-336.

63. **Lien:** In the absence of contract and provisions of the charter and by-laws, a corporation has no implied lien upon the shares of a stockholder indebted to it to secure such indebtedness, and a transfer of stock by such stockholder to secure his individual debt will not be fraudulent as to the corporation in the event that he is indebted to it, and will be valid although not assented to and approved by its directors as required by its by-laws: *Ibid.*

c. Assessment.

64. **Before subscription of entire amount:** In the absence of any restriction to the contrary, capital stock subscribed may be assessed before the entire amount of the capital stock is subscribed: *Nichols v. Burlington, etc., Plank Road Co.*, 4 G. Gr., 42.

65. But where the articles of incorporation fix the amount of capital stock, and the number of shares into which it shall be divided, a corporation cannot make an assessment upon the shares of a stockholder for the purpose of carrying on the business of the company until all the stock is subscribed, unless a contrary intention appears expressly or by implication, either in the charter or the contract of subscription: *Peoria & R. I. R. Co. v. Preston*, 35-115.

66. **Necessary before stockholder becomes liable:** Where the terms of the stock subscription were that after a certain per cent. had been paid, the balance should be subject to the call of the directors as they

Stock.— Attachment.— Officers.

might be instructed by the majority of the stockholders represented at any regular meeting, *held*, that in the event of insolvency and the neglect or refusal of the stockholders to act in the premises, the court could not compel payment by the stockholders of such balance until it was determined what indebtedness existed showing a necessity for assessment, and a call upon the stockholders had been made: *Chandler v. Keith*, 42-99.

And further as to liability of stockholders, see *infra*, V.

67. Assessment by court; receiver: A court has no jurisdiction, in an action against a corporation for the appointment of a receiver, to which certain stockholders are not made parties, to make an assessment by an interlocutory order against such stockholders on their stock notes. If the stockholders are too numerous to be made parties to the suit, that fact must be set up and made to appear at the inception of the proceedings: *Lamar Ins. Co. v. Hildreth*, 55-248.

68. Notice sufficient: An assessment of the stock, where one is necessary, is only required in order to fix the amount to be called for and the time when it may be called. When the amount and time of payment are fixed by the articles, a notice that the payment is required is all that is necessary to render instalments due as therein provided: *Waukon & M. R. Co. v. Dwyer*, 49-121.

69. Special conditions: Where a subscription to stock is made under special conditions in regard to the assessment, payments must be made upon the performance of such conditions regardless of provisions of the articles as to assessments on general stock: *Iowa & M. R. Co. v. Perkins*, 28-281.

d. Attachment.

70. How effected: The shares of a stockholder in a corporation can only be attached by following the provisions of statute (Code, § 2967) requiring notice to be served on the president and secretary of the fact that the stock has been attached. Garnishment of the secretary as an individual will not accomplish the purpose even though he understands that an attachment is intended: *Moorar v. Walker*, 46-164.

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III. OFFICERS.

a. Election.

71. Facts in a particular case considered in a controversy between conflicting claims of two sets of trustees, each claiming to be the legally elected trustees of a church corporation: *Dressen v. Brameier*, 56-756.

b. Powers and acts.

72. Action of majority: A majority of the quorum of a board of directors, all being present, have the power to act and to decide any question upon which they can act: *Buell v. Buckingham*, 16-284.

73. Directors cannot act individually: A corporation whose business is transacted by a board of directors will not be bound by the assent of a majority of the directors to a contract expressed otherwise than at a duly convened meeting. The assent of the several members separately is not enough: *Herrington v. District Tp*, 47-11.

74. Implied powers; by-laws: The general power conferred on a board of directors of a corporation to conduct its affairs carries with it every implied power and right requisite to carry out the general powers. Therefore, *held*, that the adoption of a by-law by a mutual insurance company providing as to the terms upon which policies should be issued would not be without color of authority even in the absence of an express power conferred upon the board to make by-laws: *Hygum v. Aetna Ins. Co.*, 11-21.

75. Implied contract: It is not necessary in every case, in order to bind a corporation, to prove that its officers or agents expressly assumed to bind it by contract, but the terms of the undertaking may sometimes be implied in favor of one who has been led to deal with the officers or agents, with the belief that they are representing the corporation in such contract. But in a particular case, *held*, that the evidence was not sufficient for this purpose: *Storm Lake Bank v. Missouri Valley L. Ins. Co.*, 66-617.

76. Conveyance; presumption as to seal: The signature of an officer of a corporation, executing an instrument, being proved, the seal will be presumed genuine until the presumption is rebutted. The seal itself is *prima*

Officers.— Powers and acts.

facie evidence that it was affixed to the instrument legally, and the burden of proving that it was not affixed legally is upon the party objecting to the instrument: *Blackshire v. Iowa Homestead Co.*, 39-624.

77. Where the signature of the officers of a corporation executing the instrument is proved (as by a proper certificate of acknowledgment), the seal will be presumed genuine, and it will be presumed that it was affixed under proper authority. The burden in such case is thrown upon the party objecting to the instrument to overcome this presumption: *Chicago, B. & Q. R. Co. v. Lewis*, 53-101.

78. Where it is competent for the board of directors to direct the execution, by an officer or agent, of a conveyance of its real property, and such conveyance is executed under the seal and in the name of the corporation, the presumption is that such direction was given: *Morse v. Beale*, 68-463.

79. The seal is *prima facie* evidence that it was affixed by proper authority, and the court will presume that the instrument was executed by proper authority: *Goodnow v. Oakley*, 68-25.

80. An assignment of judgment in favor of a bank, signed by persons designating themselves as president and secretary, but without other evidence that they were such officers, *held*, not sufficient to show that the assignment was with proper authority: *Klemme v. McLay*, 68-158.

81. Ratification: Where the president and secretary were directed, at a meeting of the stockholders, to execute a conveyance and did so, although the power to make conveyances was vested only in the trustees, and it appeared that the stockholders knew of the deed and the manner of its execution and acquiesced therein for years, *held*, that the corporation could have no relief in equity against such deed, whatever might be its rights in an action at law: *Marshall County High School Co. v. Iowa Evangelical Synod*, 28-860.

82. Where a corporation accepted money paid on a settlement made by a committee which the officers of the company must have known was received through the settlement, *held*, that such acceptance would constitute a ratification of the settlement: *Merchants' Union Barbed Wire Co. v. Rice*, 70—.

83. Where the reports of the treasurer of a loan association showed money borrowed ostensibly for the use of the association, *held*, that the association was liable therefor, although the treasurer was in default when the money was borrowed and used the sum borrowed in place of money of the association which should have been in his hands: *Leonard v. Burlington Mut. Loan Ass'n*, 55-594.

84. Fraud, how alleged: The allegation of fraud and misrepresentation by a corporation is sufficient without alleging that the officers or agents through whom the corporation acted and who made the representations did not exceed their authority: *Carey v. Cincinnati & C. R. Co.*, 5-357.

85. Power to mortgage: Restriction in the articles of incorporation upon the power of trustees to sell certain property of the corporation, *held* not to be an inhibition upon their power to mortgage the same: *Krider v. Trustees of Western College*, 81-547.

86. Authority of president: Stipulations of a railway company, entered into by the president with the consent of a majority of the directors, and circulated at the polls on the day of election, for voting upon a tax in aid of such railway, *held* binding upon the company in the absence of any showing that the president had no authority to make them: *Meeker v. Ashley*, 56-188.

87. A limitation of indebtedness in the articles of incorporation is binding upon the officers of the company and they cannot render it liable beyond such limit. So *held* in case of a religious corporation: *Wyncoop v. Congregational Society*, 10-185.

88. Sale of stock: Officers of a corporation cannot, in the absence of express authority, sell stock for less than its par value: *Oliphant v. Woodburn Coal, etc., Co.*, 63-332; *Jackson v. Traer*, 64-469.

89. Nor accept payment of a stock subscription in property at a price largely in excess of its value: *Osgood v. King*, 42-478.

90. But they may release a stock subscriber from his subscription: *Gelpcke v. Blake*, 19-263.

91. Power to alienate land: It is doubtful whether the general superintendent of a railway company can be presumed to have the power to alienate or charge its lands: *Kipp v. Coenen*, 55-63.

Officers.— Powers and acts.

92. Parol evidence to show authority: In such case an assertion by the president of the company that the superintendent had such power would not tend to prove it: *Ibid.*

93. The character of the employment and the nature of the duties of an agent of a corporation may be shown by parol: *Leekins v. Nordyke & Marmon Co.*, 66-471.

94. Service upon officers and agents: The general rule is that notice to the corporation must be served upon some officer or agent who has charge of some duty to which the notice pertains: *Smith v. Chicago, R. I. & P. R. Co.*, 56-720.

And in general as to the method of serving notice upon corporations, see ORIGINAL NOTICE.*

95. Liability of corporation for mismanagement of officers: A stockholder has no right of action against a corporation for depreciation of stock due to the mismanagement of the officers of the corporation: *Oliphant v. Woodburn Coal, etc., Co.*, 63-332.

96. Liability for money borrowed by officer: Where the fact that an agent of the company had borrowed money and applied it to the payment of corporate indebtedness was known to the managing director, *held*, that the company was liable therefor: *Liebfritz v. Dubuque Street R. Co.*, 48-709.

97. Fraudulent misrepresentations by officer: Where it was sought to hold a corporation liable as a stockholder in another corporation by reason of fraudulent representations of the officers of the company sought to be held liable, *held*, that such officers had no authority to make fraudulent representations regarding the other company, and could not, therefore, bind their company or render it liable thereby: *Langan v. Iowa & M. Const. Co.*, 49-317.

98. Ratification: Under particular facts, *held*, that two members of an executive committee of a county agricultural society had no authority to purchase real property and bind the society by a note to pay for the same, and that subsequent improvement of the property under the direction of the same officers would not constitute a ratification binding upon the society: *Tracy v. Guthrie County Agl. Society*, 47-27.

99. Notice to officers: A corporation is not chargeable with notice of transactions be-

tween its officers acting as private individuals in a private transaction. So *held* as to an agreement between the president and cashier of a bank as principal and surety on an individual note to the bank: *First Nat. Bank v. Gifford*, 47-575.

100. Execution of note: A promissory note, signed by the president and secretary of a corporation, in the absence of any showing that by any by-law, resolution, act or custom of doing business authority was conferred upon them to execute notes or transact other business of the corporation, *held* not binding on such corporation: *Catiron v. First Universalist Society*, 46-106.

101. Conveyance to trustees: A conveyance to certain persons, "and others, trustees of the," etc., corporation, *held*, to vest title in the corporation and not in the trustees as individuals: *Hervey v. Buchanan*, 47-588.

102. Contract of officers for private advantage not binding: A contract made by officers of a corporation, for the purpose of taking advantage of their position as such officers for personal aggrandizement, will be void as against the company if made secretly and without its knowledge, and the officers will not be allowed to derive any advantage therefrom: *Blair Town Lot, etc., Co. v. Walker*, 50-376.

103. Purchase by officers: A director of a corporation is not necessarily precluded from being the purchaser at a foreclosure sale of the property of the company to pay a debt from the company to such director, but the right to thus purchase should be exercised subject to the rules imposed by the peculiar position of the director. In a particular case, *held*, that as the director was bound to make a reasonable effort to prevent the property of the corporation from being sacrificed at such sale, and as the amount paid at the sale was grossly inadequate, it should be set aside, there being also some evidence of collusion for the purpose of defrauding the corporation of its property: *Hallam v. Indianola Hotel Co.*, 56-178.

104. Good faith of officer: While an officer is under obligation to exercise the utmost good faith in the discharge of his duties, he is not required to sacrifice his own rights under contract, and he may accept

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payment or transfer of stock in payment of his own claim against a debtor although a debt of the same debtor to the company remains unpaid: *Farmers', etc., Bank v. Wasson*, 48-838.

105. The fact that directors of the company contract indebtedness beyond the limit prescribed by the articles of corporation, and cause a mortgage to be executed to secure an amount due to themselves individually, will not defeat their security or give their creditors a right to share in the proceeds of the property mortgaged, it not appearing that there is any negligence or misconduct on the part of the directors: *Garrett v. Burlington Plow Co.*, 70—.

106. A director may become a creditor of the corporation and advance it money, or sell it property, and obligations of the corporation executed therefor may be enforced by him, and if the debt he holds was contracted in good faith, and there was no fraud on his part, he may take security or payment, though the corporation be insolvent, and he may thereby acquire priority in the payment of his claim; but courts will scan such transactions with care and even with suspicion, and require that they be accompanied by the utmost good faith: *Ibid.*

107. Where the directors indorse the obligations of a corporation to a creditor, no bad faith or fraud on part of the creditor or the directors appearing, the creditor is not required to proceed first against the directors, although the corporation was insolvent at the time such obligations were issued: *Ibid.*

c. *Liabilities.*

108. **Diversion of funds:** To render officers liable under the statute (Code, § 1072) for diversion of funds or paying dividends so as to leave insufficient funds to meet liabilities, it must appear that the entire property of the corporation is not sufficient to pay its indebtedness. A dividend may lawfully be declared although the corporation does not have cash on hand sufficient to pay all its liabilities: *Miller v. Bradish*, 69-278.

109. The word "liability" as used in this section means existing indebtedness the payment of which can be enforced, and does not include the corporate liability for pay-

ment of capital stock, such liability being remote and contingent. The amount of the capital stock is therefore not to be included in determining whether the liabilities of the corporation exceed its funds so as to render the declaration of a dividend illegal: *Ibid.*

110. If the corporation has sufficient assets to pay all its debts at the time a dividend is paid, then the payment of such dividend cannot be held illegal, nor a diversion of the funds to objects other than those authorized: *Ibid.*

111. **Fraud:** Where it is sought to recover from individual officers of a corporation the amount of a judgment against the corporation, under a claim that such officers have rendered themselves liable by fraud, proof of absence of intentional fraud and diversion of assets to their own use will relieve defendants from liability. The statutory provision (Code, § 1071) that intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public, etc., shall subject those guilty thereof to fine and imprisonment, and that any person who has sustained injury from such fraud may also recover damages against those guilty of participating therein, only applies to officers or others guilty of intentional fraud: *Hoffman v. Dickey*, 54-135.

112. **Failure to comply with articles:** Under the same statutory provision, *held*, that in an action for damages thereunder the particular respect in which there was a failure to comply with the articles, etc., resulting in damage to plaintiff, or the particular act of deception, etc., must be specified: *White v. Hosford*, 37-586.

113. The rule that when there is no principal who can be made legally responsible, the agent who attempts to act for and bind the principal will himself be personally chargeable, applied to the case of officers of a bank illegally organized: *Allen v. Pegram*, 16-163.

d. *Compensation.*

114. When an officer of a corporation performs the usual and ordinary duties of his office as defined by the charter and by-laws, he cannot recover compensation for such service unless it has been so specially agreed. He cannot, in such case, recover what his

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services are reasonably worth, nor will any arrangement as to salaries made prior to the incorporation be binding against the corporation: *Citizens' Nat. Bank v. Elliott*, 55-104.

IV. CORPORATE ACTS.

a. Powers.

115. Construction of charter: In conflicts between the sovereign power and grantees enjoying exclusive privileges conferred upon them by acts of incorporation, the charter is to be construed strictly as against the persons upon whom such privileges are conferred: *Miners' Bank v. United States*, 1 G. Gr., 553.

116. Contracts not under seal; written or oral; ratification: Corporations of all kinds may be bound by contracts not under seal. They may make a binding contract in writing not under seal, and may also be held liable under verbal contracts. So, also, they may ratify and adopt as their own a contract made by an officer out of the usual scope of his duties: *Merrick v. Burlington, etc., Plank Road Co.*, 11-74.

117. Record of action: The recital as to the making of a contract, not entered on the record at the time it was originally written, by the secretary, but at a subsequent meeting directed to be entered on the record, will not be receivable as against the other party to such contract: *Colfax Hotel Co. v. Lyon*, 69-683.

118. Implied contracts: Where a party with the knowledge and consent of the directors of a corporation borrowed money on his individual note for the use of the corporation, which money was used by it in paying its debts, *held*, that the corporation was bound to repay to such party the money so borrowed by him: *Humphrey v. Patrons' etc., Ass'n*, 50-607.

119. Powers: A corporation is presumed to be clothed with the usual powers necessary and proper to enable it as such to carry out the purposes of its existence: *Home Ins. Co. v. North Western Packet Co.*, 32-228.

120. Assignment of claim to insurance company: Therefore, *held*, that an insurance company had authority to acquire, by assignment, the claims of a shipper of goods insured by it against the common carrier in whose hands they were destroyed: *Ibid.*

121. Ratification: Corporations may ratify contracts made without their authority and thus become bound thereby like natural persons. Thus an acceptance of payment for services rendered under a contract and in accordance with its terms may amount to a ratification of such contract: *Athearn v. Independent Dist.*, 83-103.

122. Proper objects: For the purpose of effecting the objects of a corporation its powers are as broad and comprehensive as those of an individual, unless the exercise of the asserted power is expressly prohibited: *Thompson v. Lambert*, 44-289.

123. Borrowing money; misappropriation by officers: Where an agricultural society was organized for the proper objects of such a corporation, the power to borrow money and execute notes and mortgages not being expressly assumed or prohibited, *held*, that it had by implication authority to exercise such powers as to indebtedness created for the necessary and proper purposes of carrying out the objects of the corporation: *Ibid.*

124. Suretyship: The simple act of going surety for another is out of the line of the prosecution of any business: *Lucas v. White Line Transfer Co.*, 70—.

125. Mortgages: For a proper purpose it has power to borrow money by executing notes and mortgages: *Thompson v. Lambert*, 44-289.

126. The power to mortgage the property of the corporation is incident to the ordinary powers of such corporation: *Dunham v. Isett*, 15-284.

127. Negotiable bonds: And where the power to borrow money may necessarily be implied, it may be exercised by issuance of negotiable bonds: *Des Moines Gas Co. v. West*, 50-16.

128. Purchase of its own stock: Under a charter by which a corporation had authority to purchase, etc., "any real estate or other property," etc., *held*, that it was not beyond its power to purchase its own stock: *Iowa Lumber Co. v. Foster*, 49-25.

129. Endowment fund: Where the articles of incorporation of a college did not expressly give it power to raise and control funds by taking endowment notes, *held*, by a divided court, that it had the power to accept and

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enforce payment of such notes: *Simpson Centenary College v. Bryan*, 50-293.

130. Exemption of property of members from liability for debts: The corporation may exempt the private property of its members from liability for corporate debts: *Spense v. Iowa Valley Const. Co.*, 36-407; *Larson v. Dayton*, 52-597.

131. The only case in which the private property of members becomes liable for corporate debts is that specified in the statute relating to failure to take proper steps in organizing. (Code, § 1063): *First Nat. Bank v. Davies*, 43-424, 436.

132. The power to sue and be sued: A corporation must sue and be sued in corporate name: *Chicago, D. & M. R. Co. v. Keisel*, 43-39.

Further, see PLEADINGS, §§ 130-145.

133. Ultra vires; acceptance of paper upon condition: Where a corporation became the successor to an individual in the manufacture and sale of buggies, held, that it had authority to accept from the individual whom it succeeded an order accepted by him upon particular terms: *Cook Mfg. Co. v. Randall*, 62-244.

134. Acceptance of note in payment: Held, that a corporation organized for the manufacture and sale of musical instruments, and not having the power to engage in the business of loaning money, might still take from its agent, in payment of an indebtedness due from him, the note of a third party belonging to him: *Western Organ Co. v. Reddish*, 51-55.

135. Power to hold real property: The power of a railway corporation to whom public lands are granted to hold such lands is a question between the corporation and the government, and cannot be raised as against the corporation by a third party in an action by the company for possession of the lands so granted: *Chicago, B. & Q. R. Co. v. Lewis*, 53-101.

136. Power to sell and convey real property: The grant, by the law under which a corporation is organized, of the power to make contracts gives it the power to make a sale of its real property and convey the same: *Buell v. Buckingham*, 16-284.

137. A limitation upon the power to sell operates also as a limitation on the power to convey: *Middleton Savings Bank v. Dubuque*, 15-394.

138. Power over property held in trust: Where property is conveyed to a voluntary corporation in trust with limitations, neither a majority nor minority can rightfully divert the property from the use and trust. A court of equity in enforcing such trust will look to the trust intended, and disregard all questions as to majorities or as to religious creeds or beliefs except so far as is necessary to ascertain the trust intended and apply the property accordingly: *McBride v. Porter*, 17-208.

139. Power of majority: Property held by a voluntary association or corporation absolutely and without any limitation may be disposed of by a majority, or managed as they please, admitting the minority to the same benefits as themselves: *Ibid.*

140. Power to take by will: The provisions of the Code (§ 1091) limiting the power of associations or corporations not for pecuniary profit to take by will more than one-fourth of the estate of a person leaving a wife, child or parent surviving, are applicable to voluntary associations of that kind whether incorporated or not: *Byers v. McCartney*, 62-339.

141. Religious association; expulsion of member; review of action: Where a corporation is organized for the purpose of holding and disposing of the property of a religious society, and its officers are elected by the members of the church, the courts will not interfere by *mandamus* to restore to membership in the corporation a person expelled from the church organization for an alleged offense where there are no property rights involved: *Sale v. First Regular Baptist Church*, 62-26.

142. The civil courts will not revise the decisions of churches or religious associations upon ecclesiastical matters, but will interfere with the action of such associations when rights of property or civil rights are involved: *Bird v. St. Mark's Church*, 62-567.

b. Acts ultra vires.

143. Defense: The rule of *ultra vires* as to a contract to borrow money prevails in full force only where the contract remains wholly executory, and this is true even as

Acts ultra vires.

to public and municipal corporations: *Thompson v. Lambert*, 44-239.

144. Every person dealing with a corporation is charged with knowledge of its power as set out in its recorded articles of incorporation. Where a third party makes with the officers of the corporation an illegal contract, beyond its powers, as shown by its charter, such third party cannot recover because he acts with knowledge that the officers have exceeded their power, and between him and the corporation or its stockholders no amount of ratification by those authorized to make the contract will be valid: *Lucas v. White Line Transfer Co.*, 70—.

145. Where the officers of a corporation make a contract with third parties in regard to matters apparently within their powers, but which upon proof of extrinsic facts (of which such party had no notice) lie beyond their powers, the corporation must be held unless it may avoid liability by taking timely steps to prevent loss or damage to such third parties: *Ibid.*

146. Where an officer of a corporation signed the corporate name to a bond as surety, held, that the fact that other persons, having knowledge of the want of power of the corporate officer to enter into such a contract, also signed their names as sureties, would not enable such persons to enforce liability on such bond as against the corporation: *Ibid.*

147. Retaining benefits: A corporation cannot retain benefits derived from an *ultra vires* contract and at the same time treat the contract as entirely void, unless, perhaps, in cases where the other party has assisted wilfully in putting it beyond the power of the corporation to return what is received on such contract: *Ibid.*

148. Acts of officers: Where the corporation has permitted its officers to engage in *ultra vires* transactions, and, in prosecution of such transactions, the officers commit a wrong or tortious act without the fault of the injured party, the corporation is estopped from taking advantage of the *ultra vires* character of the original undertaking: *Ibid.*

149. Stockholder cannot plead; estoppel: Where certain stock in a corporation was transferred as collateral security, and subsequently bonds of the corporation,

largely in excess of the indebtedness authorized by its charter, were fraudulently issued and sold, held, that the party holding the stock as collateral security, having failed to exercise any control over the affairs of the corporation to secure honest and competent management, was, by such omission, chargeable with negligence, and in equity would not be protected against the holders of the fraudulent bonds. Also, held, that the same would be true of a stockholder acquiring his stock with a knowledge or presumed knowledge of these fraudulent transactions: *Des Moines Gas Co. v. West*, 50-16.

150. Negligence in making objection: The stockholder who seeks to prevent the consummation of an illegal corporate act, or to avoid it, should be swift to make known his desires and assert his rights through the tribunals appointed for that purpose; therefore, held, that a stockholder who knew of a proposition to borrow money for a particular purpose, and failed to object when he might have done so before the lender had parted with the fund, could not afterward resist enforcement of the debt: and that this would be true to a greater extent if the funds were used in such way as to result presumably to the benefit of the stockholder: *Thompson v. Lambert*, 44-239.

151. Corporation estopped from setting up limit of indebtedness: Where a corporation is authorized to contract indebtedness, it will be estopped from setting up the limit of indebtedness fixed by its articles where the consideration of such indebtedness has been received: *Humphrey v. Patrons, etc., Ass'n*, 50-607.

152. Indebtedness for borrowed money: Similarly the corporation will be estopped from setting up the want of authority as a defense as against money advanced to pay indebtedness in excess of such limit: *Ibid.*

153. Who may set up defense of *ultra vires*: Whether the defense of *ultra vires* can be set up by one not a party to the illegal transaction, as for instance by the maker of a note transferred by the payee to the plaintiff corporation which it is claimed the corporation as such had no power to take and hold, *quære*: *Western Organ Co. v. Reddish*, 51-55.

Corporate liabilities.—Liability of stockholders.

c. Liabilities; levy upon corporate property.

154. The capital stock of a corporation is in one sense a liability, but it is not an indebtedness. The corporate liability for the payment of the capital stock is remote and contingent: *Miller v. Bradish*, 69-278.

155. Bonds in hands of bailee: Where bonds of a corporation have been negotiated, and repurchased by it in payment of a debt due, but before their actual return and while in the hands of a bailee, they are subject to levy under execution: *Hetherington v. Hayden*, 11-835.

156. Garnishment of trust fund: Where certain bonds were deposited with the garnishee, as trustee, to be distributed to the stockholders of the corporation defendant under a certain contract, *held*, that the trustee was subject to garnishment for such bonds in his hands, under a judgment against the corporation: *Warren v. Booth*, 51-215; *S. C.*, 53-742.

V. LIABILITY OF STOCKHOLDERS.

157. Not liable in general: If the individual property of the stockholder is exempted from liability for corporate debts, he cannot be held liable for such debts even where there is no capital stock in existence from which they may be paid: *Spense v. Iowa Valley Const. Co.*, 36-407.

158. The fact that a stockholder requests a party to become surety for the corporation will not render such stockholder individually liable: *Larson v. Dayton*, 52-597.

159. Exemption from liability must appear: Where a statute exempted from liability for corporate debts, stockholders in corporations organized under the general incorporation laws, *held*, that in order that the stockholders of the corporation should be exempt from liability it must appear that the corporation was organized under such general statute: *Kaiser v. Lawrence Savings Bank*, 56-104.

160. Where a corporation is stockholder in another corporation, the stockholders of the former are not thereby individually stockholders in the latter, and cannot be held liable as such: *Langan v. Iowa & M. Const. Co.*, 49-817.

161. Under a statute (Code, § 1068) rendering stockholders liable for the debts of the corporation in case of failure to comply with statutory provisions as to organization and publicity, *held*, that a failure to file the articles did not alone render the stockholders individually liable: *First Nat. Bank v. Davies*, 43-424; *Eisfeld v. Kenworth*, 50-389; *Stokes v. Findlay*, 4 McCrary, 205.

162. In the clause of such statute "in relation to organization and publicity," the word "and" should be construed as "or." A failure in either respect will render the stockholders individually liable: *Eisfeld v. Kenworth*, 50-389.

163. So *held* in case of a failure to publish any notice whatever: *Ibid.*; *Marshall v. Harris*, 55-182.

164. Where the articles of incorporation did not state the principal place of business, or the time of commencement of business, *held*, that the publication of such articles was not sufficient notice, and that there was such failure to comply with the requirements as to notice as to render the stockholders individually liable: *Clegg v. Grange Co.*, 61-121.

165. Failure to comply with the statutory requirements as to posting a copy of the by-laws and a statement of the amount of capital stock subscribed, etc., will not render the stockholders liable: *Langan v. Iowa & M. Const. Co.*, 49-817; *McKellar v. Stout*, 14-359.

166. A failure to properly keep the books, as required by statute, does not render the stockholders individually liable. If the books are fraudulently kept, those guilty of participation in the fraud may be held liable: *Langan v. Iowa & M. Const. Co.*, 49-817.

167. Nor does the incurring of liabilities greater than allowed by statute render the stockholders individually liable: *Ibid.*

168. Stockholders in railway companies: Under the statutory provisions above referred to, stockholders in railway companies are, by express provision, not liable beyond the amount of stock held by them in such companies: *First Nat. Bank v. Davies*, 43-424.

169. A construction company having power under its articles to construct and operate a railway is a railway corporation within the meaning of the statute: *Ibid.*; *Langan v. Iowa & M. Const. Co.*, 49-817.

 Liability of stockholders.

170. Fraud: To render stockholders liable under Code, § 1071, for fraud in deceiving the public as to the means or liabilities of the corporation, there must be something done with the fraudulent intention of deceiving. The intention to deceive is not sufficient. There must be some act fraudulently done: *Miller v. Bradish*, 69-278.

171. Fraud in such cases is not to be presumed. The fact that a person is a stockholder in an insolvent corporation does not, of itself, render him liable: *Spense v. Iowa Valley Const. Co.*, 38-407.

172. Failure to incorporate: While there may be irregularities or omissions to comply with provisions merely directory, which would be sufficient to sustain an action brought to declare a forfeiture, but are insufficient to sustain an action to enforce individual liability of a stockholder, yet if the attempt to incorporate is under a general law, and there is a material non-compliance therewith, then there is such want of incorporation that exemption from individual liability is not secured: *Kaiser v. Lawrence Savings Bank*, 56-104.

173. In case of suit against individuals claiming exemption from liability on the ground of their having become a corporation under a general statute, a stricter measure of compliance with the statutory requirements must be shown than in case the plea of *nul tiel corporation* is set up in a suit between the corporation and the stockholder or other individual, on liability contracted: *Ibid*.

174. Banking corporations: The constitutional provisions (art. 8, § 9) rendering stockholders in banking corporations or institutions individually liable to an amount equal to their respective shares, applies only to banks of issue, and not to banks merely of discount and deposit: *Allen v. Clayton*, 63-11.

175. Under such constitutional provisions the liability of a stockholder in a bank is not limited in an action against him by a creditor to the proportional sum that can be collected from another stockholder, nor is it affected by the fact of fraudulent acts of the receiver or officers of the bank, nor can such stockholder delay the collection of the amount for which he is liable in order to secure contribution from other stockholders also liable: *Stewart v. Lay*, 45-604

176. Apportionment: In an action by a creditor of the corporation against a stockholder to compel payment of the balance due on stock, *held*, that under an allegation that the plaintiff was enforcing his claim unequally against different stockholders, and accepting settlements with others without crediting the payment thereof upon his claim, a receiver should be appointed and the prosecution of plaintiff's action be enjoined until the amounts due from all the stockholders could be ascertained and reported so that a *pro rata* apportionment might be made: *Habitzel v. Latham*, 35-550.

177. Stock issued at less than par: The officers of the corporation cannot issue to a creditor stock of the corporation to be accepted by him at less than its par value in payment of his claim, with the agreement that it is to be paid-up stock, and the creditor thus accepting stock becomes liable as the holder of unpaid stock to the extent that the par value exceeds the debt for which it is taken: *Jackson v. Traer*, 64-460.

178. A creditor thus accepting stock becomes a stockholder although he has not subscribed for stock. A subscription for stock is only necessary to render a person a stockholder where the stock is not delivered: *Ibid*.

179. The fact that the stock was, at the time of its issuance and acceptance, worthless, would not relieve a stockholder, accepting it, from liability: *Ibid*.

180. Unpaid instalments: Where all the capital stock of a corporation outstanding was such as had been issued to stockholders who had conveyed to the corporation the patent-right for an article which the corporation was authorized to manufacture, and such patent-right had become worthless, *held*, that such stockholders could not claim that their stock was paid up, and were liable for the amount of their stock: *Chisholm v. Forny*, 65-333.

181. Officers of a corporation cannot, by agreement with a stockholder, release him, to the prejudice of creditors, from his obligation to pay his subscription unless the transaction is characterized by the utmost fairness. Therefore, *held*, that conveyances of real estate made to a corporation by directors and other stockholders in full payment of their stock, at a price largely in excess of its

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real value, did not release such stockholders from liability for the excess of their subscriptions over the real value of the property conveyed, even to creditors becoming such after the conveyance: *Osgood v. King*, 42-478.

182. Where the president of a corporation gave a mortgage to the corporation in payment of shares of stock to the amount of such mortgage, and the same was included in the statement of the company's assets, *held*, that he could not afterwards surrender such stock and receive back the mortgage after insolvency of the company: *Burnham v. Northwestern Ins. Co.*, 36-632.

183. Although the mortgage in such case provided that it was payable in the capital stock certificates of the company, yet, *held*, that as those doing business with the company had not an opportunity to know the terms of the mortgage, it could not be discharged as to the creditors of the company by surrender of the identical shares of stock which had been issued therefor: *Ibid*.

184. Subscription payable in property: The fact that a subscription for stock was to be paid in property instead of money does not relieve the subscriber from liability, if the property was not turned over as agreed. The company cannot, by any arrangement or action upon its part, release the subscriber from his liability: *Singer v. Given*, 61-93.

185. Set-off: The subscriber cannot, as between himself and the creditor, set up claims for services, or for use of property, for which the corporation is indebted to him: *Ibid*.

186. Judgment against stockholder: An execution against the company can only be levied on the private property of a stockholder after a judgment has been obtained against him as provided by statute. (Code, § 1084): *Bayliss v. Swift*, 40-648; and see *Hampson v. Weare*, 4-13; *Bailey v. Dubuque Western R. Co.*, 13-97.

187. That section contemplates the rendition of a judgment against the stockholder, and not merely the awarding of an execution against him: *Singer v. Given*, 61-93.

188. The action against the stockholder, contemplated by statute, is an ordinary action, followed by an ordinary judgment; after which an execution against the corporation may, to the extent of such judgment,

be levied upon the private property of the stockholder: *Bayliss v. Swift*, 40-648.

189. A prior statute upon the same subject considered: *Donworth v. Coolbaugh*, 5-300.

190. Valid claim against corporation: To charge a stockholder, it must appear that there was a valid claim against the corporation: *Corse v. Sanford*, 14-235.

191. In a proceeding against the stockholder to charge him with payment of a judgment for a corporate debt, the judgment against the corporation is not open for re-examination: *Donworth v. Coolbaugh*, 5-300.

192. Demand upon officers; evidence: Under a statute (Code, § 1083) providing that property of a stockholder cannot be levied upon while corporate property can be found, but that issuance of execution and demand upon some one of the last acting officers for property on which to levy, without any property being pointed out, shall be sufficient proof that no property can be found, *held*, that the fact of demand and refusal may be shown by the official return upon the execution, and such return, as between the corporation and the creditor, must be regarded as conclusive. Evidence may be introduced to show that no such return was made, but it is not competent to dispute it by showing that no demand was made as therein stated: *Singer v. Given*, 61-93.

193. Stockholder primarily liable: Where there is a failure to comply with the requirements of the statute with reference to organization and publicity, such as to render the stockholder individually liable, he becomes primarily liable, and may be sued in the first instance. His relation to the creditor is not different from what it would have been if no attempt had been made at incorporation: *Marshall v. Harris*, 55-182.

194. Statute of limitations: Whether the stockholder can be made liable until judgment has been rendered against the corporation or not, the statute of limitations as affecting the action against such stockholder cannot be enlarged on account of any failure or delay in obtaining judgment against the corporation: *First Nat. Bank v. Greene*, 64-445.

195. Assignee of stock; collateral security: Under the national banking act making

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stockholders liable, in case of failure of the bank, in an amount equal to the amount of stock held by them, a holder of stock at the time of the dissolution of the bank becomes liable for the indebtedness thus arising upon such stock, although he holds the shares as collateral security, or as a trustee: *Hale v. Walker*, 31-344.

As to assessments on stock not fully paid up, see *supra*, §§ 64-69.

VI. RENEWAL; DISSOLUTION; FORFEITURE.

196. Resignation of officers: A corporation has an existence *per se*, so as to maintain succession and hold and preserve its franchises, though its functions may for the time being be suspended for the want of means of action, as for instance by the resignation of all its officers: *Muscatine Turn Verein v. Funck*, 18-469.

197. Winding up affairs: The voluntary dissolution of a corporation does not take away its power to act for the purpose of winding up its affairs, nor affect the right of a creditor, in equity at least, to be released from the inequitable consequences of such dissolution: *Ibid*.

198. A corporation will be kept alive by statute for the purpose of discharging its contracts and disposing of its property: *Muscatine Western R. Co. v. Horton*, 38-33.

199. Sale of franchise; dissolution: The sale by a corporation of its franchise, even though it may amount to a voluntary dissolution, will not terminate the corporation so far as its continued existence is necessary for the purpose of winding up its affairs: *Ibid*.

200. A corporation cannot in its corporate name institute proceedings asserting its non-existence at a prior time, and ask release from a decree rendered against it when it does not appear to have ever been revived: *Muscatine Turn Verein v. Funck*, 18-469.

201. Abandonment of charter: Where a party bought in the property of an agricultural society at a sale, and thereupon all the members but one transferred their membership to him, and considered the organization abandoned, *held*, that the remaining member could not bring suit in the name of the corporation to set aside the conveyance: *Union Agl. Society v. Gamble*, 52-524.

202. Repeal of charter: Where the power is reserved to the legislature in the charter to annul or vacate the same in the case of abuse of, or misconduct as to, its privileges by the corporation, the courts cannot inquire into the grounds upon which a repeal has been made by the legislature: *Miners' Bank v. United States*, 1 G. Gr., 553.

203. Forfeiture: Where a state has recognized the validity of a corporation by entering into contracts with it and executing conveyances to it, no mere irregularity in the mode of doing corporate business can deprive the corporation of the right to hold the property or of the power to alienate it. Irregularities in the mode of transacting such business cannot be shown for the purpose of defeating title acquired through such corporation: *Bellows v. Todd*, 89-209.

204. Suit to declare forfeiture: If, as a legal and necessary consequence of certain acts, a foreign corporation has ceased to have a corporate existence, and plaintiff claims that he is thereby injured, or that certain benefits have accrued to him, he may, by averring these facts, have his remedy, and need not in the first instance institute proceedings for the purpose of having it declared that the corporate existence has ceased: *Carey v. Cincinnati & C. R. Co.*, 5-357.

205. But if the corporation has suffered no act which *per se* works a forfeiture or dissolution, and an inquiry as to whether there has been such irregularity in its proceedings becomes necessary, the question cannot be inquired into by courts in this state, either in a direct or collateral proceeding. The judgment must be obtained in the state granting the corporate powers: *Ibid*.

206. Dissolution; jurisdiction in equity: Courts of equity, aside from statutory authority, do not exercise jurisdiction over a corporation as over a partnership to dissolve it or distribute its assets, but will afford a stockholder relief from the malfeasance of those intrusted with the management of the corporate business: *Walsh v. Aetna L. Ins. Co.*, 30-133.

207. Renewal: Whether the provisions of Code, § 1069, as to renewal of corporations, is applicable to corporations not for pecuniary profit, *quære*: *Byers v. McCartney*, 62-339.

Security for.—Taxation of.

COSTS.

I. SECURITY FOR.

II. TAXATION OF.

As to taxation of attorneys' fees as costs, see ATTORNEYS, IV.

I. SECURITY FOR.

1. Statutory provisions as to security¹ apply to domestic as well as to foreign corporations: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38-446.

2. These provisions are not applicable to proceedings in justices' courts: *Smith v. Humphrey*, 15-428.

3. Whether, in an action on appeal from a justice's court, security for costs can be required, *quære*; but the motion therefor should at least be made at the earliest practicable moment: *Adae v. Zangs*, 41-536, 540.

4. These provisions for requiring a cost bond have relation to the ordinary forms of action and are not applicable to a proceeding for the trial of exceptions to a claim or demand filed against the estate of an insolvent: *Meyer v. Evans*, 66-179.

5. When application to be made: This section does not mean that a party may have his own time to file the motion. When the time arrives for an answer, demurrer, or motion, he may properly be required to do something, and if he chooses to make the motion, he must make it instant, or within such time as is given him by the court. If he fails, without sufficient excuse, he may properly be held to have waived his right to file the motion, and may be required to answer or demur: *Sprague v. Haight*, 54-446.

6. Where defendant did not file his motion for security for costs by noon of the second day of the term, nor by the further time fixed by the court therefor, but filed such motion after the time fixed by the court for answering, *held*, that the right to insist on such motion was waived and the motion properly overruled: *Ibid*.

7. The express provision of the Code that the defendant shall make and file an affidavit before answering, applies to the cases contemplated in reference to a subsequent removal of plaintiff from the state: *Gilbert v. Hoffman*, 66-205.

8. Affidavit of defense: The affidavit that the party has a good defense need not state the facts constituting such defense. The affidavits and counter-affidavits provided for in the latter part of the section are as to facts on which the motion is based, for instance, the residence or non-residence of plaintiff: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38-446.

9. Attorney as surety: The statutory provision (Code, § 2981) that no attorney or other officer of the court shall be received as security in any proceeding in court does not render a bond upon which an attorney has been accepted as surety void as to him, and he cannot escape liability under such provision. It simply authorizes the officer to refuse to accept such surety: *Wright v. Schmidt*, 47-238.

10. This provision applies not only to bonds for costs, but to injunction, attachment and other bonds: *Massie v. Mann*, 17-181.

11. An appeal will lie from an order dismissing the action for want of a bond when required, but not from an order requiring a bond: *Des Moines Valley, etc., Ins. Co. v. Henderson*, 38-446.

II. TAXATION OF.

12. What taxable: Under the statutory provision (Code, § 2942) authorizing the clerk to tax in favor of the party recovering costs various items specified, and "any further sum, for any other matter which the court may have awarded as costs in the progress of the cause, or may deem just to be taxed," the court may tax in addition to compensation for services specially mentioned in the statute, a further sum for other matters when deemed just. Thus, *held*, that the cost of

¹ Code, § 2927. If a defendant shall, at any time before answering, make and file an affidavit stating that he has a good defense in whole or in part, the plaintiff, if he be a non-resident of this state, or a private or foreign corporation, before any other proceeding in the cause, shall file in the clerk's office a bond with a sufficient security to be approved by the clerk for the payment of all costs which may accrue in the action in the court in which it is brought or in any other to which it may be carried, either to the defendant or to the officers of the court. The application for such security shall be by motion, filed with the case, and the facts supporting it must be shown by affidavits annexed thereto, which may be responded to by counter-affidavits on or before the hearing of the motion, and each party shall file all his affidavits at once, and none thereafter.

Taxation of.

writing down the testimony by a person appointed by the court for that purpose, on agreement of the parties, might be taxed as costs: *Kuhnlee v. Independent Dist.*, 86-99.

13. But the section affords no warrant for taxing up as costs any fee for officers, except it is allowed by law: *Sprout v. Kelly*, 37-44.

14. Jury fees: Although a trial occupy but part of a day, if there is no other jury trial on the same day, a full day's jury fee should be charged up. What should be the rule when there is more than one jury trial on the same day, *quære*: *State v. Verwayne*, 44-621.

15. In action by minor: In an action for an infant by his next friend, such "next friend" is liable for costs: *Vance v. Fall*, 48-364.

16. In an action by a minor in his own name, a valid judgment for costs may be rendered against him: *Albee v. Winterink*, 55-184.

17. In action against administrator: Where, in an action by the widow against the administrator of her deceased husband's estate, the administrator did not defend, but counsel appearing for the heirs defended in his name and plaintiff secured judgment, *held*, that the costs of the suit should not be taxed against the estate, but against the heirs in whose behalf the defense was conducted: *Drummond v. Irish*, 52-41.

18. In case of dismissal: Plaintiff is liable not only for costs taxed at the time of such dismissal, but for all costs properly taxable in the case: *Aches v. Hancock*, 4-568.

19. When taxable to plaintiff: Where defendant's answer was in effect a counterclaim, and he was successful thereon, *held*, that the costs incurred by reason of the trial of such issue should be taxed to plaintiff: *Judd v. Day*, 50-247.

20. Where, as to the matter in litigation, defendant was successful, but was ordered to pay off a claim upon the property involved which was acquired by plaintiff pending the suit, *held*, that no costs appearing to have been incurred as to the repayment of such claim, it was proper to tax costs to plaintiff: *Semple v. McCrary*, 46-37.

21. Where the merits of a proceeding by

injunction were found substantially against plaintiff, *held*, that the costs were properly taxed against him, although as to a matter which might have been corrected without action he was successful: *Tredway v. McDonald*, 51-663.

22. Under the peculiar circumstances of a particular case, *held*, that the costs were properly taxed to plaintiff: *Bare v. Wright*, 28-101.

23. Where it was provided by statute (not now in force) that in actions for tort brought in the district court, if plaintiff recovered less than fifty dollars he should recover no more costs than damages, *held*, that upon recovery of less than fifty dollars he became liable for the costs incurred in excess of the amount of damages: *Britton v. Wright*, 1 G. Gr., 426.

24. Where defendant admitted plaintiff's claim, and the only contest was on a counterclaim in which defendant was successful, *held*, that plaintiff should pay all costs excepting those for commencing action and entering judgment for balance found due him: *Hall v. Clayton*, 42-526. See, also, *Judd v. Day*, 50-247.

25. Costs against defendant: Where plaintiff sought, by motion, to have a judgment which had been discharged restored, and defendant resisted, *held*, that upon the sustaining of the motion all of the costs should have been taxed against the defendant: *Kanke v. Herrum*, 48-276.

26. Where plaintiff sought to set aside a tax title for fraud, and offered to pay the amount justly due from him to the owner of such title, and succeeded in the action, *held*, that costs should be taxed against defendant notwithstanding judgment was entered in his favor for taxes, interest and penalties: *Springer v. Bartle*, 46-688.

27. Disclaimer: A party who, having filed a disclaimer of interest and moved to be dismissed after such motion is denied, contests plaintiff's right to recover, and is defeated, is liable for costs notwithstanding such disclaimer: *Wilcox v. Goldsmith*, 44-573.

28. Apportionment:¹ While the statutory provisions as to apportioning costs refer pri-

¹ Code, § 2933. Costs shall be recovered by the successful against the losing party. But where the party is successful as to a part of his demand, and fails as to part, unless the case is otherwise provided for, the court may, on rendering judgment, make an equitable apportionment of costs.

§ 2934. In actions where there are several plaintiffs or several defendants, the costs shall be apportioned

Taxation of.

marily to a case where the petition embraces several causes of action, or where several issues are joined thereon, or upon new matter in the answer, they may include a case where plaintiff recovers upon his demand, and defendant in whole or in part upon his counter-claim: *Arthur v. Funk*, 22-238.

29. Where plaintiff sued defendant for assault and battery and slander, and defendant defended and also set up a counter-claim for slander, and the jury returned a verdict of ten dollars for plaintiff for the assault and battery and a like amount for defendant for slander, *held*, that the action of the court below in taxing certain unnecessary costs to one party and dividing the balance equally between them was proper, it being impossible to assort the witnesses and apportion the costs on each issue tried: *Ferguson v. Thorpe*, 54-422.

30. Where plaintiff asked the reformation of a deed, but the relief granted was only a portion of that asked, *held*, that the claim was not indivisible and that an apportionment of the costs was proper: *Strayer v. Stone*, 47-333.

31. In an action before a justice upon four separate items, plaintiff recovered judgment, but upon appeal he obtained a general verdict for a less amount; *held*, that the case was a proper one for apportionment of costs, and that Code, §§ 3592-3, as to costs in cases of appeal from justices, did not prevent such apportionment: *Howder v. Overholser*, 48-365.

32. In an action for the recovery of certain articles of specific personal property, where plaintiff recovered as to certain articles and failed as to others, *held*, that an apportionment of costs was proper: *Whitaker v. Sigler*, 44-419.

33. So *held*, also, where plaintiff failed as to a part of his demand, and had increased the costs by bringing his action in equity, when, as to a part of his claims, an action might have been brought at law: *Hatch v. Judd*, 29-95.

34. Where a number of witnesses were summoned by plaintiff, and in attendance, to testify touching an issue presented by the pleadings, and the defendant, just before the

impaneling of a jury, withdrew his answer and thereby rendered the testimony of such witnesses unnecessary, *held*, that although defendant was successful in the suit, it was proper to tax up a portion of the costs against him: *Whitney v. Hackney*, 20-400.

35. Equitable apportionment of costs made in a particular case: *Starr v. Case*, 59-491.

36. As to apportionment of costs of compensation of a receiver, see *French v. Gifford*, 81-428.

37. Where plaintiff's claim is indivisible and he recovers a portion of the amount claimed, the costs should be taxed to defendant. There is no ground in such case for apportionment: *Upson v. Fuller*, 43-409.

38. Where plaintiff recovers the whole of his claim, an apportionment of costs should not be made: *Drummond v. Irish*, 53-41.

39. Nor should apportionment be made when recovery is had for less than his claim, if the claim is indivisible: *Hammond v. Sioux City & P. R. Co.*, 49-450.

40. Failure of plaintiff to recover a portion of the amount claimed does not exempt the defendant from liability for any part of the costs unless there was a tender made and pleaded, or an offer to permit judgment to be entered for a sum equal to or greater than the amount of the judgment finally entered: *Rand v. Wiley*, 70—.

41. Where plaintiff obtains relief in part, the costs may properly be charged to defendant in the discretion of the court: *Burton v. Mason*, 26-392.

42. Where final judgment is rendered for defendant upon a voluntary nonsuit or plea in abatement, there should not be an apportionment of costs: *Hyde v. Cole*, 1-106.

43. Discretionary: An order apportioning the costs will not be interfered with on appeal where the record does not show the basis on which the order was made below: *Brinck v. Neiweg*, 29-444.

44. The order as to costs is largely discretionary, and where no abuse of discretion is apparent, the action of the court below will not be disturbed on appeal: *Boone County v. Wilson*, 41-69.

45. The question of costs rests very largely in the sound discretion of the trial court.

according to the several judgments rendered; and where there are several causes of action embraced in the same petition, or several issues, the plaintiff shall recover costs upon the issues determined in his favor, and the defendant shall recover costs upon the issues determined in his favor.

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Where a petition embraced several distinct charges, amounting to two hundred and forty-nine dollars, and plaintiff recovered only five dollars, *held*, that it was not error to assess one-third of the costs against him: *Andrews v. Zimmerman*, 42-708.

46. The apportionment of costs in certain cases is in the discretionary power of the trial court, and that discretion will not be interfered with on appeal unless an improper exercise thereof is shown: *Bush v. Yeoman*, 30-479.

47. The presumption in regard to the action of the court as to apportionment of costs is in favor of the correctness of such action, and the ruling will not be disturbed on appeal unless all the facts and circumstances are before the court, and it is manifest that the ruling is wrong: *Koestenbader v. Peirce*, 41-204.

48. When the record does not disclose the facts or circumstances attending the trial, the action of the lower court in refusing to tax in defendant's favor costs accrued in support of his cross-claim, only a small portion of which was established, will be presumed to have been based upon sufficient reasons: *Arthur v. Funk*, 22-288.

49. The mere fact that a decree in favor of the defendants directed that they pay the costs in the first instance, to be afterward recovered by them of the plaintiffs, *held*, not of itself sufficient to warrant a reversal, when the facts on which the court acted were not shown: *Scott's Adm'rs v. Cole*, 27-109.

50. Offer of judgment: Where, in a proceeding to condemn the right of way for a street, plaintiff offered to submit to judgment in a certain amount, and on the trial a less amount was found for defendant, *held*, that it was not a case for taxing costs against defendant, the action not being one for the recovery of money within the provisions of Code, § 2900: *Cherokee v. Sioux City & I. F. Town Lot Co.*, 52-279.

51. Where an offer to confess judgment has been made which is insufficient in amount, it will have no effect upon the question of costs where the matter to which the confession relates is only one of the questions upon which the controversy is determined: *McClatchey v. Finley*, 62-200.

52. Affidavits as to costs: The court may, in determining the matter of costs, consider affidavits and counter-affidavits, or may require the affiants brought in and subjected to examination and cross-examination: *Packer v. Pucker*, 24-20.

53. Judgment: Where a court has jurisdiction to render judgment it may also render a valid judgment for costs: *Sprott v. Reid*, 8 G. Gr., 489.

54. One who is served with notice of an action which does not state that no personal claim is made against him, cannot, after default and judgment against him for costs, have such judgment corrected or inquired into by an injunction. Having the power to render such judgment, the court's action can only be corrected by motion or on appeal: *Davis v. Keith*, 23-419.

55. A provision in a judgment for the recovery of costs by the successful party against his adversary is an adjudication with reference thereto: *Fairbairn v. Dana*, 68-231.

56. And the correctness of such determination cannot be urged by motion to retax the costs: *Ibid*.

As to what is a sufficient record of a judgment for costs, see COURTS, §§ 204, 205.

57. Retaxing costs: The ruling on a motion to retax costs because certain costs taxed in the case were unnecessary cannot be reviewed where it is not affirmatively shown to what extent, if at all, unnecessary costs were taxed: *Toohey v. Lowell*, 68-661.

58. A motion to retax costs cannot be made in the lower court while the case is pending in the supreme court on appeal: *Levi v. Kar-rick*, 15-444.

59. Collection of judgment for: The judgment, so far as it covers costs, is for the use of the parties entitled to such costs, and the successful party has no interest in that part of the judgment except in so far as such costs have been paid by him; therefore a payment to him of the costs covered by the judgment will not release his judgment debtor from the claims of parties entitled to such costs: *McConkey v. Chapman*, 58-281.

60. Fee bill: The party against whom the judgment is rendered is primarily liable for all the costs to the parties entitled thereto. They may issue their fee bill therefor, and failing in that they may, by motion, require

Jurisdiction of particular.—Supreme court.

the successful party to pay such of the costs as accrued at his instance, as provided in Code, § 2935. The statute does not contemplate the issuance of a fee bill against a party against whom no judgment has been rendered: *Ibid.*

61. Officers and witnesses entitled to fees in a case cannot have process issued for the collection of such fees. The judgment is subject to the control of the party in whose favor it is rendered: *Ex parte Hampton*, 2 G. Gr., 137.

62. If fees are unreasonably delayed in their collection the person entitled thereto may proceed against the party liable: *Ibid.*

COUNTIES.

See MUNICIPAL CORPORATIONS, III.

COURTS.

I. JURISDICTION OF PARTICULAR COURTS.

- a. *Supreme court of state.*
- b. *District and circuit courts of state.*
- c. *Other state courts.*
- d. *Federal courts.*

II. ORGANIZATION; EXERCISE OF POWER.

- a. *What constitutes court; functions of judge.*
- b. *Time and place of holding court; terms.*
- c. *Records.*
- d. *Rules; assignment of causes.*
- e. *Process.*

As to jurisdiction in general, and courts of general and courts of limited jurisdiction, see JURISDICTION.

As to PRACTICE, see that title.

I. JURISDICTION OF PARTICULAR COURTS.

- a. *Supreme court of state.*

1. No original jurisdiction: The supreme court has no original jurisdiction. It can review or correct judgments of a lower court only upon appeal or writ of error: *Powell v. Spaulding*, 3 G. Gr., 417; *Westbrook v. Wicks*, 36-382.

2. It cannot grant an injunction upon an original application, although the judges of

the court are authorized to issue injunctions as judges: *Reed v. Murphy*, 2 G. Gr., 568.

3. It cannot, in the first instance, grant an attorney's lien, as that would be an exercise of original jurisdiction: *Preston v. Daniels*, 2 G. Gr., 536.

4. It can only try issues presented on appeal. It cannot, by way of a ruling on a motion, determine that, by reason of matters arising pending the appeal and shown by affidavit, appellee should be barred from further prosecuting the case: *Simonson v. Chicago, R. I. & P. R. Co.*, 48-19.

5. Jurisdiction not conferred by consent: Parties cannot by agreement confer jurisdiction upon the supreme court in a case in which an appeal is not authorized. So held, where, by consent, an appeal in a criminal case was taken without judgment having been rendered: *Rutter v. State*, 1-99.

6. Appellate jurisdiction at law: The statutory provision (Code, § 8169) dispensing with the necessity of a motion for new trial is not in violation of the constitutional provision that the supreme court shall have jurisdiction in actions at law only for the correction of errors. Previous to that statute the ruling of the lower court on a motion to set aside the verdict as contrary to the evidence was reviewed as a matter of law, and the statute simply acts as a standing motion for a new trial: *Coffin v. City Council*, 26-515; and see *Delvee v. Boardman*, 20-446.

7. In a law case it is a court for the correction of errors at law, and it will not decide a case upon an agreed statement of facts which does not purport to embody the evidence, and when no error of law is presented: *Harvey v. Miller*, 25-219.

8. Regulation restricting appeals: The rule of the supreme court requiring the certificate of the trial judge in an appeal, where the amount in controversy is less than one hundred dollars, to state the question involved on which the decision of the supreme court is desired, is not nugatory as limiting the jurisdiction of the court: *Wilson v. Iowa County*, 52-339.

9. Appeals in equity: The distinction between the law and equity attributes of the supreme court is too well defined in the constitution to be erased by legislative action: *Claussen v. Lafrenz*, 4 G. Gr., 224.

Supreme court.—District and circuit courts.

10. The supreme court can only acquire jurisdiction in a chancery cause by appeal, and it can only review and decide questions made in and decided by the court below. Upon a trial *de novo* of a chancery cause, it cannot consider new testimony, and it has no power to entertain a bill of review: *McGregor v. Gardner*, 16-538.

11. The method to be pursued for securing a trial *de novo* upon appeal may be regulated by statute: *Richards v. Hintrager*, 45-253.

12. The right to a trial *de novo* upon appeal cannot be insisted upon unless the method prescribed by statute for securing such form of trial has been pursued: *Cross v. Burlington & S. W. R. Co.*, 51-683.

13. The statutory provision that an appeal is only allowed when the amount in controversy is not less than one hundred dollars, unless there is a certificate of the trial judge that there is a question involved upon which it is desirable to have the decision of the court, is not unconstitutional as depriving the party, in cases involving less than one hundred dollars, of his right to appeal in equity: *Andrews v. Burdick*, 62-714.

14. But the right of trial *de novo* in equitable actions cannot be entirely taken away by statute: *Sherwood v. Sherwood*, 44-192.

15. Jurisdiction of the supreme court in chancery cases can be exercised only upon appeal and not upon writ of error: *Stockwell v. David*, 1 G. Gr., 115.

16. The supreme court has jurisdiction to hear a case *de novo* on appeal only in actions in chancery and not in special proceedings: *Brett v. Myers*, 65-274.

17. Its jurisdiction may be restricted by the general assembly; and therefore, *held*, that where an act gave the district court final jurisdiction in a matter, there was no right of appeal from its judgment to the supreme court: *Lampson v. Platt*, 1-556.

In general, as to the exercise of appellate jurisdiction, see APPEALS.

b. District and circuit courts of state.¹

18. The district court is a court of general jurisdiction. It may have jurisdiction

over any case brought within its district except so far as the exercise of its jurisdiction is prescribed by statute. The general and unlimited scope of its jurisdiction is illustrated by the fact that it is styled the district court for the state, held in and for a particular county, and its judges are judges of the state with authority to grant writs running into every part of the state. The legislature cannot deprive it of its jurisdiction or limit such jurisdiction, but the manner of its exercise may be prescribed by law: *Laird v. Dickerson*, 40-665.

19. The jurisdiction of the district court, which is a superior court of general original jurisdiction, can only be taken away by express words or irresistible implication. Therefore, *held*, that a statute which prohibited the bringing of action in the district court on claims against an estate for a mere money demand except with the approbation of the county court was not intended to take away the jurisdiction of the district court, but merely as a restraint upon plaintiff: *Sterritt v. Robinson*, 17-61.

20. And in such case, *held*, that the failure on the part of plaintiff to obtain such leave must be set up as a defense and could not be made the ground of a collateral attack on the judgment: *Cooley v. Smith*, 17-99.

21. The statutes conferring jurisdiction upon the probate court do not defeat or oust the general jurisdiction of the district court: *Harlin v. Stevenson*, 30-371.

22. As the district court is one of general jurisdiction, its powers are such as to give it cognizance of proceedings by creditors to compel an administrator to sell real estate for debts, and of all other proceedings except where jurisdiction is denied or taken away by express language or necessary implication: *Waples v. Marsh*, 19-381.

23. At law and in equity: The district court is invested with all the powers of a court of law and those of a court of equity, and the distinction between the two jurisdictions is recognized. This distinction the legislature cannot take away: *Claussen v. Lafrenz*, 4 G. Gr., 224.

24. Under statutes different from those now in force, *held*, that in a proceeding in

¹ The circuit court is now abolished and its jurisdiction, in general, added to that already possessed by the district court: 21 G. A., ch. 134.

District and circuit courts.

equity, the court possessed no jurisdiction to render in favor of the party such judgment as he might show himself entitled to at law: *Roberts v. Taliaferro*, 7-110.

25. Supervisory powers: By statute, the general supervision of the circuit court over inferior courts, etc., in civil matters, is exclusive, and so is that of the district court in criminal matters. Jurisdiction in proceedings by *certiorari* is not given indiscriminately to both courts, but each court has jurisdiction in that class of cases under its supervision: *Keniston v. Hewitt*, 48-679; *Groves v. Richmond*, 58-570.

26. The supreme court will recognize the want of jurisdiction of the district court in *certiorari* in civil cases, though the objection be not made below nor on appeal: *Groves v. Richmond*, 58-570.

27. The circuit court has exclusive jurisdiction over appeals in the trial of contested county elections: *McKinney v. Wood*, 35-167.

28. The statutory provision (Code, § 162) giving the circuit court jurisdiction in all appeals and writs of error over inferior courts, tribunals and officers, and the general supervision thereof in all civil matters, to prevent or correct abuses where no other remedy is provided, does not permit appeals in cases where there is no statute authorizing them; as for instance from the action of fence-viewers: *McKeever v. Jenks*, 59-850.

29. Circuit court: Where the circuit court has exclusive jurisdiction and a change of place of trial is granted, it should be sent to some other circuit court and not to the district court: *Schuchart v. Lammey*, 62-197.

30. The fact that a certain court is given exclusive original jurisdiction of an action does not imply that such jurisdiction is final and without review on appeal: *Conboy v. Iowa City*, 2-90.

31. Probate jurisdiction:¹ The probate court has not jurisdiction to appoint an administrator of the personal property of a person who was not a resident of the county at the time of his death and held no property there, merely on the ground that the

property was brought into the county after his death for a special purpose and removed again before the appointment of such administrator: *Christy v. Vest*, 36-285.

32. If there is any claim due the estate of decedent on which action might be maintained in the courts of this state by an administrator properly appointed, the courts of this state have jurisdiction to appoint such administrator. So held as to a cause of action accruing in another state under the laws of that state for causing the death of decedent, defendant being suable in Iowa: *Morris v. Chicago, R. I. & P. R. Co.*, 65-727.

33. The fact that a court, in granting administration upon the estate of a foreign decedent, appoints an administrator for the sale of real estate in that county, does not limit its jurisdiction as to property in other counties of the state: *Lees v. Wetmore*, 58-170.

34. Jurisdiction of the probate court is not exclusive as to land belonging to an intestate, which is not required for the payment of debts and remains in the possession of the heirs after administration is concluded, and an action against heirs in possession by a person claiming to be heir may be brought in another court: *In re Seaton's Estate*, 58-523.

35. Where the relief sought is the enforcement of a lien, the action may properly be brought in equity, there being no method of obtaining relief in probate proceedings: *Goodnow v. Wells*, 67-654.

36. Under the Revision, the county courts did not have exclusive jurisdiction of all matters connected with the settlement of the estate, and no express power was granted them to entertain a creditor's bill to command an administrator to sell real estate for debts: *Waples v. Marsh*, 19-381.

37. The court having taken jurisdiction to appoint an administrator, such action cannot be attacked collaterally by showing that there was no property in the county to warrant such appointment: *Murphy v. Creighton*, 45-179; *Lees v. Wetmore*, 58-170.

38. The probate court has exclusive juris-

¹ Code, § 2312. The circuit court of each county shall have original and exclusive jurisdiction of the probate of wills, and the appointment of such executors, administrators, or trustees, as may be required to carry the same into effect; of the settlement of the estate of deceased persons, and of the persons and estates of minors, insane persons, and others requiring guardianship, including applications for the sale of real property belonging to any such estates, except as prescribed in chapters one and three of title fifteen.

District and circuit courts.

diction of an action to probate a will, but such probate is not conclusive on adverse parties, and an original action to set the will aside may be instituted in the district court: *Leighton v. Orr*, 44-679.

39. A circuit court, as a court of probate, does not have exclusive jurisdiction of a suit on an administrator's bond: *Wheelhouse v. Bryant*, 13-160; *Jenkins v. Shields*, 36-526.

40. An order of a probate court approving the report of an administrator, in which he certifies to a distribution of all the funds to certain heirs, is not an adjudication that there are no other heirs: *Crosley v. Calhoon*, 45-557.

41. A probate court may appoint a referee in the matter of the examination of administrator's accounts: *In re Heath's Estate*, 58-36.

42. The jurisdiction of the circuit court as a court of probate relates to probate matters exclusively, and no chancery powers are thereby conferred upon it. It may regulate the distribution of property to legatees, but cannot supervise the management of such property by the legatees charged with a trust duty in respect thereto by the will, the execution of trusts being within the jurisdiction of a court of equity: *Perry v. Drury*, 56-60.

43. The provisions as to the probate jurisdiction of the circuit court do not defeat or oust the general equity jurisdiction of the district court: *Harlin v. Stevenson*, 30-371.

44. The jurisdiction of the probate court in relation to estates of insane persons does not exclude that of the district court in an action of right between an insane person and others: *Flock v. Wyatt*, 49-466.

45. The authority given by Code, § 2315, to the clerk of the circuit court to appoint guardians, etc., in vacation, does not confer upon him authority to approve a guardian's bond in vacation: *Reno v. McCully*, 65-629.

46. The circuit court, as a court of probate, may authorize expenditures by a guardian for the support and education of the ward, without notice to the ward. Such a proceeding is not adversary in its nature and does not partake of the character of an action: *Breuer v. Stoddard*, 49-279.

47. Where a probate court directed that notice of an application by the administrator

for sale of the real property to pay debts of the estate should be served by publication for two weeks in a newspaper, which order was complied with, *held*, that the court thereby acquired jurisdiction as against non-resident defendants to act upon such application: *Casey v. Stewart*, 60-160.

48. The hearing of a probate matter may be ordered to be had at a place other than the county seat: *Ibid*.

49. The circuit court cannot sit outside of the county for the transaction of probate business, and an order made in such matter outside of the county will be void: *Capper v. Sibley*, 65-754.

50. Where a proceeding which should have been in probate is brought in law or equity, the error is merely one as to the forum of the action and cannot be raised on appeal, if not interposed in the lower court: *Goodnow v. Wells*, 67-654.

51. Nor can such objection be taken advantage of by demurrer, but it must be raised by motion to transfer the proceeding to the proper docket as provided in Code, § 2519: *Ashlock v. Sherman*, 56-311.

52. Where the parties submitted to the circuit court a controversy involving the allowance of claims against the estate upon an agreed state of facts, *held*, that the circuit court might determine such question, although it was not one involving the exercise of probate jurisdiction: *Baugh v. Barrett*, 69-495.

53. Concurrent jurisdiction: The fact that jurisdiction in a particular class of cases exists in one court by virtue of statute, and by subsequent statute jurisdiction thereof is vested in another court, does not operate as an implied repeal of the previous statute. The jurisdiction of the courts is to be regarded as concurrent: *Hummer v. Hummer*, 3 G. Gr., 42.

54. In such case, if a proceeding has been commenced in either court, the jurisdiction of the case being thereby assumed in accordance with the law, the other court would be precluded from taking cognizance of it: *Ibid*.

55. It is no interference on the part of one court with the jurisdiction of another for a person, not a party to an attachment suit in the one, to bring an action of replevin in

Other state courts.—Federal.

another against the sheriff for property seized by him under such attachment: *Seaton v. Higgins*, 50-305.

56. The court first obtaining jurisdiction of the person of the accused in a criminal case retains it to the exclusion of another court seeking to obtain such jurisdiction and will proceed to try the case and administer justice. So held where defendant was indicted in one county for a crime which was indictable in either one of two counties, and was afterwards indicted and first arrested in the other county: *Ex parte Baldwin*, 69-502.

57. Jurisdiction of inferior courts not exclusive: Under the provisions of the Revision of 1860 giving a right of appeal from the county court to the district court, held, that the original jurisdiction of the district court in such cases was not excluded: *Waples v. Marsh*, 19-381.

58. The jurisdiction of a court of general jurisdiction is not limited by the provisions giving justices of the peace jurisdiction in cases where the amount does not exceed one hundred dollars. The courts of general jurisdiction have original jurisdiction in such cases: *Koons v. Dyer*, Mor., 98; *Hudson v. Matthews*, Mor., 94; *Bush v. Elson*, Mor., 316; *Chapman v. Morgan*, 2 G. Gr., 374; *Nelson v. Gray*, 2 G. Gr., 397; *Hutton v. Drebbilbis*, 2 G. Gr., 593.

59. In actions of forcible entry and detainer, exclusive jurisdiction is given to justices of the peace, and the district or circuit court cannot exercise original jurisdiction therein: *Dicks v. Hatch*, 10-380; *Easton v. Fleming*, 51-305.

c. Other state courts.

60. Superior courts: The jurisdiction of superior courts over appeals in civil cases from justices of the peace in the township is not exclusive of that of the circuit courts in the respective counties: *Hickox v. Nutting*, 55-403; *Hickox v. Burlington, C. R. & M. R. Co.*, 55-431.

61. The superior court has, as to cases originally brought therein, concurrent jurisdiction throughout the county with courts of general jurisdiction. The limitation of jurisdiction to the township in which the city is located applies only to appeals and writs of

error from justices of the peace: *Winet v. Berryhill*, 55-411.

62. The act (16 G. A., ch. 143; McClain's Ann. Stat., 140) authorizing cities of a certain population to establish superior courts upon the adoption of a proposition to that effect by popular vote is not unconstitutional as providing for the exercise of legislative power by the people. It confers upon cities certain powers which may be accepted and exercised by a vote of the people, but the validity of the act of the legislature is not made dependent upon popular vote: *Lytle v. May*, 49-224.

63. Police courts: Neither the constitution nor any statute gives a defendant tried before a police magistrate for violation of a city ordinance, the right of trial by jury: *Zelle v. McHenry*, 51-572.

64. Nor is there any provision for change of venue from such a court in such proceeding: *Ibid.*

65. Mayor's court: The court of a mayor is not a court of record: *Santo v. State*, 2-165, 230.

66. County court: Under a statute providing for a county judge and authorizing him to hold a county court, held, that the official acts of the county judge were acts of the county court, whether judicial or ministerial, and that county judge and county court were convertible terms: *Lee County v. Nelson*, 4 G. Gr., 348.

67. The territorial courts of Iowa held not to be foreign courts with respect to the courts organized under state authority: *Wright v. Marsh*, 2 G. Gr., 94.

d. Federal courts.

68. Appeal to supreme court of the U. S.: The fact that the validity of a state statute is called in question on the ground that it is in conflict with the constitution of the United States must appear on the face of the record, and a certificate to that effect will not be given by the state supreme court where the question is not made in the record but is first suggested in the argument of counsel on a petition for rehearing in the latter court: *Martin v. Cole*, 38-141.

69. Where a state and a federal question are presented to the state court, and the fed-

Federal courts.

eral question not being necessarily involved in the decision, the state court ignores it, and bases its decision wholly on the state question, the United States supreme court has no jurisdiction: *Adams County v. Burlington & M. R. R. Co.*, 112 U. S., 123.

70. Where the record shows that plaintiffs in error claimed in the state court that the contract made with defendants in error had been rendered void and of no force and effect by the constitution of the United States, and of certain acts of congress, and that the supreme court of Iowa denied this claim, a federal question is presented which will give the United States supreme court jurisdiction under the twenty-fifth section of the judiciary act: *Railroads v. Richmond*, 15 Wall., 3.

71. Writs of error from the state supreme court to the supreme court of the United States must be signed by the chief justice of the state court: *Bartemeyer v. Iowa*, 14 Wall., 26.

72. Where writ of error is allowed by the state supreme court, and a citation signed, but the same, with *supersedeas* bond, is not filed with the clerk until after the expiration of the sixty days allowed therefor by the statute of the United States, the judgment is not superseded: *Chicago, R. I. & P. R. Co. v. Grinnell*, 53-55.

73. **Federal courts not foreign:** The circuit courts of the United States are not to be regarded as foreign tribunals by the courts of that state in which the federal court was holden which rendered the judgment, so as to allow a party to relitigate in an action on such judgment the same defenses which were pleaded by and decided against him on the first action: *Thomson v. Lee County*, 22-206.

74. The state and federal courts for Iowa are not foreign to each other in any such sense that proceedings will be allowed to be pending in each court at the same time between the same parties for the enforcement of the same rights, which would result in the granting of the same remedy operative within the same territorial limits: *Radford v. Folsom*, 4 McCrary, 527.

75. **Interference of state courts; injunction:** The state courts have no jurisdiction, power or authority to interfere by injunction to restrain a party who has recovered judgment in a federal court, or the officers

of that court, from enforcing such judgment: *Shimer v. Hammond*, 51-401.

76. The state court cannot interfere with the execution of process from a federal court: *Seaton v. Higgins*, 50-305.

77. The supreme court of the United States is the final arbiter respecting the extent of the judicial power of the United States and the jurisdiction which the federal courts possess under constitutional legislation of congress: *Holman*, 28-88.

78. In the exercise of their respective jurisdictions, the state and federal courts cannot interfere with the operations of the other at any time, whether before or after judgment: *Ibid.*

79. Where plaintiff has the constitutional right to bring his action in the federal court, its jurisdiction will not be ousted by proceedings touching the subject-matter in the state court. Nor can a state court interfere with the execution of process issued from the federal court to enforce its judgment in such a case. A decision of the latter when made is binding on the state court: *Ibid.*; *Clark v. West*, 197.

80. **Mandamus:** Although the federal courts have jurisdiction to enforce the execution of a judgment therein against county officers by *mandamus*, yet it being the duty of county officers by statute to apply to the federal court for the satisfaction of a judgment, the duty of making such application is one which may be enforced by *mandamus* in the state courts: *Brown v. Brown*, 32-498.

81. **Penalties under United States laws:** The federal courts have exclusive jurisdiction of cases arising under penal statutes of the United States. Whether the penalty of the national banking act in respect of usury by banks authorized under that act is far penal in its nature that congress gave the state courts jurisdiction thereof is attempted in that act, *quere*. But that in an action by a national bank in a state court, the defendant might recover on the ground of the invalidity of the claim on the ground contained usurious interest: *National Bank v. Eyre*, 52-114.

82. **Equity practice:** The rules of procedure of the circuit court of the United States

Federal courts.

chancery causes are such as are prescribed by the supreme court of the United States, and the provisions of the state statutes cannot be considered in determining the effect of proceedings therein: *Scully v. Chicago, B. & Q. R. Co.*, 46-528.

Bankruptcy proceedings: The jurisdiction of the federal courts in bankruptcy proceedings is exclusive and the state courts can exercise no jurisdiction therein: See *BANKRUPTCY*, §§ 3-7.

83. Subject-matter: Where the jurisdiction of the federal courts is extended to a class of cases by reason of the subject-matter of the action, such jurisdiction attaches without regard to the parties, and where it attaches on account of the remedy sought and the form and course of proceedings, such jurisdiction is not exclusive of a proceeding in any other form in a state court having jurisdiction, although the subject-matter is the same: *Home Ins. Co. v. North Western Packet Co.*, 32-223.

84. Admiralty and maritime jurisdiction: The judicial power of the United States in admiralty cases is limited by the proceedings had, the form and manner of the action, and the form in which it is prosecuted, and exclusive jurisdiction is not given to the federal courts over subjects which may be the foundation of action in admiralty, and also, according to the course of common law, in chancery or at law. In such cases, the state courts have concurrent jurisdiction with the United States admiralty courts: *Ibid.*

85. The Missouri river is such a river that the federal courts have jurisdiction over admiralty cases arising thereon: *Walters v. Steamboat Mollie Dozier*, 24-192.

86. Removal of cases; amount in controversy: Where the petition asked judgment for a sum less than \$500, and interest at such rate and for such time as that it would be sufficient to make the amount exceed \$500, *held*, that the amount in controversy was sufficient to authorize the removal: *Brayley v. Hedges*, 53-582.

87. Citizenship: Residence and citizenship are not synonymous terms, and a petition to remove a cause to a federal court, which alleges that the parties reside in different states, is insufficient: *Delaware R. Const. Co. v. Davenport & St. P. R. Co.*, 46-406.

88. In an action against a railway company incorporated under the laws of Illinois, and having therein its principal place of business, but operating, as lessee of a domestic corporation, a railroad in Iowa, in which action it was sought to recover damages for an injury occurring on the leased line in Iowa, *held*, that defendant should, for the purpose of determining his right to remove the cause to the federal courts on the ground of citizenship, be regarded as a citizen of Illinois, and that, although suable in this state, because doing business here under the sanction of the state laws, it was not deprived of the right to be regarded as a citizen of Illinois, for the purpose of removal of the action: *Treadway v. Chicago & N. W. R. Co.*, 21-351.

89. Where suit is brought by a trustee, who is such in good faith and has power to control the claim, the citizenship of persons beneficially interested, but not parties to the record, is not considered on the question of removal. If the assignment by virtue of which plaintiff sues is not effectual to confer upon plaintiff the power to sue, defendant's remedy would not be to remove the suit, but to defeat plaintiff's action on the ground that he is not the real party in interest: *Vimont v. Chicago & N. W. R. Co.*, 64-513.

90. Where a cause of action is assigned so as to vest the legal title to the claim in plaintiff for the purpose of preventing the transfer of the cause to the federal court on account of difference in citizenship of the parties, it is immaterial that the motive of the assignment was to defeat such transfer: *Ibid.*; *S. C.*, 69-296.

91. Where plaintiff sues as assignee, and is a citizen of the same state as defendant, there cannot be a removal of the cause to the federal court, although, had the action been brought by the assignor, there would have been such difference in citizenship of the parties as to authorize such removal: *Ibid.*; *Goodnow v. Litchfield*, 67-691; *Goodnow v. Oakley*, 68-25.

92. The controversy: To authorize a removal to the federal court it is necessary that there be a "controversy," and where defendants have not answered or demurred to the petition for removal, and it is not shown that there is a defense, there is no such contro-

Federal courts.

106. Upon the filing of a petition in a state court presenting a sufficient case for removal to the federal court, the rightful jurisdiction of the state court comes to an end, and the state court cannot permit an issue upon the allegations of the petition to be raised, and upon its determination order or refuse the removal of the case, as it may find the facts upon which the jurisdiction of the federal court is based: *Van Horn v. Litchfield*, 70—.

107. In a particular case, *held*, that the petition and bond for removal being sufficient in form, removal could not be refused on account of certain averments in a prior affidavit made for requiring security for costs: *Ohle v. Chicago & N. W. R. Co.*, 64-599.

108. Rightfulness of removal: Where a party has, by motion in the federal court, sought to have the case in which proceedings for removal have been taken remanded to the state court on account of the insufficiency of such proceedings, he will be bound by the disposition of the case made in the federal court, and cannot afterward question the sufficiency of the proceeding in the state court: *Ryan v. Mathews*, 64-250.

109. Effect of removal upon prior proceedings: The removal of a cause into a federal court under the judiciary act of 1789 does not *ipso facto* render a delivery bond in attachment inoperative, nor does it so change the liability of the sureties as to discharge them: *Ramsey v. Coolbaugh*, 18-164.

110. An order in regard to the withdrawal of a delivery bond, after the bond is filed in the federal court, upon removal, is not a further proceeding in the cause, within the meaning of the act authorizing a removal of causes to the federal courts: *Ibid*.

111. Right of foreign corporations to remove: The state statute (21 G. A., ch. 76) requiring foreign corporations to procure permits from the auditor of state before doing business in the state, and providing that the removal of a case by such corporation to the federal court shall constitute a revocation of such permit, *held* unconstitutional. (Reversing *Goodell v. Kriechbaum*, 70—): *Barron v. Burnside* (U. S. Sup. Ct.), 7 S. C. Rep., 981.

112. Following state decisions: The decisions of the supreme court of a state interpreting a statute of such state are binding upon the federal courts: *Goodnow v*

Wells, 67-654; *Crooks v. Stuart*, 2 McCrary, 18; *Davenport Nat. Bank v. Mittelbuscher*, 4 McCrary, 361.

113. The judgment of the state supreme court against the constitutionality of a state statute concludes the federal courts from upholding the statute and they will not attempt to do so: *Kaeiser v. Illinois Cent. R. Co.*, 5 McCrary, 496.

114. However little the federal courts may approve the decisions of the state courts, the former will not set up a different rule of property with respect to state laws, but will follow the state decisions in such matters: *Burham v. Fritz*, 4 McCrary, 410.

115. The question as to whether certain acts of the county constitute a conveyance by it of lands received from the United States is a question depending upon state and not on federal law: *Adams County v. Burlington & M. R. R. Co.*, 112 U. S., 123.

116. As to a question of general law not depending upon state statutes, the federal courts will follow the decisions of the supreme court of the United States rather than those of the state wherein the case arises: *Crooks v. Stuart*, 2 McCrary, 18; *Edwards v. Davenport*, 4 McCrary, 34.

117. When the federal courts are called upon to consider contracts resting upon state statutes which were valid at the time they were made, according to the decisions of the highest courts of the state, and were entered into on the faith of those decisions, they will decline to follow later decisions of the state declaring the invalidity of such statutes. But in other cases the federal courts will hold themselves bound to accept the constructions given by the courts of the states to their statutes: *Supervisors v. United States*, 18 Wall., 71.

118. Bonds of counties issued in aid of railways after the state courts have held such bonds invalid will not be enforced in the federal courts: *Foote v. Mt. Pleasant*, 1 McCrary, 101.

119. A state law of practice has no effect *proprio vigore* in the courts of the United States, and can only be made effectual in those courts by adoption by a rule of the circuit court for that district: *Mayor v. Lord*, 9 Wall., 409.

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80. Mandamus: Although the federal courts have jurisdiction to enforce the payment of a judgment therein against a county by *mandamus*, yet it being the duty of the county officers by statute to apply a tax levied for the satisfaction of a judgment to its payment, the duty of making such application is one which may be enforced by *mandamus* in the state courts: *Brown v. Crego*, 32-498.

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82. Equity practice: The rules of practice of the circuit court of the United States in

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117. When the federal courts are called upon to consider contracts resting upon state statutes which were valid at the time they were made, according to the decisions of the highest courts of the state, and were entered into on the faith of those decisions, they will decline to follow later decisions of the state declaring the invalidity of such statutes. But in other cases the federal courts will hold themselves bound to accept the constructions given by the courts of the states to their statutes: *Supervisors v. United States*, 18 Wall., 71.

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120. Lien of judgments of federal courts, see JUDGMENTS, § 509.

 Organization.—What constitutes court.

II. ORGANIZATION; EXERCISE OF POWER.

a. What constitutes court; functions of judge.

120. Open court: To give existence to a court, its officers and the time and place of holding it must be such as are prescribed by law. The term "open court" as used in the statutes is to be understood as conveying the idea that the court must be in session, organized for the transaction of judicial business. Hence, a trial before a referee cannot be considered a trial in open court: *Hobart v. Hobart*, 45-501.

121. Who entitled to be present: While witnesses may be separated and excluded from the place of trial, in the discretion of the court, upon the application of a party, an exception arises in the case of a party to the action, who has the right to be present during the trial. *Jemison v. Gray*, 29-537.

122. That there may be a separate examination of witnesses, see *Hubbell v. Ream*, 31-289.

123. Judge; unauthorized person cannot act as: A person not duly authorized and qualified by law cannot, by consent of parties or by direction of the duly qualified judge, act as judge in the trial of a cause: *Michales v. Hine*, 3 G. Gr., 470; *Winchester v. Ayres*, 4 G. Gr., 104; *Petty v. Durall*, 4 G. Gr., 120; *Smith v. Frisbie*, 7-486.

124. It is not proper for a judge of the court to have an attorney substituted temporarily in his place, even by consent of parties, and himself act as attorney for one of the parties to the case: *Wright v. Boon*, 2 G. Gr., 458.

125. The judge may, during the argument of the case to the jury, properly be absent from the court room for the purpose of hearing another case, or otherwise: *Hall v. Wolff*, 61-559.

126. If it appears that the judge required arguments to the jury to be made while he was absent attending to other business in a separate room, such fact will not be ground for reversal if it does not appear but that such absence was necessary, or that prejudice resulted or might be inferred therefrom: *Baxter v. Ray*, 62-336.

127. Substitute: Where a statute provides that, in case of the absence or disability of the judge, a certain other officer designated shall act in his place, it must appear, in order to support an action of the person thus designated in sitting as judge, that the contingency upon which he was authorized to act had occurred: *Burlington University v. Stewart's Ex'rs*, 12-442; *State v. Chicago, R. I. & P. R. Co.*, 50-692.

128. A judge may hold court in another district than his own by exchange under the provisions of statute: *State v. Stingley*, 10-488.

129. Such provision (Code, § 175) is not unconstitutional: *Ibid*.

130. Judge previously interested: A judgment rendered by a judge who has previously been an attorney in the case is not to be deemed absolutely void, where it does not appear that the judgment has ever been questioned or objected to by the party interested: *Floyd County v. Cheney*, 57-160.

131. Change of judge: Where, after the submission of a cause on deposition to the judge of the circuit court, the circuit was so changed that another judge became judge of such court, *held*, that a decision of the cause by the new judge was proper: *Manning v. Mathews*, 66-675.

132. Where at one term of court a judge signs or makes a memorandum of a decree which is not entered at that term on the record, and before the next term the judge goes out of office, his successor should cause the record to be made up from the previous decree or memorandum, and cannot regard the cause as open for trial: *Tracy v. Beeson*, 47-155.

133. Where the judgment rendered by one judge, upon the report of a referee, was set aside by his successor as having been improperly entered in vacation, and a new judgment to the same effect was rendered, *held*, that the unsuccessful party had no right to have his exceptions to the referee's report passed upon anew by the incoming judge: *Mellinger v. Von Behren*, 58-874.

134. Powers may be conferred upon the judge which cannot be exercised by the court of which he is judge: *Cummings v. Des Moines, W. & S. W. R. Co.*, 86-173.

135. Territorial judges: The constitution under which Iowa was admitted having

Time and place of holding court; terms.

divided the state into four judicial districts instead of three as there had been under the territorial constitution, *held*, that until an election of officers under such constitution there were no judges in such districts, although by the constitution the officers of the territory were authorized to act until new officers were elected: *Allen v. Dunham*, 1 G. Gr., 89.

b. Time and place of holding court; terms.

136. **Sunday; dies non:** A verdict rendered on Sunday, or a judgment entered on that day, is void: *Davis v. Fish*, 1 G. Gr., 406. (But by statute, Code, § 191, a verdict may be received or a jury discharged on Sunday.)

137. To avoid a judgment, regular on its face, on the ground that it was rendered on Sunday, the fact that it was so rendered should be clearly established, beyond the reasonable doubt naturally arising from the difficulty of establishing the precise time of a transaction: *Bishop v. Carter*, 29-165.

138. **Extent of term:** In contemplation of law, aside from statute, the whole term of the court is considered but one day; and where a term of court commenced during the year for which grand jurors were properly summoned, *held*, that they did not cease to be grand jurors during the existence of the term although it extended into another year: *State v. Winebrenner*, 67-230.

139. **Acts after expiration of term:** Where the term of court is limited, any action after the end of the term is void: *Davis v. Fish*, 1 G. Gr., 406.

140. A court cannot hold a term in one county on a day when, by statute, the same judge is required to hold court in another county. An adjournment of the term in the latter county and a continuance of the term in the former will not cure the defect: *Grable v. State*, 2 G. Gr., 559; *Sheppard v. Wilson*, Mor., 448.

141. Where a trial is commenced in the midst of a term, under the *bona fide* expectation and belief that it can be concluded before the day shall arrive when the judge is by law directed, but not imperatively required, to hold court in another county, he may remain and conclude that case, receive

the verdict and pass judgment, even though this may happen to be done on a day when regularly he would be opening or holding court in another county: *State v. Knight*, 19-94.

142. It being provided by statute (Code, §§ 167-8, 185-6) that where a jury trial has been commenced during the term in one county, the verdict of the jury may be returned after the opening of court in another county, and judgment rendered thereon, the verdict in such a case may be returned after the expiration of the term and to the judge in person: *Tilton v. Swift*, 40-78.

143. This statute changes the rule announced by the decisions previously referred to, and under it a term of court in one county may legally be extended beyond the time at which the same court, by the terms fixed by statute, should be in session in another county. At least a judge may, if he sees proper, extend the term in one county during the first three days in another county: *Cook v. Smith*, 54-686.

144. The fact that the trial is had and completed during the time fixed for the court to be held in another county, the term of such other county having, however, been previously adjourned, will not constitute error: *State v. Stevens*, 67-557; *State v. Peterson*, 67-564.

145. The fact that it appears on the record that a judgment was rendered in the court of one county three days after the term of the same court should have commenced in another county, *held*, not sufficient to render such judgment void, even though it did not appear affirmatively of record that the term of court fixed for the other county had been adjourned: *Weaver v. Cooledge*, 15-244.

As to judgments rendered in vacation, see *infra*, §§ 157-169; and JUDGMENTS, §§ 152-158.

146. **Change of term by statute:** Where by statute, which took effect on the third day of the term of court, the time of holding the terms of such court was changed, *held*, that such change did not apply to the term then being held, and that it might be continued: *Clare v. Clare*, 4 G. Gr., 411.

147. **Special terms:** The authority to hold special terms should never be withheld from a court. It may be regarded as a right

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which a court of general jurisdiction should exercise *ex officio*: *Harriman v. State*, 2 G. Gr., 270.

148. Where a special term of court was provided for the trial of criminal cases only, *held*, that the jurisdiction of the court at such term was that provided for the trial of criminal cases in general, and was not limited merely to the trial of those in which there was consent: *State v. Smith*, 7-244.

149. And *held*, that at such special term an indictment might be found: *State v. Nash*, 7-347.

150. The court may call a grand jury together at a special term: *State v. Reid*, 20-413, 424.

151. Whether a judge may, for the purpose of concluding a trial begun during a regular term of court, appoint a special term at a day fixed by law for the regular term in another county, *quære*: *State v. Knight*, 19-94.

152. Under statute authorizing special terms, *held*, that a special term which was ordered for the same day fixed for the general term of the same court in another county, the general term being subsequently adjourned to a later date, was not illegal: *State v. Clark*, 30-168.

153. A special term is not a continuance of the regular term after an adjournment, but is a new term: *Dryden v. Wyllis*, 54-667.

154. Adjournments: The judge is clothed with full power over the adjournments of his court: *State v. Clark*, 30-168.

155. A telegram from the judge to the clerk, making the proper direction as to adjournment, is a sufficient written order for adjournment within the requirements of the statute: *State v. Holmes*, 56-588.

156. Where the judge, being absent from the state, wrote and telegraphed to the clerk to adjourn the approaching term of court to a further date, and the clerk, in accordance with the telegram, published a notice of the adjournment, and notified parties, jurors and witnesses, but no proclamation of the adjournment was made at the day for opening the term, and the written order was not filed nor entry thereof upon the record made until after the opening of the term at the time to which it was so adjourned, nor until after defendant, who was held for trial at the

regular term under a continuance from a previous term, had filed his protest against being tried at such adjourned term, *held*, that a *nunc pro tunc* record of the order was sufficient, and the trial of defendant was properly held at the adjourned term, no prejudice being shown: *State v. McGuire*, 58-165.

157. Judgment in vacation: Whether a decree entered in vacation is void or merely irregular, the parties seeking to have it set aside in equity must offer to pay the amount appearing to be justly due, or allow judgment to be rendered for that amount: *Byers v. Odell*, 56-618.

158. A judge has no authority, without consent of parties, to render a decision in vacation discharging a garnishee: *Laughlin v. Peckham*, 66-121.

159. An entry of judgment made by the clerk in vacation, no action of the court authorizing or approving it being shown, is void: *Balm v. Nunn*, 63-641.

160. Where, upon the appearance of defendant at a subsequent term, the judgment in vacation was set aside and a new judgment entered of that term, *held*, that the new judgment was not void: *First Nat. Bank v. Hostetter*, 61-395.

161. It is only where authority is specially conferred by statute that the judge is authorized to make orders and exercise judicial functions in vacation: *Prosser v. Prosser*, 64-378.

162. An order of the judge may issue in vacation directing the sheriff as to publication of notice of sale under execution: *Herriman v. Moore*, 49-171.

163. Consent of a party to the cause being determined in vacation, implied from the conduct of his attorney in not objecting to its being held over for that purpose, *held* sufficient to authorize such decision: *Myers v. Funk*, 51-92; *Babcock v. Wolfe*, 70—.

164. Where, by agreement of parties, either party was to have a certain time to file a motion for a new trial to be decided in vacation, and thereafter a motion for a new trial was filed and so decided, *held*, that a motion in arrest of judgment could not be filed and decided in vacation under the same agreement, it not being expressly provided for therein: *Scribner v. Ruthersford*, 65-551.

165. Where parties in open court agreed

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that judgment should be entered upon the disposition of a motion for a new trial, and that such motion for a new trial might be decided in vacation, *held*, that a judgment entered in vacation in pursuance of such arrangement was proper: *Hattenback v. Hoskins*, 12-109.

166. An agreement for a decision in vacation implies that the judge will decide the case at his chambers or wherever he may be when he finally considers it: *Johnson v. Mantz*, 69-710.

167. Entry of judgment in vacation, when it is not practicable to prepare and enter it in term time, is, by statute, valid: *Traer v. Whitman*, 56-448. And *held*, that a decision of a cause submitted to be decided in vacation, which was signed and forwarded to the clerk while the judge was in office, but not received by the clerk until the judge's term had expired, was valid: *Babcock v. Wolfe*, 70—.

168. Entry of judgment on confession may be made by the clerk in vacation and approved at the next term: *Kendig v. Marble*, 58-529.

169. Under Code, § 3894, with reference to granting temporary injunctions by a judge during vacation, *held*, that the judge had authority to grant such injunction at any time when the court was not actually in session, and that such authority was not limited to the period intervening between different terms of court: *Thompson v. Benepe*, 67-79.

Further as to judgments in vacation, see *supra*, §§ 139-145; and JUDGMENTS, §§ 152-158.

170. Place of holding court: Notwithstanding the statutory provision that courts must be held at the places provided by law, probate courts are expressly authorized (Code, § 2818) to appoint the time and place for the hearing of matters requiring notice: *Casey v. Stewart*, 60-160.

171. But such provision as to probate courts does not authorize a probate court to sit outside the county, unless perhaps by consent of parties, and any order made by the court outside the county in which the case is pending is void: *Capper v. Sibley*, 65-754.

172. A trial at a place not within the county where the suit was pending, had by agreement of parties during vacation, *held* binding: *O'Hagen v. O'Hagen*, 14-264.

173. Where it is agreed that a case shall be heard in vacation at a particular place, and it is heard, but at another place, the record showing that counsel on both sides were present at the argument and made no objection to the place of hearing, it will be presumed that objection to the place was waived: *Johnson v. Mantz*, 69-710.

174. A party is bound to take notice of the place of sitting of the court, where, by reasonable effort, he might have ascertained such fact: *Jordan v. Circuit Court*, 69-177.

175. Where it appears that a court was sitting at some place other than the court-house, it will be presumed, in the absence of a showing to the contrary, that it was at a place properly provided for the purpose, if any reason appears why the court-house might not be a proper place: *State v. Sheldy*, 8-477, 509.

176. The legislature may by special act authorize the holding of court at a place other than the county seat: *Cooper v. Mills County*, 69-350.

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As to JUDGMENTS, see that title, I, d.

177. What deemed part of: An affidavit for publication when filed becomes a part of the record: *Bradley v. Jamison*, 46-68, 73.

178. A motion and affidavit in support thereof filed in the case do not become a part of the record unless embodied in a bill of exceptions: *Cook v. Steuben County Bank*, 1 G. Gr., 447; *Abbee v. Higgins*, 2 G. Gr., 535.

179. A judgment entry is to be construed in the light of the pleadings and the entire record: *Fowler v. Doyle*, 16-534; *Mayfield v. Bennett*, 48-194.

Further as to what constitutes the record, see APPEAL, VI, e; EXCEPTIONS, §§ 69-76.

180. Filing of pleadings: Under the statutory provision as to filing of pleadings, *held*, that where a pleading is marked filed by the clerk, but no entry of such filing is made on the appearance docket, it cannot be considered as having been filed: *Padden v. Moore*, 58-703.

181. Thus where a petition in attachment was marked filed, but not entered on the appearance docket, *held*, that the action was properly dismissed upon motion, as the court

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was bound to consider the petition as not filed: *Nickson v. Blair*, 59-581.

182. This provision does not apply in respect to the filing of depositions: *Byington v. Moore*, 62-470.

183. Nor to the filing of bills of exceptions: *Royer v. Foster*, 62-821.

184. The filing consists in the delivery of the paper to the clerk and his receiving it to be kept on file in his office. It is not essential that it shall be indorsed as filed, although that would be the better practice. The indorsement is simply evidence of the filing: *State v. Briggs*, 68-416; and see *State v. Patterson*, 23-575.

185. Notice of filing of pleadings: After completed service or voluntary appearance a party is deemed in court and must take notice of what is done therein up to the time of final judgment, but after judgment he is not bound to take notice of further proceedings: *Wright v. Leclair*, 3-221.

186. Notice of filing of motions: Under Code, § 2914, a party must take notice of motions filed during the term. No other notice is necessary: *Wagner v. Tice*, 36-599.

187. Notice of a motion for change of venue, made in vacation, should be given as required by that section: *Preston v. Winter*, 20-264; *Loomis v. McKenzie*, 31-425.

188. A motion to set aside a judgment rendered at a prior term should not be heard without notice to the parties interested: *Keeney v. Lyon*, 21-277.

189. Return of papers taken from the files: A court has the power to enter an order for the return of papers withdrawn from the records without previous notice to the party required to return them: *Wisconsin, I. & N. R. Co. v. Given*, 69-581.

190. Appearance docket; indexing: The indexing in the appearance docket is no part of the filing, and the failure to index will not defeat the notice which is imparted to third persons by the commencement of an action affecting real property: *Haverly v. Alcott*, 57-171.

191. Judge's calendar not part of record: The judge's calendar or docket is not a record of the court: *Rogers v. Morton*, 51-709; *Traer v. Whitman*, 56-443; *Case v. Plato*, 54-64.

192. Where a decree was entered in vaca-

tion containing provisions not for memorandum on the judge's docket that such provisions would not be void: *Traer v. Whitman*, 56-443.

193. The judge's minutes kept, his calendar are not sufficient to make of record exceptions taken by a party on ruling of the court: *Lewis v. May*.

194. The judge's calendar is not provided for by law, and the entries therein constitute the mere announcement of the judge's mental conclusion, as to the court's action: *Miller v. Wolf*, 63-344; *Manley*, 63-344.

195. The judge's minutes upon the calendar do not constitute a judgment if it was sought, in an action on an appeal bond, to prove the dismissal of the injunction by proof of the entry in the judge's calendar "dismissed as premature," and the stipulation was not that the evidence was held not sufficient: *Leacock*, 59-42.

196. The entry in the judge's calendar for the guidance of the clerk, and is evidence tending to show that the case was ordered where such fact is recited: *Estate of Edwards*, 58-431.

197. While the judge's notes will control or vary the formal judgment, yet, in the absence of higher proof, they are entitled to their due weight as to the facts aspired or was done in the case: *Kellion*, 9-329.

198. The bar docket constitutes the records of the court, and can only be a part of the record in a particular case being incorporated into or sufficient by a bill of exceptions: *Gifford*, 57-272.

199. Judgment; entry of: A judgment cannot exist merely in the memory of the officers of the court, or a memorandum entered on books not intended to be a part of the record of judgments: *Balm v. Nunn*.

200. It is essential to the validity of a judgment that it appear upon the record. This is approved by the judge, and constitutes the only proof of his acts: *Case*, 54-64.

201. The judgment docket is intended to show merely an abstract of the judgment, and it is contemplated that it shall

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up from a judgment previously entered in the judgment book: *Ibid.*

202. Where the entry of judgment in the record book was blank as to amount of recovery except the amount of costs, *held*, that it was only an entry of judgment to the amount of such costs, although the judge's calendar contained an entry directing the clerk to assess the amount of recovery, and the judgment docket contained an entry of an amount so assessed by the clerk: *Ibid.*

203. The only legal evidence of a judgment is the clerk's entry in the record book as provided by law, and the abstract of the same in the judgment docket. It cannot be proved by a memorandum in the judge's calendar: *Miller v. Wolf*, 63-233.

204. Where, at the time of a purchase of land from a judgment debtor, the amounts of the judgment and costs were left blank, but were afterward filled up by the clerk in vacation, *held*, that as the judgment was at least valid as to the costs, the purchaser did not take free from the lien of the judgment: *Lind v. Adams*, 10-398.

205. A judgment "for costs taxed at \$—" is valid for such costs as may be taxed in the case: *Frankel v. Chicago, B. & P. R. Co.*, 70—.

Further as to judgment for costs, see COSTS, §§ 53-56.

206. Judgment docket: Where the abstract of the judgment as contained in the judgment docket is introduced in evidence without objection, it should be regarded as evidence even without proof of the loss or destruction of the original: *Moore v. McKinley*, 60-367.

207. Where the entry upon the judgment docket was erroneous by reason of a mistake of initials, and it did not appear whether there was a mistake in the judgment record or not, *held*, that it would be presumed, for the purpose of supporting an attachment proceeding, that the judgment was properly entered upon the record: *Preston v. Wright*, 60-351.

208. Indexing judgment docket: If a party is not charged with constructive notice of a judgment by what appears in the index book, he is not bound to look further, and is therefore not bound by what appears of record; so *held*, where there was a mistake in

the first name of the party against whom judgment was rendered: *Thomas v. Desney*, 57-58.

209. The entry and indexing of a judgment as A. B. v. C. D. *et al.* does not operate as notice to strangers of such judgment as against co-defendants of C. D., whose names do not appear: *Cummings v. Long*, 16-41.

210. A judgment not indexed is not notice to the purchaser at foreclosure sale of premises upon which such judgment would be a lien, and the holder of such judgment cannot therefore redeem in equity from such sale: *Sterling Mfg. Co. v. Early*, 69-94.

211. Even though a judgment is not properly indexed, a sheriff's deed thereunder duly recorded imparts notice of all prior proceedings: *Cushing v. Edwards*, 68-145.

212. Notice of judgment or order: A party is bound to know and take notice of any judgment or order that is entered in an action to which he is properly made a party, whether the records of the court are read from time to time as required by statute, or not: *Finch v. Hollinger*, 47-173.

213. After judgment a party is not bound to take notice of further proceedings: *Wright v. Leclair*, 8-221.

As to correction of entry without notice, see *infra*, §§ 243-246.

As to notice of filing pleadings, motions, etc., see *supra*, §§ 185-188.

214. Signing and approval of record: The salutary provisions as to the signing of the record by the judge are directory only, and the failure to comply therewith does not render the judgment void: *Vanfleet v. Phillips*, 11-558; *O'Hare v. Leonard*, 19-515; *Childs v. McChesney*, 20-481; *Hamilton v. Barton*, 20-505.

215. An approval of the entries at any succeeding term relates back to the time of the entry, and is as effectual as if given at that time: *Vanfleet v. Phillips*, 11-558.

216. The reading, approval, and signing of a judgment entry made in vacation at the next term of court does not make it valid where there is no authority to enter a judgment in vacation. Approval at the subsequent term is only allowable as to entries authorized to be made in vacation: *Townesley v. Morehead*, 9-565; *McClure v. Owens*, 31-183; *Spear v. Fitchpatrick*, 37-127.

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217. Although the record of the judgment is not read and approved until the term after it is made, exceptions thereto must be taken at the term when the judgment is entered: *State v. Orcig*, 34-112.

218. The expiration of the term of a judge before the approval and signing of the record does not make judgments rendered by him void: *Tracy v. Beeson*, 47-155.

219. A judgment is valid though the record be not signed by the judge: so held as to a decree signed by the judge in vacation, filed with the clerk, and entered by him without the record being signed: *Traer v. Whitman*, 56-443.

220. Although the practice of procuring the signature of the judge to a form of decree is to be commended as tending to secure accurate records, such signature is not the signature of the record contemplated by the statute: *Bosch v. Kassing*, 64-312.

221. Entry by clerk without authority: The clerk has no authority to enter up a decree not warranted by the entry on the judge's calendar: *Smith v. Cumins*, 52-143.

222. Signature of clerk: As the court knows its own clerk and his deputy, it is not necessary that the signature of either one of them to a jurat should be authenticated by an official seal: *Finn v. Rose*, 12-565.

223. Correction of records: During all the term the record is under the control of the court, and at any time before adjournment an order of nonsuit or a judgment by default may be set aside on proper showing: *Taylor v. Lusk*, 9-444.

224. The court has the power at any time during the term to have the record corrected so as to conform to its ruling: *Robbins v. Neal*, 10-560.

225. The court has discretionary power to modify or reverse any order during the term at which it is made: *Chapman v. Allen*, Mor., 23.

226. The court, upon discovering an error or mistake in its ruling, may, before the record is signed, or at any time during the term at which it is made, amend or expunge the record so as to correct such mistake: *Brace v. Grady*, 36-352.

227. A default improperly entered may be set aside without following the provisions of

statute with reference to setting aside defaults: *Boals v. Shules*, 29-507.

228. The power of the courts to revise, correct and change their sentences, at the term at which they were pronounced and before anything has been done under them, has long been recognized both in this country and in England, and any doubt as to the existence of the power is removed by statutory provision. (Code, § 178): *State v. Dougherty*, 70—.

229. A court may, on its own motion, correct its record; and may, upon discovering mistake or error in its rulings, expunge the first ruling from the record and make a different one: *Wolmerstadt v. Jacobs*, 61-372.

230. Until the record is signed, it is not conclusive upon the court as against a bill of exceptions subsequently signed: *Shepherd v. Brenton*, 15-84.

231. A total omission to make any entry of record may be supplied at the succeeding term: *Tracy v. Beeson*, 47-155.

232. Correction at subsequent term: The power to change entries, on account of evident mistake, is not necessarily limited to the term next succeeding the one at which they were made. A correction in a particular case, held proper under peculiar circumstances: *Hurley v. Dubuque Gas, etc., Co.*, 8-274.

233. Entries made at a previous term may be altered and corrected for mistake when it is clearly made to appear: *State v. McComb*, 18-43, 48.

234. Where a verdict is returned but no judgment rendered thereon at that term, it is not error to render such judgment at a succeeding term to supply the omission: *Shepherd v. Brenton*, 20-41.

235. The statutory provision that entries made and signed at a previous term can be altered only to correct an evident mistake (Code, § 179) does not deprive the court of the power to make a *nunc pro tunc* entry at a subsequent term, of a fact, such as consent of parties to trial by a certain method, etc.: *Buckwalter v. Craig*, 24-215.

236. A *nunc pro tunc* order showing certain facts in regard to the impaneling of a grand jury at a previous term, held allowable: *State v. Munzenmaier*, 24-87.

237. By analogy these provisions will be

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followed in the supreme court: *Roberts v. Corbin*, 26-315, 331.

238. The statute provides for the correction of entries made, approved and signed at a (not the) previous term: *Goldsmith v. Clausen*, 14-278.

239. The proceeding by motion to correct a judgment entry reciting a judgment against a party, where it appears that no judgment was in fact rendered, is not limited to one year: *Shelley v. Smith*, 50-543.

240. Even though the court has the power to correct its record after the term and before it is signed, it should not do so unless it clearly and beyond cavil appears that the correction should be made. Except for the purpose of correcting some mistake, the record, at least after the adjournment of the term, is an absolute verity in all courts, including the court making it, and it is doubtful whether a court should correct it upon affidavits after the adjournment of the term, unaided by anything in the record, or within the recollection of the judge, which tends to corroborate the facts stated in the affidavits. If the court after the adjournment of the term refuses to correct its record upon parol evidence, the supreme court will not interfere unless there is record evidence supporting the claim that there is a mistake in the record: *State v. Crosby*, 67-352.

241. Where a judge at a term of court signs a decree which is filed with the papers but not recorded at that term, and before the next term of court goes out of office, the court at the succeeding term cannot consider the cause as still open but should enter the decree previously signed: *Tracy v. Beeson*, 47-155.

242. Action of the judge in ruling upon a motion for supplying an omission in the records will not be overruled on appeal where it appears that the facts which it is sought to make of record transpired in the trial before him, and that the evidence upon which he acted in correcting the record was conflicting: *Stockdale v. Johnson*, 14-178.

243. Notice of correction: The court may at the next term after making an entry in vacation proceed to correct or expunge it without notice to the party at whose instance it has been made. For all purposes connected with the approval of the entry the party must

be regarded as in court: *Carpenter v. Zuver*, 56-390.

244. After the entry of final judgment in the case and approval thereof by the court, it loses jurisdiction to make an order setting aside such judgment, even during the term, after the attorney for the party has left the court: *Hawkeye Ins. Co. v. Duffie*, 67-175.

245. A motion at a subsequent term to modify the decree in a matter affecting another party should not be sustained, no notice of such motion having been given to the party adversely interested: *Wetmore v. Harper*, 70—.

246. The court cannot, after a judgment, execution and sale, so amend its record as to show proper service of notice which did not before appear, without notice of the proceeding for such amendment having been given to the opposite party: *McGlaughlin v. O'Rourke*, 12-459.

That a party is bound to take notice of the entry of a judgment or order, see *supra*, §§ 212, 213.

247. Correction of evident mistake: An amendment of the record upon motion of one of the parties, supported by an affidavit setting forth an agreement as to what should be submitted to the court, cannot be made under the authority to correct an evident mistake: *Eno v. Hunt*, 8-436.

248. Entry *nunc pro tunc*: Where the court has failed to make record entry of an essential act, such omission may be supplied upon motion *nunc pro tunc*, but such entries are limited to supplying omissions occurring through oversight or negligence, and cannot be made to alter or expunge a record: *Goodrich v. Conrad*, 28-298.

249. Held not error, in an action on a bail bond, to admit in evidence the entry of the court ordering the bond filed *nunc pro tunc*, it appearing that the bond had been in fact deposited in the clerk's office at and ever since the date upon which it was so marked as filed: *State v. Guisenhouse*, 20-227; *State v. Patterson*, 23-575.

As to judgment entered *nunc pro tunc*, see JUDGMENTS, §§ 143, 144.

250. Supplying lost records: The power of supplying a new record where the original has been lost or destroyed is one which pertains to courts of record of general jurisdiction

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independent of legislation. It is inherent in such courts, and is not taken away in reference to judgments by the statute with reference to an action on a judgment the record of which has been lost or destroyed: *Gamon v. Knudson*, 46-455.

251. In a proceeding to supply lost records it is error to make the substitution in such form as to bind a party holding under the original party to the proceeding without proof that the record as it originally existed was such as to be binding upon the new party: *McDonald v. Des Moines Valley R. Co.*, 61-192.

252. Where an indictment is lost, the court may, upon motion, substitute a copy, and proceed thereon as upon the original: *State v. Rivers*, 58-102; *State v. Stevisger*, 61-623.

253. Evidence as to the contents of records of the court destroyed by fire, held sufficient in a particular case to establish a decree of divorce rendered therein: *In re Estate of Edwards*, 58-431.

254. Where a pleading supposed to be lost is supplied by a copy and afterward the original is found, the substitute should be, on motion, stricken from the files: *Sweet v. Brown*, 61-669.

As to restoring records of judgments which have been lost or destroyed, see JUDGMENTS, §§ 145, 146.

255. After the taking of an appeal the lower court may correct its record: *Maxon v. Chicago, M. & St. P. R. Co.*, 67-226; *Mahaffy v. Mahaffy*, 63-55.

256. The power to supply lost records may be exercised whenever the protection of the rights of parties demands it. Therefore, held, that where, after the perfection of an appeal, the evidence in the case was lost, so that the appeal could not be prosecuted, the proper remedy was to apply to the lower court to supply such record by substitution, and that the loss of the record was not a ground for a new trial: *Loomis v. McKenzie*, 48-416; *Steiner v. Steiner*, 49-70.

257. If the record of the lower court does not correctly state the facts, a party desiring to appeal should prosecute the correction of the record there; it cannot be changed or corrected on appeal: *Duffees v. Sherman*, 48-287.

258. In a certain sense the court below re-

tains jurisdiction so long as anything remains to be done by it. It may order a lost record to be substituted, and do whatever else is proper to be done to enable the supreme court to review the alleged errors: *Becker v. Becker*, 50-189; *State v. Dillard*, 52-749.

259. Presumption in favor of record: The records of a court, regular upon their face, have a large degree of sanctity attached to them, and are not to be lightly overcome: *Wheeler v. Cox*, 56-86.

260. Where the record of the court states an act of the court, it will be presumed to have occurred in open court: *State v. Hirronemus*, 50-545.

See further, JUDGMENTS, §§ 147-151.

261. Complete record: The provision of the statute as to making a complete record in cases where title to land is involved applies only to cases where plaintiff on one side claims title, legal or equitable, and the defendant disputes the plaintiff's title, claiming title in himself or another: *Smith v. Cumins*, 52-148.

262. In a proper case for making a complete record, all that should be recorded is the original notice and return, the pleadings and the judgment or decree. Depositions and matters of evidence should not be recorded: *Ibid.*

263. Incumbrance book; index: An entry by the sheriff in the incumbrance book of a levy of attachment as provided for by statute becomes notice though not indexed: *Blodgett v. Huiscamp*, 64-548. (But as to index of judgments, see *supra*, §§ 208-211.)

d. Rules; assignment of causes.

264. Rules: As to power to make rules, method of adoption, publication, etc., see *State v. Ensley*, 10-149.

265. A rule of the circuit court in regard to filing transcripts on appeals from justices, upheld: *Pinders v. Yager*, 29-468.

266. It may be provided by rules of the court that defendant shall be required to appear and answer by noon of the first day instead of the second day of the term: *McGrew v. Downs*, 67-687.

267. Rules of court properly adopted, until repealed or changed, have the force and effect of law as applied to the rights of parties, and

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in their construction the same rules should be applied: *David v. Aetna Ins. Co.*, 9-45.

268. A rule of court providing that witnesses subpoenaed in different cases between different parties should draw but one *per diem*, upheld: *Meffert v. Dubuque, B. & M. R. Co.*, 34-430.

269. A rule of court must be abrogated in the same manner and under the same authority by which it is made. It cannot be abolished by an order of the judge resting only in parol: *Burlington & M. R. R. Co. v. Marchand*, 5-468.

270. The supreme court cannot take notice of rules of a district and circuit court unless they are embodied in the record: *Lyon v. Byington*, 7-422; *Horseman v. Todhunter*, 12-230. (This is now changed by statute, Code, § 2709.)

271. Assignment of causes: The court may, after an assignment of causes has been made, make a re-apportionment, and if the party is not taken by surprise, or thus prevented from obtaining his testimony, he will have no ground of objection: *Elliott v. Cadwallader*, 14-67.

272. Dropping case from docket: Jurisdiction of the cause is not lost by the fact that there is no formal continuance from term to term, or that the cause is dropped from the docket: *Langford v. Ottumwa Water Power Co.*, 53-415.

e. Process.

273. Process defined: *Davenport v. Bird*, 34-524.

274. Attestation: In the attestation of a writ under seal, the seal should be referred to: *Riggs v. Bagley*, 2 G. Gr., 383.

275. Process issued by the clerk in which the teste recites "witness my hand," signed with the name of the clerk, is sufficient without reciting such name in the teste itself: *East v. Parks*, 4 G. Gr., 80.

276. Abuse of process: A party to the suit can gain nothing by fraud or violence under pretense of process, nor will fraudulent or unlawful use of process be sanctioned by the courts. In such case parties will be restored to the rights and position they possessed and occupied before they were deprived thereof by fraud, violence, or abuse of process: *Reifanyder v. Lee*, 44-101.

277. The law will not permit any one to gain any benefit or advantage by the fraudulent use or other abuse of its process: *Patterson v. Pratt*, 19-358.

278. Where an officer arrested a party outside of the limits of his county under the representation that he had a writ of attachment, and got possession of property thereunder, held, that the process had been improperly used and that the judgment obtained thereunder should be discharged: *Pomroy v. Parmlee*, 9-140.

279. When a defendant is put on trial under indictment for a crime charged to have been committed in this state, it is no defense that he was arrested in another state without authority and brought to this state by force and against his will: *State v. Ross*, 21-467.

280. The court will not, upon the trial of a criminal prosecution under the plea of not guilty, inquire as to whether or not defendant was improperly brought within the jurisdiction of the court: *State v. Day*, 58-678.

COVENANTS.

See CONVEYANCES, V.

CRIMINAL CONVERSATION.

As to actions for SEDUCTION, see that title.

1. Condonation: In an action for criminal conversation evidence of subsequent matrimonial cohabitation cannot operate to defeat the husband's right of recovery even if it may be considered in mitigation of damages: *Verholf v. Van Houwenlengen*, 21-429.

2. The fact that after knowledge of the wife's criminality plaintiff has continued to live with her upon the same terms as before does not show assent or connivance on his part: *Stumm v. Hummel*, 39-478.

3. Damages: In an action for criminal conversation the fact that plaintiff has not lost the society or affection of his wife and that his family has not been broken up will not preclude recovery for more than nominal damages: *Ibid.*

4. Evidence of premeditated design to commit the injury against plaintiff is receivable to show the full extent of the injury: *Ibid.*

5. In an action the gravamen of which is criminal conversation, plaintiff cannot re-

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cover damages for the alienation of the wife's affections otherwise than by debauching: *Wood v. Matheus*, 47-409.

6. **Negligence:** The fact that by reason of the confidence in his wife entertained by plaintiff defendant had opportunity to commit the wrong will not defeat the husband's right to recover in the absence of knowledge of the criminal intimacy or of circumstances from which his assent can be presumed: *Ibid.*

7. **Intimacy before marriage:** Where the husband married the wife upon the recommendation of defendant that she was a good girl and the husband believed her to be so, *held*, that criminal intimacy of defendant with her before marriage, that being her only bad conduct, could not be considered in mitigation of damages: *Ibid.*

8. **Previous chastity:** While the fact that plaintiff's wife before marriage had been guilty of unchaste conduct will not take away the right of action for criminal intimacy subsequent to marriage, it may be shown to reduce the amount of damages, and it is also proper to show, by way of offsetting such evidence, that such misconduct, prior to marriage, was confined to relations with defendant himself: *Concey v. Nicol*, 34-533.

9. **Limitation of action:** Although the fact of illicit intercourse prior to the period of the statute of limitations should not be proved for the purpose of establishing the right to recover therefor, yet it may be shown to the jury and considered by them to strengthen evidence introduced in proof of acts of adultery committed within the period of the statute of limitations: *Ibid.*

10. **Divorce not a bar:** A subsequent divorce is not a bar to the prosecution of an action for criminal conversation: *Wood v. Matheus*, 47-409.

11. **Evidence:** It is material in actions for criminal conversation to ascertain upon what terms the husband and wife lived together before the seduction, but in a particular case *held*, that it was immaterial to show statements made by them as to the failure of the husband to support and maintain her: *Kilburn v. Mullen*, 22-493.

12. In an action for criminal conversation the marriage may be proven by evidence of the parties or of others, record evidence not being required: *Ibid.*

13. Proof of criminal intercourse between defendant and plaintiff's wife occurring before the marriage to the latter, *held* admissible without the fact being pleaded, as tending to establish the subsequent acts: *Stumm v. Hummel*, 39-478.

14. An instruction allowing the jury to take into consideration the resemblance between defendant and the child of plaintiff's wife, claimed to be the offspring of the illicit connection, provided their judgment and experience teach them that there is anything reliable in such resemblances, that it would be safe for them to form an opinion upon, *held* not erroneous: *Ibid.*

For other cases as to resemblance of child, see EVIDENCE, §§ 813-815.

CRIMINAL LAW.

I. WHAT ACTS CRIMINAL.

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 - b. *Intent; ignorance or mistake.*
 - c. *Defense of person or property.*
 - d. *Negligence or recklessness.*
3. *Degree of connection with the act; principal and accessory; combination.*

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 - a. *Burglary and other breakings and enterings.*
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II. PARTICULAR CLASSES OF CRIMES — con.

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 - a. *Perjury.*
 - b. *Compounding felonies.*
 - c. *Resisting officers; assisting prisoners to escape.*
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 - b. *Enticing away female child; defilement.*
 - c. *Adultery.*
 - d. *Bigamy.*
 - e. *Incest*
 - f. *Abortion.*
 - g. *Exposing child.*
 - h. *Prostitution and lewdness; keeping or leasing houses of ill-fame.*
 - i. *Betting and gambling; keeping gambling-house.*
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As to contract in violation of Sunday laws, see *CONTRACTS*, §§ 800-817.
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12. *Bail.*
18. *Evidence; burden of proof; amount of proof.*
 - a. *Circumstantial evidence; failure to produce evidence; identity of defendant; alibi.*
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What acts criminal; infancy; coverture; insanity.

III. PROCEDURE IN COURTS OF RECORD, Evidence, etc.—continued.

d. *Confessions or admissions of defendant.*

e. *Acts, declarations and conduct of defendant; state of feeling; other criminal acts.*

f. *Defendant's good character.*

g. *Declarations of person injured; dying declarations.*

h. *Burden of proof and amount of evidence; reasonable doubt.*

14. *Appeal.*

15. *Imprisonment.*

16. *Fines and forfeitures.*

17. *Costs.*

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IV. PROCEDURE IN INFERIOR COURTS.

As to procedure before magistrates on preliminary information, see *supra*, III, 6.

As to procedure on binding over to keep the peace, see *supra*, III, 2.

I. WHAT ACTS CRIMINAL.**1. In general.**

1. **Common law crimes:** While the principles of the common law enter into all our criminal adjudications, where the jurisdiction of our courts has been established by law, still they do not confer upon the courts the power to try and punish an offense that is not made a crime by the supreme law-making power of the state: *Estes v. Carter*, 10-400.

2. Therefore, *held*, that as there is no provision in the statute for the punishment of the common law crime of sodomy, it is not actionable *per se* to charge a person with the commission of such crime: *Ibid*.

3. **Common law definitions:** Where the Code declares a crime punishable and provides a punishment for it, the definition of the crime may be determined from the common law. So *held* as to the offense of assault and battery which is made punishable by the Code but is not defined: *State v. Twogood*, 7-252.

4. **Strict construction of penal statutes:** Criminal statutes are inelastic and cannot by construction be made to embrace cases plainly without the letter though within the reason and policy of the law: *State v. Lovell*, 23-304.

5. **Forfeiture:** The fact that an act or omission renders a party liable to a pecuniary forfeiture, which when collected goes into the public treasury, does not render the act or omission a crime: *Polk County v. Hierb*, 37-361.

2. Capacity and intent.

a. *Infancy, coverture, insanity and intoxication.*

6. **Infancy:** The law presumes that persons between the ages of seven and fourteen years are incapable of committing any crime, and in a prosecution for the commission of a crime by a person between those ages, it is incumbent upon the state to show that defendant had sufficient capacity to know that he was committing a crime before he can be convicted: *State v. Fowler*, 52-103.

7. **Coverture:** A *prima facie* case of coercion such as to relieve a married woman from liability for her criminal act is made when it is shown that the act was done in the presence of her husband: *State v. Fitzgerald*, 49-260.

8. **Insanity, delusion:** In case of partial insanity or delusion, if the act, which is done under the impulse of the insane delusion, is one which defendant knew at the time to be contrary to law, he is punishable. The law considers him as to his responsibility in the same condition as if the facts in which his delusion exists were real: *State v. Mewherter*, 46-88.

9. A defendant claiming exculpation on the ground of insanity must make it appear from all the facts and circumstances of the act as disclosed by the testimony that he was insane and that the offense was the offspring of such insanity. Whilst a person resting under a peculiar delusion as to some particular matter, and perfectly sane as to other matters, cannot be regarded as sane, yet he would be criminally responsible for his acts unless they could be attributed to his particular delusion: *State v. Stickley*, 41-232.

10. **Insane impulses:** If defendant's act was caused by mental disease or unsoundness which destroyed his power to rationally comprehend the nature and consequences of his act, and which, overpowering his will,

Insanity.

irresistibly forced him to its commission, he is not amenable to punishment; but if he is in possession of a rational intellect and allowed his passion to escape control, he cannot claim the protection of insanity: *State v. Felter*, 25-67.

11. The doctrine as to insanity stated in the last foregoing case has been too long followed in this state and acquiesced in to be now questioned: *State v. George*, 62-682.

12. If a person allows a feeling of passion or revenge to so take possession of his mind as to impel him to an act of violence, he is still responsible therefor if his act was an outgrowth of passion or revenge, and not of insanity: *State v. Stickley*, 41-232.

13. If, on account of mental disease, defendant is not able to distinguish right and wrong, and has not a knowledge and understanding of the character and circumstances of his act and power of will to abstain from it, he is not legally a responsible being: *State v. Mewherter*, 46-88.

14. Mental disease, to constitute a defense, must have destroyed defendant's power to comprehend rationally the consequences of his act, and overpowered his will. An uncontrollable propensity must have been the effect of a diseased mind to shield the perpetrator of crime from punishment: *Ibid.*

15. The alleged insanity and the alleged crime must be connected, and the latter the offspring of the former, in order that the perpetrator of the criminal act shall be held irresponsible. Medical theorists have propounded doctrines respecting insanity which a due regard for the safety of the community and an enlightened public policy prevent jurists from adopting as a part of the law: *State v. Hockett*, 70—.

16. The jury must be clearly satisfied that, at the time the crime was committed, defendant was laboring under a mental disease or monomania, such as irresistibly and uncontrollably forced him to commit the crime. Unless it appears that defendant's mind was so deranged that he did not know the nature of the act, or that he was doing wrong, he is not to be held irresponsible: *Fouts v. State*, 4 G. Gr., 500.

17. Evidence; presumption: The law presumes all men sane until insanity is established by competent evidence to the satisfaction of the jury: *State v. Bruce*, 48-530.

18. Where a condition of insanity is shown to exist, it will be presumed to continue until the contrary is shown by evidence or presumptions arising on the facts of the case: *State v. Jones*, 64-849, 860.

19. Inquiry as to the conduct and appearance of accused, as indicating insanity, should not be limited to the time of the alleged crime. Conduct, language and appearance of accused previous to that time may be shown, though their weight as evidence of sanity or insanity diminishes as they recede in time. Where such evidence is introduced in connection with the opinions of witnesses it may be considered as bearing upon the value of the opinions and also on the independent question of insanity: *Ibid.*

20. While insanity may be established by proofs which are not direct and positive, yet the jury are not required to find insanity from slight evidence, but only when the evidence is of a reliable character, satisfying them that the defense has been made out: *State v. Hockett*, 70—.

As to evidence of insanity in general, see EVIDENCE, §§ 81-88, 384-398, 859, 860.

21. Epilepsy: The fact that defendant is subject to attacks of epilepsy is not necessarily such evidence of insanity as to excuse the defendant from responsibility. Common observation teaches that there are persons afflicted with this disease who during intervals between the convulsions are perfectly sane and rational: *State v. George*, 62-682.

22. Burden of proof: The burden of proving insanity rests upon the defendant and he must overcome by a preponderance of evidence the proof of sanity on behalf of the prosecution: *State v. Geddis*, 42-264.

23. It is not necessary that the evidence of insanity shall satisfy the jury beyond a reasonable doubt; but it is sufficient if from all the evidence they are reasonably satisfied that defendant is insane. If weight or preponderance of testimony shows insanity of defendant, it raises a reasonable doubt of guilt: *State v. Bruce*, 48-530.

24. It is error to charge the jury that, if the evidence shows that the insanity of defendant was probable, it will not overcome the presumption of sanity, and that more than this is required to satisfy the minds of

Intoxication.—Intent; ignorance or mistake.

the jury that defendant is insane. The presumption of sanity simply imposes the burden of proof upon the defendant. It supposes an equilibrium of proof, and the party holding the affirmative is not entitled to judgment unless he places evidence in the scale which will turn it; but if the party sustaining this burden gives evidence which creates a probability, he thereby overcomes the presumption against him and is entitled to judgment: *State v. Jones*, 64-349.

Further as to burden of proving insanity, see *infra*, §§ 1600-1604.

25. Intoxication: Unless the intoxication of defendant at the time of the commission of the act was so great as to deprive him of the power to deliberate and form a guilty intent, it is no excuse or palliation for the act: *State v. Bruce*, 48-530, 532.

26. Evidence of drunkenness on prior occasions depriving defendant of his reason is not admissible for the purpose of showing that drunkenness at the time of the commission of the crime had that effect: *State v. Hart*, 29-268.

27. That defendant was intoxicated with liquor furnished him by the person killed is no defense for a homicide: *State v. Soper*, 70—.

28. Intoxication may be shown in defense where a specific intent is necessary to constitute the crime charged, for instance, assault with intent to commit rape. It is error to instruct that drunkenness is more of an aggravation than an excuse: *State v. Donovan*, 61-369.

29. Held, also, that evidence of intoxication was admissible where defendant accused of burglary sought by proof of intoxication to show that the breaking and entering was not with an intent to commit a crime: *State v. Bell*, 29-316; *State v. Maxwell*, 42-208.

b. Intent; ignorance or mistake.

30. Presumption of intent: Malice is presumed from the commission of an act wrongful in itself and without just cause or excuse: *State v. Decklotts*, 19-447.

31. An instruction that an axe is a deadly weapon and that the law presumes a criminal intent from the use of a deadly weapon, held proper in a trial for murder committed in that manner: *State v. Ostrander*, 18-435.

32. Men are presumed to intend all the nat-

ural and probable consequences of deliberate acts: *State v. Jones*, 70—.

As to presumption of malice in homicide, see, further, *infra*, §§ 1—.

33. Mistake: If one intentionally fence within the limits of a high impeded travel, such act constitutes a nuisance, and is none the less a nuisance count of the belief of the party that it is not in the highway. The fact, however, may properly be considered in mitigation of punishment: *State v. 372*.

34. Advice of counsel: It is no defense for one who, desiring to vote at an election, is in doubt as to the fact of his citizenship, to take advice of counsel and then, in accordance with such advice, might be convicted in a prosecution for illegal voting, if he can prove or as tending to disprove any criminal intent. But proof that he consulted others not learned in the law will not be received: *State v. Sheeley*, 1—.

35. Mistake where party is ignorant of the facts: Where there is a general inhibition upon acts of a certain class, followed by a permission to act under certain circumstances, the act must be undertaken to do the act must be known that the circumstances are such that the act is legal. Therefore, *held*, in the case of the sale of intoxicating liquors, such sales are permitted by law under certain circumstances, but are forbidden to minors, the seller is bound to know that the person to whom sold is not a minor: *Jamison v. Burton*, 1—.

36. Where the statute makes the sale of intoxicating liquors to a person of a certain character, the fact of knowing the condition of the person to whom the sale is made is not essential to render the sale illegal: *Church v. Higham*, 44-4—; *v. Sautbine*, 49-650.

37. Where a person is engaged in a business that becomes unlawful or criminal under certain conditions, he must exercise his peril, taking care that his acts are lawful: *State v. Probasco*, 62-400.

38. Therefore, held, that under a statute providing a penalty for allowing a person to remain in a saloon, the owner of the saloon and his employees are punishable

 Defense of person or property.

ing a minor to remain therein, although the fact of his age was not known, no vigilance to ascertain the facts having been exercised: *Ibid.*

39. Under a statute providing a punishment for enticing away an unmarried female under fifteen years of age for the purpose of prostitution, *held*, that the fact that the defendant believed, and had reason to believe, that the person injured was over fifteen years of age, constituted no defense: *State v. Ruhl*, 8-447.

40. In a prosecution for assault upon a female child under ten years of age, *held*, that in order to constitute the offense it was not necessary that defendant should know that the child was under that age: *State v. Newton*, 44-45.

Further as to evidence of intent, see *infra*, §§ 1544-1558.

c. *Defense of person or property.*

41. Self-defense: Where a homicide is shown to have been committed in proper self-defense, there can be no conviction in any form, and the law of self-defense therefore has no place in the definition of any particular degree of criminal homicide: *State v. Castello*, 62-404.

42. Prevention of felony: A person may repel force by force in defense of his person or property, against one who manifestly intends, by violence or surprise, to commit a felony on either, and the taking of life in either case is justifiable. But, when the attack is not felonious, and the party assailed has no reason to believe that he is in danger of death or great bodily harm, he has no right to take the assailant's life: *State v. Kennedy*, 20-569; *State v. Collins*, 32-36.

43. Great bodily harm: The law gives a person the same right to use such force as may be reasonably necessary to protect himself from great bodily harm, as it does to prevent his life being taken: *State v. Burke*, 30-381; *State v. Fraunburg*, 40-555.

44. An instruction that, in order to make out self-defense, the taking of the life of deceased must have appeared to the defendant reasonably necessary to save his own life, *held* erroneous, as leaving out the feature of preservation from imminent and enormous

bodily injury, felonious in its character: *State v. Benham*, 23-154.

45. Must be necessary: If it is not apparent from the manner of the assault, the nature of the weapon used, and the like, that the assailant intended to commit a felony, that the danger was imminent and that the species of resistance used was necessary to avert it, the party assailed is not justified in resorting to the use of a deadly weapon and using it in a deadly manner: *State v. Thompson*, 9-188.

46. If there is no reason for the belief by the defendant that his person is in danger of death or great bodily harm, or that more than an ordinary battery is intended, he has no right to take the life of the assailant: *Ibid.*

47. The killing of an assailant is justifiable on the ground of self-defense only when it reasonably appears to be the only means of saving the life of the party assailed or preventing some great injury to his person. If the danger which seems to threaten the person assailed can be avoided or prevented by any other means in his power, he is not justified in taking the life of the assailant: *State v. Mahan*, 68-804.

48. There may be such disparity between the parties in physical strength, and the assault may be of such a ferocious character, as that, although made without any weapon at all, it would be highly dangerous to the person assailed; but where the possession of a weapon is the only circumstance relied upon as showing that the assault was dangerous, it is not error to instruct the jury that no words spoken by assailant, however insulting, and no assault without a dangerous weapon or the appearance of one, would justify the person assailed in taking life in self-defense: *Ibid.*

49. It is error to instruct the jury that if one is attacked by a person not armed with any weapon of offense, and the person assailed is able to defend himself from such attack without resort to the use of a deadly weapon, or, if so assailed, he can retreat, with evident safety, or if he can call others to his aid, and that is apparent to him, these circumstances or any of them will show the absence of any necessity for killing assailant. While it is the duty of the person assailed to use all reasonable means to protect himself

 Defense of person or property.

without resorting to a deadly weapon, yet he is not bound to act with an infallible judgment, and the facts recited, while they would be circumstances against defendant, would not be necessarily conclusive: *State v. Cross*, 68-180.

50. Where a defendant accused of murder sought to justify the act as done in defense of the life of another, and it appeared that after all attempt upon the life of such other person had ceased, defendant followed up and assaulted deceased, *held*, that the facts did not show any justification even though it should appear that deceased was the first assailant: *State v. Maloy*, 44-104.

51. In a particular case, *held*, that there was nothing to justify an assault claimed to have been made in defense of the person of another from apprehended danger, and that the court would have been justified in refusing to submit the question of self-defense to the jury: *Ibid*.

52. Danger must be real and immediate: Even if the person acting in defense of the life of another believes that assailant is going to procure a weapon for the purpose of continuing the assault, this will not justify the former in running after him and voluntarily placing himself in the way of peril. The party should wait to see whether there was any such peril before making the assault in self-defense: *Ibid*.

53. A person assaulted is not justified in killing his assailant in self-defense unless such killing was to all reasonable appearances necessary to preserve his own life or prevent great bodily harm: *State v. Middleham*, 62-150.

54. To justify the taking of human life on the ground of self-defense, there must be such appearance of an impending danger as that the killing of the assailant reasonably seems to be the only means of preventing the threatened injury: *State v. Shelton*, 64-333.

55. It is not error to confine the jury, in considering the question as to self-defense, to a case where it is absolutely necessary or reasonably seems to be absolutely necessary to do the act for the preservation of life, etc.: *State v. Crawford*, 66-318.

56. Nor is it erroneous to direct the jury that defendant is excusable if he acted as an

ordinarily courageous man would have done under the same circumstances: *Ibid*.

57. Apprehension of danger; reasonable belief: Where defendant attempts to show that he was acting in self-defense, the charge of the court should direct the jury to ascertain whether all the circumstances in the evidence show an intention on the part of the assailant to take life or inflict some dreadful bodily harm. In such case the party assailed might lawfully take the life of the assailant, provided he used all the means within his power to save himself or prevent the assault, such as retreating if practicable, or by disabling his adversary, if he might do so, and it would be well to add that if the defendant had reasonable ground to believe that his assailant only intended an ordinary assault, he would not be justified in taking the life of his assailant, and if, under such circumstances, defendant fatally shot deceased, he would be guilty of at least manslaughter: *State v. Benham*, 23-154.

58. Where one was shot while attempting to whip another with an ox gad, *held*, that the attention of the jury should have been called in the court's charge to the circumstances of the attack, the physical capacity of the parties, the size and character of the ox gad, etc., as important considerations in determining whether defendant was within the law of self-defense when he did the shooting: *Ibid*.

59. In determining whether defendant was justified in acting in self-defense, the inquiry is whether the danger was actual to defendant's comprehension, not whether it existed in fact, nor whether injury was actually intended by deceased. But the danger must be evident or actual to the prisoner, as compared with danger remote or problematical: *State v. Neeley*, 20-108.

60. While it is not necessary that the danger should in fact exist, there must be actual and urgent danger according to the defendant's comprehension as a reasonable man: *State v. Collins*, 32-36.

61. It is not necessary, in order to the exercise of the right of self-defense, that the danger should in fact be such that a party could only save his life by killing his assailant. It is only necessary that to the defendant's comprehension as a reasonable man there

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is actual and real danger: *State v. Fraunburg*, 40-555.

62. It is error to instruct the jury that if the danger be not great and imminent, and the necessity urgent to use extreme force in repelling the assault, the law regards the person using such extreme force as the aggressor, for the reason that such instruction omits the element of reasonable apprehension on the part of the person resisting: *State v. Shelton*, 64-333.

63. It is for the jury, and not for defendant, to judge of the apprehension of danger. The question is, whether defendant, as an ordinarily prudent and cautious man, had reason to apprehend loss of life or great bodily harm: *State v. Abarr*, 39-185.

64. The question is, not whether defendant was able, from the circumstances, to form a correct judgment as to the danger, but whether the facts as they appeared justified a reasonable belief of actual necessity; not what conclusion defendant drew from the circumstances, but what inference ought in reason to have been drawn: *State v. Sterrett*, 68-76; *State v. Archer*, 69-420.

65. An instruction that defendant was not justified in taking life in self-defense, unless he believed that the deceased intended to take his life, held proper and not materially different from the usual instruction as to having reasonable ground to believe. It must be assumed that what a person has reasonable ground to believe he does believe, and conversely, as to what a person does not believe, there is to his mind a lack of reasonable ground to believe: *State v. Donnelly*, 69-705.

66. Where defendant seeks to show self-defense in a prosecution for homicide, it is not proper to admit evidence of a particular physical weakness of deceased, by reason of which he was not as strong as his appearance would indicate, where the fact of such physical weakness did not appear to have been known to defendant: *State v. Cross*, 68-180.

67. Use of deadly weapon: Instructions as to when a person assaulted would be justified in using a deadly weapon in self-defense, considered and approved: *State v. Sullivan*, 51-142.

68. The facts of a particular case held not to support the plea that the killing was justifiable as in self-defense: *Ibid*.

69. In case of mutual combat: One who seeks to bring on a quarrel cannot avail himself of the plea of self-defense, if he takes the life of the other person engaged in the quarrel: *Ibid*.

70. A man may not kill another, even in combat, unless such killing shall be necessary for his self-defense. If there is no necessity, real or apparent, he may be guilty of murder in the second degree, even though he entered the combat with no intent to kill: *State v. Morphy*, 33-270.

71. An instruction that defendant could not excuse a killing as in self-defense if he sought deceased with a view to provoke a difficulty or bring on a quarrel, held correct: *State v. Stanley*, 33-526.

72. If one invite or provoke an assault to be made on himself, for the purpose of securing a pretext or opportunity for the killing of the assailant, the assault will furnish no justification or excuse for the killing: *State v. Cross*, 68-180.

73. Change of conduct; burden of proof: After entering a combat there may be a change of conduct or action on the part of the person engaged therein, such as to entitle him to claim that killing afterwards committed was in self-defense, but the burden of proof as to such change of conduct or action would be upon him: *Ibid*.

74. If it appears that defendant, with a loaded weapon, sought deceased with a view of provoking a difficulty or with the intention of having an affray, and the difficulty did ensue, he cannot, without some proof of change of conduct or action, excuse the homicide upon the ground that the deceased fired the first shot. If it appears that the prisoner did not exercise the intention of withdrawing from the combat sought by him, but that by seeking and continuing therein he brought upon himself the necessity of killing deceased, he cannot be regarded as acting in self-defense: *State v. Neeley*, 20-108.

75. Duty to retreat: The rule requiring the person assaulted to retreat before he will be justified in using a deadly weapon in self-defense does not apply where the party assaulted is in his own habitation: *State v. Middleham*, 62-150.

76. The right to take life in self-defense does not arise even in case of an attempt on

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the part of the assailant to commit a felony or inflict great bodily injury, if the person assailed can manifestly secure his safety by retreating. In such case it is not necessary to take the life of the assailant to prevent the consummation of the felony attempted: *State v. Donnelly*, 69-705.

77. Where a person is assaulted with a deadly weapon he is not required to fly from his adversary and go to the wall before he can justify the taking of the life of such adversary in self-defense: *Tweedy v. State*, 5-433.

78. In defending person, habitation, or property, against one who manifestly intends and endeavors by violence and surprise to commit a known felony on either, the person assailed is not obliged to retreat, but may pursue his adversary until he finds himself out of danger: *State v. Collins*, 32-36.

79. Defense of others: Where defendant claimed to have been one of a party assailed by a hostile party with deadly weapons, and that the killing was in self-defense, held, that the jury should have been instructed that defendant, if he had well grounded apprehension that their lives were in danger, was authorized to defend his associates, even to the extent of taking the lives of the assailants, and that it was error to confine instructions as to self-defense to the defense of defendant's own person: *State v. Westfall*, 49-328.

80. A master may do that to protect his apprentice which another party could not do without being the assailant or giving considerable provocation for an assault: *Orton v. State*, 4 G. Gr., 140.

81. In cases of trespass: A party cannot justify an assault as made in protection of property upon mere fear or suspicion of an encroachment: *McAuley v. State*, 3 G. Gr., 435.

82. A bare trespass against the property of another, not his dwelling, is not a provocation sufficient to warrant the owner in using a deadly weapon in its defense, and if he does so, and kills the trespasser, it is murder, although the killing be actually necessary to prevent the trespass. If it appears that the intention was not to take life, the offense may be extenuated and be no more than manslaughter. If the killing be done in passion or heat of blood, it may be manslaughter but cannot be less: *State v. Vance*, 17-138.

83. A party has no right to prevent or resist a trespass which would not amount to more than a misdemeanor by means calculated to endanger life or inflict great bodily harm, and he will be civilly liable for any injury thereby committed, even to a person trespassing or committing a misdemeanor: *Hooker v. Miller*, 37-613.

84. An assault with a revolver cannot be justified on the ground that the person assaulted was a trespasser and the purpose of the assault was to remove the trespasser from the premises. An attempt to use such a weapon for such purpose is unlawful: *State v. Montgomery*, 65-483.

85. A party is not precluded from availing himself of the plea of self-defense for the reason alone that the assault upon him was provoked by his trespass, that trespass not having been created for the purpose of provoking the assault nor with the knowledge or expectation that it would have that effect: *State v. Archer*, 69-420; *State v. Perigo*, 70-.

86. Resistance to officer: The right to use force in defense of one's person and property does not authorize the defendant in execution to resist forcibly an officer in the discharge of his duty: *Cokely v. State*, 4-477.

87. Burden of proof in cases of self-defense: Proof of the homicide will not throw upon defendant the burden of proving, by preponderance of evidence, excuse or justification arising from self-defense, where such excuse or justification is apparent from the evidence of the prosecution or from the circumstances attending the homicide: *Tweedy v. State*, 5-433.

88. Where defendant undertakes to establish that the homicide for which he is on trial was committed in self-defense, it is error to instruct the jury that the burden of proof is upon him to show that he did it in self-defense. He is entitled to acquittal if he shows by the facts attending the commission of the offense, as appearing from his own evidence or that of the prosecution, that there is a reasonable doubt that his act was wilful: *State v. Porter*, 34-131.

89. Where there is evidence tending to show that the defendant acted in self-defense, the jury should be instructed that the burden of proof is on the state to show, from the circumstances attending the commission of the

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offense, that the homicide was not committed in self-defense: *State v. Fowler*, 52-103; *State v. Cross*, 68-180.

90. Evidence of character of deceased: Where defendant, charged with felonious homicide, attempts to show that he acted in self-defense, he may introduce evidence to prove that deceased was of a quarrelsome and violent disposition or character: *State v. Graham*, 61-608.

91. The rule allowing the quarrelsome and dangerous character of deceased to be shown in evidence as bearing upon the question of self-defense cannot be extended to permit evidence that the manner of deceased was reckless: *State v. Middleham*, 62-150.

92. Evidence of particular fights and quarrels of deceased is not admissible as showing his character as bearing upon the question of self-defense: *State v. Abarr*, 39-185.

93. Threats: Evidence of threats by deceased against defendant are only competent when it appears that they were made in the presence of or communicated to defendant: *State v. Sullivan*, 51-142.

94. Evidence of threats made by deceased against defendant in prior quarrels, and of his conversations and conflicts with others, *held* not competent: *Ibid.*

95. Evidence of threats: The testimony of a magistrate before whom defendant had been bound over to keep the peace toward deceased as to such proceedings and as to threats made, etc., *held* competent as to the threats and as to the arrest and proceedings for the purpose of identifying the time and explaining the circumstances under which the threats were made: *Ibid.*

96. Where defendant attempted to justify an assault resulting in death on the ground of defense of the life of another, *held*, that evidence of previous threats by deceased against the life of the person assaulted, which were not communicated nor known to defendant, were not admissible: *State v. Maloy*, 44-104.

97. The decided weight of authority is to the effect that threats uncommunicated are inadmissible. The one exception to the rule seems to be that where evidence has been given making it a question whether defendant perpetrated the act charged in defense of his person against an attempt to murder him

or inflict some great bodily harm upon him, violent threats made by deceased against defendant may be proved, though not communicated: *State v. Elliott*, 45-486.

98. State of feeling: While knowledge of previous threats and of a violent and dangerous natural disposition on the part of deceased may be shown to have been communicated to defendant previous to the homicide, it is not proper to show the communication to him of the fact that deceased knew of defendant's having been engaged in a criminal prosecution against him and that he was much incensed about it, and was a quick-tempered and very powerful man: *State v. Cross*, 68-180.

99. Angry appearance of deceased immediately preceding the encounter in which the homicide was committed, claimed to be in self-defense, *held* admissible: *Ibid.*

100. But *held*, that the angry appearance of deceased at an interview with defendant three years previous to the homicide was not admissible: *Ibid.*

101. The fact of newspaper comments having been made with reference to a criminal prosecution against deceased, in which defendant testified against decedent before the grand jury, is not admissible in evidence: *Ibid.*

102. The fact that defendant testified against deceased before the grand jury is not competent evidence as bearing upon the question whether, in taking the life of deceased, defendant was acting in self-defense. Such evidence would not tend to show the character and extent of the hostility of deceased, even in connection with evidence tending to show an attack of deceased upon defendant, and therefore would not tend to show the character of the attack: *Ibid.*

103. Ill-will of deceased toward defendant and former quarrels between them cannot be considered in determining whether defendant was justified in believing himself in such peril that he was warranted in using a deadly weapon in self-defense: *State v. Sullivan*, 51-142.

104. Evidence: In a prosecution for murder committed in a general fight between hostile parties, where self-defense was claimed, *held*, that the fact that on previous occasions the party to which defendant be-

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longed had sought to avoid quarrels and conflicts with the other party, should have been admitted: *State v. Westfall*, 49-328.

105. In such case, *held*, also, that evidence offered by defendant that the members of the opposite party had been drinking should have been admitted: *Ibid*.

106. Where defendant sought to show self-defense as an excuse for using a deadly weapon in a manner causing bodily injury, to protect himself against injuries anticipated by reason of threats, *held*, that it was not proper for his counsel to ask him, while a witness, what he had done between the time that the threats were made and the meeting at which the injury was inflicted, to prevent the party making the threats from putting such threats into execution: *State v. Noble*, 66-541.

107. On a trial for murder, *held* proper to allow a witness to state complaints made by deceased to him against defendant in connection with the fact that he told defendant of such complaints, and defendant's answer thereto: *State v. Moelchen*, 53-810.

d. *Negligence or recklessness.*

108. Recklessly shooting into a crowd and wounding some one not intended is criminal: *State v. Myers*, 19-517.

109. If one fires a gun recklessly or heedlessly and kills another, the offense will be at least manslaughter, though the weapon be pointed in the direction of deceased by accident, with no design to wound or kill. If the act is likely to kill deceased or persons generally, and death ensues, the crime is murder or manslaughter according to the degree of deliberation: *State v. Vance*, 17-138.

And see further, *infra*, §§ 186-189.

3. *Degree of connection with the act; principal and accessory; combination.*

110. **Principal and accessory:** To constitute a principal in the second degree there must be a participation in the act committed, and also presence either actual or constructive. Mere presence without participation will not be sufficient: *State v. Farr*, 83-553.

111. A person who is present aiding and abetting others who actually commit the assault is himself guilty with the others although he does not himself actually strike: *State v. McClintock*, 8-208.

112. One who is actually present aiding or abetting the deed, or is constructively present, as by keeping watch at a distance to prevent surprise or the like, is guilty as principal of any act done in pursuance of the original design: *State v. Nash*, 7-847, 385.

113. Evidence that defendant knew that horses were to be stolen and went to the place, or near by, and was in position to give the alarm, and also that before the stealing he agreed to take care of the families of the felons while they were disposing of the property, *held* sufficient to warrant his conviction as an accessory: *State v. Stanley*, 48-221.

114. An accessory before the fact is liable for all that ensues upon the execution of the unlawful act contemplated, but not for a crime not contemplated by him nor necessarily involved in the completion of the act but intentionally committed by the principal. Therefore, *held*, that an accessory who rowed the principals ashore in a boat, for the purpose of assisting them in robbing the safe of a mill, was not accessory to the crime of robbery committed by such principals in knocking down and taking money from the night watchman in charge of the mill: *State v. Lucas*, 55-321.

115. In a particular case, *held*, that the jury were warranted in finding that defendant was accessory to the crime of robbery committed in the prosecution of a conspiracy to commit burglary: *State v. Lucas*, 57-501.

116. In order to render a party liable as accessory to a crime, the evidence must with reasonable certainty point out the particular crime as to which he is accessory and that defendant had knowledge of and aided in its commission. Knowledge of the crime obtained after its commission is not sufficient: *State v. Clouser*, 69-813.

117. Under the statutes prohibiting the sale of intoxicating liquors except for specified purposes by persons having permits, no penalty being prescribed for the purchase of such liquor from a person illegally selling, such purchaser is not guilty of a crime

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in such sense that he may be excused from testifying as to the purchase, on the ground that he would thereby criminate himself: *Wakeman v. Chambers*, 69-169.

118. In view of the statutory provision (Code, § 4314) which abolishes the distinction between an accessory before the fact and a principal, and directs that all persons concerned in the commission of a public offense, or aiding and abetting in the commission thereof, although not present, must be indicted, tried, and punished as principals, *held*, that under an ordinary indictment charging the commission of a crime, the defendant might be proved guilty of aiding and abetting in such commission: *State v. Hessian*, 58-68; *Bonsell v. United States*, 1 G. Gr., 111.

119. Under this statute, all persons concerned in the commission of a public offense, including aiders and abettors, are guilty as principals: *State v. Brown*, 25-561; *State v. Thornton*, 26-79.

120. Under such statutory provision, two or more may be jointly indicted for a criminal act which is of such nature that it can be actually committed by but one person: *State v. Comstock*, 46-265.

121. Liability for acts of confederates: Where two persons engage in an unlawful act, such as the resisting of an officer, each is accountable, not only for his own acts but for the acts of the other done in the execution of the unlawful purpose, and the presumption of malice and the consequences of the crime attach equally to both: *State v. Zeibert*, 40-169.

122. If two persons engage in an assault and aid each other therein, each is responsible for whatever is done by the other, also for the consequences resulting therefrom. If they are acting together in making an unlawful assault, it is not necessary, in order to render one of them responsible for the consequences, that he should assist in striking or that he knew or supposed that the other would strike: *State v. Maloy*, 44-104.

123. If it does not appear that one defendant acted in combination or joint purpose with others, then he should not be convicted for a crime committed by the others, unless the jury are satisfied beyond a reasonable doubt that he and not some one else com-

mitted the crime charged: *State v. Westfall*, 49-328.

124. It is not necessary that the evidence of an unlawful combination to commit a crime should be direct and positive. It may be shown from the circumstances connected with the transaction: *Miller v. Dayton*, 57-423; *State v. Lucas*, 57-501.

125. Instructions as to liability of persons jointly participating in a murder committed in the prosecution of a common unlawful design, *held* proper under the circumstances of the case: *State v. McGuire*, 53-165.

Further as to liability for acts of confederate in cases of homicide, see *infra*, § 184.

126. When two or more persons combine to do an unlawful act, and declarations and acts of each, made and done with reference to the common purpose, implicate all alike, each is guilty of the offense as a principal: *State v. Myers*, 19-517.

As to conspiracy, in general, see *infra*, II, 3, c.

Admission of persons conspiring together to do an unlawful act may be received in evidence as against each other: See *infra*, §§ 1479-1484.

127. Acts of agents: Where a person is engaged in the business of selling intoxicating liquors contrary to law, or keeping them with intent to sell, he is criminally liable for the unlawful acts of his servant or agent done in the course of the business; but where liquors are lawfully kept for sale with intent to sell only for legal purposes, the owner will not be criminally liable for an illegal sale by his agent or clerk, made without his knowledge or consent: *State v. Hayes*, 67-27.

II. PARTICULAR CLASSES OF CRIMES.

1. Offenses against life or the person.

a. Homicide.

128. Human being; infant unborn: An infant in the womb is not a human being within the meaning of Code, § 3848, defining murder; certainly not before it is quick: *Abrams v. Foshee*, 3-274.

129. An infant does not become possessed of independent life in such sense as to be subject of homicide until independent circu-

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lation has been established: *State v. Winthrop*, 43-519.

130. It is not necessary that an indictment for murder should allege that the deceased was a human being: *State v. Stanley*, 33-526, 531.

131. **Malice aforethought:** In murder of either degree there must be malice aforethought, express or implied: *State v. Johnson*, 8-525; *Fouts v. State*, 4 G. Gr., 500.

As to charging malice aforethought in the indictment, see *infra*, §§ 145-148.

132. Malice aforethought is essential to the crime of murder, but it is not necessary that it should have existed for any considerable length of time. It is sufficient if it existed for any length of time before the commission of the act: *State v. Decklotts*, 19-447.

133. **Malice inferred:** Malice may, as at common law, be implied in case of homicide from any act unlawful and dangerous in its nature, unjustifiably committed. Therefore, *held*, that death caused in an unlawful attempt to procure an abortion was murder in the second degree: *State v. Moore*, 25-128.

134. Persons conspiring to do an unlawful act which is a trespass only will be guilty of murder only when death results in the prosecution of the design; but if the unlawful act be a felony, or more than a trespass, death resulting will be murder in all, although it happen beside the original design: *State v. Shelledy*, 8-477, 505.

Further as to presumptions as to intent, see *supra*, §§ 80-82.

135. **Use of deadly weapon:** The malice implied by the use of a deadly weapon is malice aforethought, such as will sustain a conviction for murder. Malice may be inferred from the deliberate, violent use of a deadly weapon: *State v. Zeibart*, 40-169.

136. When a man assaults another or uses upon another a deadly weapon in such a manner that the natural, ordinary and probable result of the use of such weapon in such manner would be to take life, the law presumes that such person so assaulting intended to take life: *State v. Sullivan*, 51-142; *State v. Hockett*, 70—.

137. But it is error to charge the jury that malice is proved by the selection and use of a deadly weapon in a deadly manner without legal excuse. Such fact merely raises a pre-

sumption of malice subject to be rebutted: *State v. Townsend*, 66-741.

138. An instrument may or may not be a deadly weapon, depending upon the manner in which it is used; and in a particular case, *held*, that a stick of wood might be found to be a deadly weapon: *State v. Brown*, 67-289.

139. The fact that deceased was in a feeble condition, so that a blow of less force caused his death than would have been required to take the life of a healthy man, even if that fact is not known to the assailant, will not constitute a defense: *State v. Castello*, 62-404.

140. Where it appeared that defendant sought a meeting with deceased at which the act was committed by the use of a revolver, *held*, that his having used a revolver tended to indicate that defendant sought the meeting with the intent to take the life of deceased: *State v. Jones*, 64-349.

As to assault with intent to murder, see *infra*, §§ 249-254.

141. **Resisting officer:** In a prosecution for murder in resisting an officer, the official character of the officer need not be shown by record evidence. It is sufficient if it is shown that he was acting as officer *de facto*: *State v. Zeibart*, 40-169.

142. **Death from wound:** If death ensues from a wound given in malice, not in its nature mortal, but which being neglected or mismanaged causes death, this will not excuse the person who gave it, and he will be held to have caused the death, unless he can make it clearly and certainly appear that the maltreatment of the wound or the misconduct of the person wounded, and not the wound itself, was the sole cause of the death: *State v. Morphy*, 33-270.

143. **Malpractice of physician:** A person who assumes to act as a physician in good faith, with good motives and honest intentions, however erroneous the course of treatment he adopts, is not to be held criminally liable if death results from such treatment: *State v. Schulz*, 55-628.

144. **Indictment:** It is not necessary that an indictment for murder should specifically charge, as at common law, that the defendant murdered the deceased. The use of other words of the same import will be sufficient: *State v. O'Neil*, 23-272.

145. Although the indictment must charge

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that the killing was done with malice aforethought, it is not essential that these identical words be used. It is sufficient if words are used of the same import, or if it clearly appears from the language used that malice aforethought is charged, or can, without doubt, be implied: *State v. Thurman*, 66-698.

146. Therefore, where the indictment charged murder in the second degree, committed by the administration of drugs and the use of an instrument for the purpose of procuring an abortion, and charged these acts as maliciously done, and with the specific intent to produce an abortion, *held*, that malice aforethought was sufficiently charged: *Ibid*.

147. In an indictment for murder under our statute it is necessary to charge that the homicide was done with malice aforethought: *State v. Newberry*, 26-467.

148. Words used in the indictment in a particular case, *held* to be equivalent to the expression "malice aforethought:" *State v. Neeley*, 20-108.

149. In an indictment for murder it is sufficient to aver that the wound was inflicted on the person of deceased, that his death was caused by it, and that the act was within the jurisdiction of the court. The wound need not be more particularly described: *Nash v. State*, 2 G. Gr., 286.

150. **Murder in first degree:** The distinctive peculiarity of murder in the first degree, as defined by statute, is that it must be accompanied with the premeditated intention to take life. The killing must be premeditated. Wherever, then, in case of deliberate homicide, there is a specific intention to take life, the offense, if consummated, is murder in the first degree. If there is not a specific intention to take life, it is murder in the second degree: *State v. Gillick*, 7-287, 311.

151. An intention to take life may be presumed from the use of a deadly weapon in a manner in which death would most likely ensue, and proof of such a killing is primary evidence that it is wilful, deliberate and premeditated: *Ibid*.

152. Premeditation implies more than deliberation. It means to meditate and deliberate before concluding to do the deed; not only to wilfully take life, but to predetermine,

to contrive by previous meditation: *State v. Johnson*, 8-525.

153. The distinctive peculiarity constituting murder in the first degree is that it should be accompanied with a premeditated determination to take life. The killing must be premeditated, but no specific time is required for premeditation or deliberation: *Ibid*.

154. The intent must have preceded the killing long enough to admit of premeditation and deliberation. They need not have existed for any particular length of time, if previously formed and continuing until the killing: *State v. Soper*, 70—; *State v. Hockett*, 70—.

155. It is not sufficient to charge murder in the first degree that the indictment alleges the killing as wilful and premeditated only: *State v. Boyle*, 28-522.

156. The indictment must charge that the killing was wilful, deliberate and premeditated. The allegation that the assault was so will not suffice: *State v. Knouse*, 29-118; *State v. Thompson*, 31-393.

157. So, an indictment charging that the assault was wilful, deliberate and premeditated, and that the blow from which deceased died was wilful, deliberate and premeditated, but not charging that it was dealt for the purpose of killing, or that the killing itself was wilful, does not charge murder in the first degree: *State v. McCormick*, 27-403; *State v. Watkins*, 27-415.

158. The facts to bring the case within the first degree of murder must be set out. Naming the offense in the introductory and closing portions of the indictment as murder in the first degree will not cure the defect. An indictment which would be sufficient at common law for murder is not necessarily sufficient to charge murder in the first degree under the statute: *Ibid*.

159. To constitute the crime of murder in the first degree, it is essential that the killing be done with malice aforethought; that it be done wilfully, and also that it be done deliberately and premeditatedly; but if it is charged and proven that the wounds were inflicted with specific intent to kill, and also that they were inflicted deliberately and premeditatedly, it is not necessary that it be charged and proven that the intent to kill was deliberate and premeditated: *State v. Shelton*, 64-333.

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160. A wilful killing is simply an intentional killing, and nothing more is necessary to make the killing wilful except the intended result of the act. It is not necessary, therefore, to charge that the killing was wilful where it is charged that the act causing the homicide was done with the specific intent to kill and murder: *State v. Townsend*, 66-741.

161. It is not necessary in charging murder in the first degree to use the precise language of the statute. It is sufficient if the words used are fully equivalent: *Ibid*.

162. An indictment charging an assault with intent to kill, wilfully, etc., and that defendant did thereby, wilfully, etc., inflict a mortal wound of which the deceased then and there did die, sufficiently alleges murder in the first degree although there is no averment that the killing was done wilfully, etc.: *State v. Stanley*, 38-526.

163. Proof of design to kill at the time of killing would show malice aforethought, but would not show premeditation or deliberation: *Fouts v. State*, 4 G. Gr., 500.

164. The proof of killing, without more, does not raise the presumption that such killing was wilful, deliberate and premeditated: *State v. McCormick*, 27-402.

165. Whether, in case the killing is committed in the perpetration or intent to perpetrate some of the felonies mentioned by the statute, it should be charged as wilful, deliberate and premeditated, *quære*: *Ibid*.

166. Where death is caused by the administration of poison, the crime will be murder if the poison is unlawfully administered and without a good intention. Such administration of poison constitutes the required deliberation, premeditation and intent to kill, and it is immaterial whether or not there is a specific intent to kill: *State v. Wells*, 61-629.

167. The expression "lying in wait" used in the statute in defining murder in the first degree means lying in ambush or concealment: *State v. Cross*, 68-180.

168. The jury cannot find the defendant guilty of murder in the first degree when the indictment is only sufficient to charge defendant with murder in the second degree: *Fouts v. State*, 4 G. Gr., 500.

169. It is prejudicial error to put a party on trial for murder in the first degree under an indictment charging only murder in the

second degree, although the party is only convicted of the lesser offense: *State v. Boyle*, 28-522; *State v. Knouse*, 29-118.

170. Where, on an indictment not sufficient to charge murder in the first degree, the defendant was found guilty in that degree, and defendant on appeal asked that the sentence be modified to one which would be proper under the indictment for the second degree, the court so reduced the sentence: *State v. McCormick*, 27-402.

171. But where, in a similar case, defendant denied the sufficiency of the evidence to establish his guilt in any degree, and demanded a new trial, *held*, that he was entitled thereto: *State v. Watkins*, 27-415.

That it is error to put a defendant on trial for a higher crime or degree of crime than charged in the indictment, see *infra*, § 1257.

172. In a particular case, *held*, that the evidence, although circumstantial, was sufficient to sustain a conviction for murder in the first degree: *State v. Stanley*, 38-526.

In a trial for murder in the first degree, the court should define all the degrees of criminal homicide: See *infra*, §§ 1209-1217.

173. Murder in second degree: A specific intention to kill is not essential to constitute murder at common law, nor under our statute, to constitute murder in the second degree: *State v. Decklotts*, 19-447; *State v. Morphy*, 38-270; *State v. Mewherter*, 46-88.

174. An allegation that defendant caused death by acts intended to produce miscarriage when not necessary to save life, sufficiently charges murder in the second degree: *State v. Leeper*, 70—.

175. Evidence *held* not sufficient to support a verdict of murder in the second degree: *State v. Havercamp*, 54-350.

176. Degree of offense to be determined by jury: Under the statute requiring the jury to determine by their verdict the degree of the offense on a trial for murder, *held*, that a verdict of "guilty as charged in the indictment" was fatally defective as not sufficiently ascertaining the degree of the offense although the indictment charged murder in the first degree: *State v. Moran*, 7-236.

177. Where defendant was charged with committing murder in the perpetration of robbery and burglary, and the verdict of the jury was "guilty as charged in the indict-

Homicide.—Maiming; disfigurement.

ment," *held*, that this was a sufficient finding of the degree of the crime and was a conviction of murder in the first degree: *State v. Weese*, 53-92.

178. The jury may, if they do not find the defendant guilty of murder in either degree, convict him of manslaughter: *Gordon v. State*, 3-410.

179. The provision that the jury may determine whether the punishment for murder in the first degree shall be capital is not unconstitutional: *State v. Hockett*, 70—.

And see further as to conviction of included crime, *infra*, §§ 1238-1256.

180. In case of a plea of guilty, the record should show that witnesses were examined by the court and the degree of the crime thus fixed: *McCauley v. United States*, Mor., 486.

181. **Manslaughter:** The common law definition of manslaughter has not been changed by our statute: *State v. Shelledy*, 8-477; *State v. Moore*, 25-128. Further as to definition, see *State v. Abarr*, 39-185; *State v. Hockett*, 70—.

182. Homicide committed otherwise than wilfully, deliberately, and with premeditation, may be manslaughter or murder in the second degree, depending upon absence or presence of malice: *State v. Spangler*, 40-365.

183. A homicide committed in sudden passion or heat of blood, without premeditation and without malice, is not murder in the second degree, but manslaughter: *Ibid.*; *State v. Decklotts*, 19-447.

184. Great provocation may reduce a homicide to manslaughter, but can never render it justifiable or excusable: *State v. Vance*, 17-188.

185. Mere words will not constitute sufficient provocation to reduce a homicide to manslaughter. *Held*, also, that the fact that deceased had been criminally intimate with defendant's wife's sister was not sufficient: *State v. Hockett*, 70—.

186. Lawful and peaceful intentions will not excuse an unlawful homicide by subsequent violence, though they might bear upon the degree of the homicide. If the conviction is for manslaughter the previous intention is immaterial: *State v. Castello*, 62-404.

187. The careless use of a dangerous and deadly weapon, whereby a person is killed, constitutes manslaughter, although no harm is intended: *State v. Hardie*, 47-647.

188. Punishment for manslaughter in a particular case, where the facts indicated on the part of defendant an entire recklessness of the consequences in the unnecessary use of a dangerous weapon in self-defense, *held* not excessive: *State v. Fitzsimmons*, 63-656.

189. Where it appeared that defendant pointed a loaded gun at deceased under circumstances not justifying killing, and deceased seized it to prevent injury, and it was discharged in the struggle without any purpose on the part of defendant, *held*, that the latter would be guilty of manslaughter, and the circumstances of the case would not wholly excuse the homicide, but might be regarded by the court in fixing punishment. But *held* that if the gun was pointed under circumstances in which it might have been lawfully discharged, defendant would be guilty of no offense: *State v. Benham*, 23-154.

190. Where one by his negligence contributes to the death of another, he is guilty of manslaughter, and it is no defense that the death of deceased was caused by the negligence of others as well as that of the defendant: *State v. Shelledy*, 8-477, 507.

191. Manslaughter is not a degree of murder, but a distinct offense, included, however, in the crime of murder: *State v. White*, 45-325.

192. In a trial for murder, the jury should be instructed as to what constitutes manslaughter, so that they may convict of the lower offense if the higher is not established: *State v. Clemons*, 51-274.

As to instructions relating to conviction for included crimes, see *infra*, §§ 1209-1217.

193. On a trial for manslaughter, it is not necessary to define the crime of murder in either degree, nor is it necessary to define any included crime where it appears that defendant admits the killing but seeks to justify and excuse it. But if there is any evidence sustaining the claim that the blow was accidental, the law in relation to accidental killing should be given to the jury: *State v. Hartzell*, 58-520.

As to assault with intent to commit manslaughter, see *infra*, § 255.

b. Maiming; disfigurement.

194. **Intent:** While a specific intent to disfigure is an essential element of the crime,

Rape.

yet such intent may be inferred or presumed if the act is done deliberately, and the disfigurement is reasonably to be apprehended as the natural and probable consequence of the act: *State v. Jones*, 70—.

195. Assault with intent to disfigure: Where an assault is made with intention of committing a bodily injury which will constitute a disfigurement, no other intention to disfigure need be proven: *State v. Clark*, 60-196.

c. Rape.

196. What constitutes: The force necessary on the one hand, and the resistance required on the other, to constitute the crime, depend upon the relative mental and physical strength of the parties and the circumstances surrounding them: *State v. Tarr*, 28-397.

197. Where a female was imbecile, and the prisoner, knowing such fact (which might be inferred from his having had some conversation with her), used some force, and there was nothing to indicate consent on her part, *held*, that the act would be considered to have been against her will, and that in such case actual opposition or dissent need not be shown: *Ibid*.

198. It seems that a defendant might, under the statutory definition, be convicted of the crime of rape, committed upon a woman so destitute of mind that she was incapable of consent, without proof of any resistance on her part: *State v. Atherton*, 50-189.

199. By statute, the criminal knowledge and abuse of a female child under the age of ten years is rape, and an assault with intent to commit such crime is an assault with intent to commit rape. The fact that defendant does not know that the child is under ten years of age will be immaterial: *State v. Newton*, 44-45.

200. Where it does not appear that active resistance was made, the age of prosecutrix is important to be considered. If, though over ten years of age (the age of consent fixed by statute), she is still very young, with mind not enlightened upon the nature of the act, this consideration should lead the jury to demand a less clear opposition than if she were older and more intelligent.

Consent involves submission, but submission does not necessarily involve consent, and while in most cases such submission of the adult female would imply consent, yet the mere submission of a young and uninformed female in the hands of a strong man cannot be taken to show consent: *State v. Cross*, 12-66.

201. While a female over ten years of age is presumed capable of giving consent, yet the fact that a female over that age lacked puberal development may be considered in support of her claim that she did not understand the nature of the intended act: *State v. McCaffrey*, 63-479.

202. In a prosecution for rape committed upon a girl eleven years old, *held*, that though it appeared that she had allowed defendant improper liberties, yet that the evidence that she resisted before penetration was effected was sufficient to support a conviction: *Ibid*.

203. Two or more may be jointly indicted for the crime, one being the principal and the others accessories: *State v. Comstock*, 46-265.

204. The crime of rape necessarily includes both a simple assault, and an assault with intent to commit the crime: *State v. Vinsant*, 49-241; *State v. Peters*, 56-263.

205. On a trial for rape, defendant may be convicted of an assault with intent to commit the crime, and even though consent is shown at the time of the commission of the act, it may be shown to have been absent at the time of the commission of the assault: *State v. Cross*, 12-66; *State v. Atherton*, 50-189.

As to assault with intent to commit rape, see *infra*, §§ 256-267.

206. Indictment: The sex of the person injured in a particular case *held* to sufficiently appear from the language of the indictment, although not specifically alleged: *State v. Hussey*, 7-409.

207. The indictment in a particular case *held* to sufficiently indicate the person ravished: *State v. Pennell*, 56-29.

208. Evidence: It is not necessary to establish the non-consent or force, by proof of outcries or of a struggle, nor need actual penetration be shown by the testimony of the prosecutrix herself. But the jury may say whether, from all the circumstances, the

Rape.

requisite facts are shown: *State v. Tarr*, 28-397.

209. The absence of any marks of violence, or of outcries, etc., at the time, may be considered as against the evidence of prosecutrix: *State v. Tomlinson*, 11-401.

210. Absence of such outcries and complaints tends strongly to rebut the hypothesis of guilt, but is not conclusive, and the age, etc., of prosecutrix is to be considered: *State v. Cross*, 12-66.

211. The better rule is to admonish the jury as to the difficulty of disproving the charge, and call their attention to the fact whether outcry was made at the time: *State v. Hagerman*, 47-151.

212. The fact of prosecutrix making complaint is proper evidence, but the particulars of such complaint are not: *State v. Richards*, 38-420.

213. But the evidence as to complaints need not be limited necessarily to the fact of complaint being made. It may extend to showing what the person made complaint of: *State v. Mitchell*, 68-116.

214. The particular facts stated by the prosecutrix are not admissible in evidence except when elicited on cross-examination, or by way of confirming her testimony after an attempt to impeach it: *State v. Clark*, 69-294.

215. Therefore, *held*, that a letter written by prosecutrix, relating the circumstances of the alleged crime, was not admissible: *Ibid*.

216. Evidence that bruises were found upon prosecutrix two and one-half or three weeks after the alleged injury *held* properly admitted. The length of time that had elapsed would be for the jury as affecting the credibility of the evidence, but would not render it incompetent: *State v. McLaughlin*, 44-82.

217. Proof of another crime of the same character committed at a different time upon or against another person and having no connection with the crime charged is not admissible. So *held* in a prosecution for assault with intent to commit rape as to evidence of similar assaults at previous times upon other persons; but *held*, that proof of previous assaults on prosecutrix was admissible to show intent: *State v. Walters*, 45-389.

218. In a prosecution for rape, *held*, that statements of prosecutrix made on the same day on which the crime was charged to have been committed, that she had had criminal intercourse with defendant and would have it again, were admissible in evidence as tending to show the character of prosecutrix and her feelings toward defendant: *State v. Cook*, 65-560.

219. Evidence considered, and *held* insufficient to justify conviction for the crime: *State v. Tomlinson*, 11-401.

220. Corroboration: Under the statute (Code, § 4560) requiring corroboration of the testimony of prosecutrix in such cases in order to connect defendant with the crime charged, *held*, that the fact that the crime has been committed by some one may be established by the testimony of the injured party alone: but that to ascertain the guilty party it is necessary that the testimony of the person injured be corroborated by other evidence tending to connect defendant with the crime, and such as, when considered with the testimony of the person injured, shall establish defendant's guilt beyond a reasonable doubt: *State v. McLaughlin*, 44-82.

221. Where prosecutrix testified to a rape committed by defendant, and that bruises afterward found upon her person were received at that time, and there was evidence that defendant admitted the criminal connection, *held*, that the court properly left to the jury to determine whether the injuries were received at the time of the alleged outrage and whether they, in connection with defendant's admissions, were sufficient to connect him with the offense: *Ibid*.

222. Evidence that prosecutrix was bruised, etc., and made complaint, would not tend to connect defendant with the commission of the offense, and therefore should not be considered as tending to corroborate the testimony of prosecutrix: *State v. Stowell*, 60-535.

223. The corroboration in particular cases *held* sufficient: *State v. Comstock*, 46-265; *State v. Mitchell*, 68-116.

Further as to corroboration, see *infra*, §§ 589-595.

224. Included crimes: Assault and battery is not necessarily included in the crime of rape: *State v. McDevitt*, 69-549.

Robbery.—Assault.

d. *Robbery.*

225. To constitute robbery, there must be *animus furandi*; compelling the payment of money which is due, by threats of violence, is not robbery: *State v. Hollyway*, 41-200.

226. The means used to put in fear need not be such as would put in fear one used to the ways of the world: *State v. Carr*, 43-418.

227. A sudden snatching from the hand of another is sufficient force and violence to constitute robbery: *Ibid.*

228. The crime of robbery includes all the elements of larceny from the person, defined in Code, § 9905, with the addition of the element of violence or putting in fear, and the fact that the evidence shows the crime to be robbery will not render erroneous a conviction under that section: *State v. Graff*, 66-482.

229. **Indictment:** An indictment for robbery need not in express terms charge an assault; if it charge putting in bodily fear and danger of life, it will be sufficient in this respect, the charge of an assault being thereby necessarily implied: *State v. Brewer*, 53-735.

230. An indictment stating that defendant, with force, etc., and by putting in fear, etc., "did take, steal and carry away from the said," etc., is not sufficient to charge this offense. It should charge a taking, etc., from the person: *State v. Leighton*, 56-595.

231. An indictment charging that defendant made an assault upon the person named, "and with force and violence unlawfully and feloniously did steal, take and carry away from the person of" said person, etc., held sufficient to charge robbery: *State v. Kegan*, 62-106.

232. Evidence that a person was robbed of a certain number of dollars in gold pieces of specified denominations and also of a certain number of dollars in silver coin, held sufficient to show that the person was robbed of gold and silver coins of denominations mentioned in the indictment: *State v. Helvin*, 65-289.

e. *Assault; assault and battery; assault with intent to commit other crimes; malicious threats; carrying concealed weapons.*

233. **Assault; what constitutes:** To constitute an assault, it is not necessary that de-

fendant should have been in such position as to inflict injury on the person assaulted with the weapon used, provided it appears that he intended and endeavored to inflict such injury and had means and ability to do so, and was only prevented from doing so by the interference of others: *State v. Malcolm*, 8-413.

234. It is an assault to present an unloaded gun or pistol at another in a manner calculated to terrify the person aimed at, if the latter does not know or has no reason to believe that the weapon is not loaded: *State v. Shepard*, 10-126.

235. An indictment charging that defendant did make an assault with a certain dangerous weapon, to wit, a gun with which he was armed, etc., but not alleging that the gun was loaded, nor the manner of using it, nor that it was pointed or discharged, held sufficient to charge an assault: *Ibid.*

236. An assault may be committed without doing any personal injury: *State v. Myers*, 19-517.

237. **Assault and battery:** The statute merely prescribes the punishment for the offenses of assault, and assault and battery, and leaves them to be defined by the common law: *State v. Twogood*, 7-252.

238. **Justification:** Angry words are no justification for an assault and battery. Neither is it unlawful for a party to forbid an angry person coming upon the former's premises: *Thompson v. Mumma*, 21-65.

239. The fact that an officer has levied upon property exempt from seizure is no justification for an assault: *Cokely v. State*, 4-477.

240. In a prosecution for an assault, it is not proper to ask the prosecuting witness whether he had not at a previous time struck the defendant: *State v. Montgomery*, 65-483.

241. **How charged:** Information charging defendant with inhumanly beating his own child sufficiently charges the offense of assault and battery; but the name of the person on whom the offense was committed should be given: *State v. Bitman*, 13-485.

242. **Necessarily included in higher crime:** An indictment charging an assault and also a battery does not charge two offenses. Every battery necessarily includes an assault: *State v. Twogood*, 7-252.

Assault.

243. The offense of maiming and disfiguring necessarily includes an assault and battery: *Benham v. State*, 1-542.

244. An assault with intent to do great bodily injury necessarily includes a simple assault: *Orton v. State*, 4 G. Gr., 140.

245. While an assault with intent to murder may not in all cases include an assault and battery, yet under an indictment charging the former offense, in a particular case, *held*, that sufficient was charged to warrant a conviction of the latter: *State v. Graham*, 51-72.

246. Assault and battery is not necessarily included in the crime of rape: *State v. McDerritt*, 69-549.

247. An assault with intent to commit murder necessarily includes a simple assault: *State v. Jarvis*, 21-44; *State v. Shepard*, 10-126.

As to convicting for crime necessarily included in crime charged, see *infra*, §§ 1238-1256.

248. Assault with intent: In an indictment for assault with intent to commit an offense, it is not necessary to make all the averments required in an indictment for the offense itself: *State v. Newberry*, 26-467.

249. Assault with intent to commit murder: Therefore, in charging an assault with intent to murder, it is not necessary to charge that the assault was made with malice aforethought: *Ibid*.

250. In a particular case, *held*, that the evidence was sufficient to show that the assault was made with premeditation and intent to kill: *State v. Brown*, 67-239.

251. Assault with intent to commit murder does not admit of different degrees, the intent being the gist of the offense: *State v. Jarvis*, 21-44.

252. The facts in a prosecution for assault with intent to commit murder, *held* sufficient to show that the punishment inflicted was excessive and sentence was modified accordingly: *State v. Doering*, 48-650.

253. Evidence in a particular case *held* sufficient to show defendant guilty as accessory to an assault with intent to murder: *State v. Mower*, 68-61.

254. What offenses included: An assault with intent to commit manslaughter is included within an assault with intent to com-

mit murder, and a party may be convicted of the former under an indictment charging the latter: *State v. White*, 45-825 (overruling *S. C.*, 41-816); *State v. Schiele*, 52-608; *State v. Connor*, 59-357.

255. Assault with intent to commit manslaughter is punishable under the statutory provision for assault with intent to commit a felony: *State v. White*, 45-825.

256. Assault with intent to commit rape: It must appear that the intent of defendant was to gratify his passions, notwithstanding any possible resistance prosecutrix should make: *State v. Cross*, 12-66; *State v. Hagerman*, 47-151.

257. The intent to commit the crime of rape necessarily includes an attempt to overcome the resistance of the woman and accomplish the connection by force; and to establish assault with intent to commit rape, the evidence must show that the assault was made with the intent to use whatever degree of force might be necessary to overcome the resistance and accomplish the object: *State v. Canada*, 68-397.

258. Assault with intent to commit rape does not necessarily include assault and battery: *State v. McDerritt*, 69-549.

259. Defendant may be found guilty of an assault with intent to commit, etc., although at the time of accomplishing the act there was such consent as to deprive the act of the character of rape: *State v. Cross*, 12-66; *State v. Atherton*, 50-189.

260. Assault with intent to carnally know a child under ten years, etc. (Code, § 3861), is an assault with intent to commit rape, and in such case it is not necessary to prove that defendant knew the fact as to the age of the child. Proof of that fact itself is sufficient: *State v. Newton*, 44-45. And upon a similar point, see *State v. Ruhl*, 8-447.

261. In a prosecution for this crime, the conduct of the parties towards each other, both before and after the alleged offense, may be shown in evidence: *Mallett v. Beale*, 66-70.

262. Facts in a particular case, *held* sufficient to show the intent with which the assault was committed: *State v. McIntire*, 66-339.

263. Evidence of intoxication is admissible for the purpose of showing absence of intent in such a case: *State v. Donovan*, 61-369.

Assault.—Burglary.

264. The jury should be told that if they find from the evidence that defendant was so drunk as to be incapable of an intent to ravish the prosecutrix, they should find him not guilty: *Ibid.*

265. There is no legal presumption that any offense or any specific result is intended by a man chasing a woman: *Ibid.*

266. Under the facts of a particular case, a new trial was granted for the insufficiency and unsatisfactory nature of corroborating testimony, and for want of proper instructions as to the effect of a jest as indicating criminal intent: *State v. Warner*, 25-200.

267. Whether the provisions of Code, § 4560, requiring corroboration of evidence of the injured party in a prosecution for rape are applicable in an assault with intent to commit rape, *quære*: *State v. McIntire*, 66-339.

As to what is sufficient corroboration, see *supra*, §§ 220-223; and *infra*, §§ 589-595.

268. Assault with intent to do great bodily injury: This crime is sufficiently charged in an information which accuses defendant of an assault and battery, alleging that defendant wilfully and maliciously struck and beat the person injured with intent of doing him great bodily injury: *State v. Carpenter*, 23-506.

269. An indictment charging an assault and battery with intent to inflict great bodily injury does not charge more than one offense. The battery is simply an aggravation: *Cokely v. State*, 4-477.

270. When the felonious intent is shown, that which would be an assault if unaccompanied with such intent will be such when thus accompanied: *State v. Malcolm*, 8-413.

271. Under an indictment for this offense, defendant may be convicted of a simple assault: *Orton v. State*, 4 G. Gr., 140.

272. A great bodily injury is an injury to the person of a more grave and serious character than an ordinary battery, but it cannot be definitely defined. The question whether the injury inflicted in a particular case constitutes a great bodily injury is for the jury: *State v. Gillett*, 56-459.

273. Where a person makes an assault on another and inflicts upon him an injury of a more grave and serious character than an ordinary battery, the presumption is warranted that he intended to inflict a great

bodily injury, if there is no evidence tending to show that he intended a less injury: *Ibid.*

Assault with intent to disfigure, see *supra*, § 195.

274. Malicious threats: Extortion and pecuniary advantage are not necessary elements of the crime of maliciously threatening, etc., as defined by statute. An indictment charging defendant with maliciously threatening, etc., with intent "to compel the person, etc., to do an act against his will," is sufficient: *State v. Young*, 26-122.

275. An indictment charging defendant with verbally threatening to kill and murder two certain persons with intent, etc., held sufficient without setting out the threatening words used; also, held, that a threat to kill two persons constituted but one offense: *State v. O'Mally*, 48-501.

276. In the absence of a felonious intent, it is not robbery to compel, by means of threats of personal violence, the payment of money; but such an act is an offense under the statutory provision as to malicious threats: *State v. Hollyway*, 41-200.

277. Carrying concealed weapons: The intent or purpose with which the weapon is carried is not an element of the statutory offense (under Code, § 3379), nor is it required that it be carried with the defendant's knowledge, or wilfully, that is, with set purpose. The obvious purpose of the statute is to forbid the carrying of weapons on the person with the knowledge of the accused that the weapon was carried upon his person, and that the thing carried was a weapon. If the weapon was carried through restraint, or ignorance, or for any innocent or lawful purpose, such fact may be shown by the defense; it need not be negated in the indictment: *State v. Williams*, 70—.

2. Offenses against property.

a. Burglary and other breakings and enterings.

278. What constitutes breaking: The pushing open of a closed door is a sufficient breaking within the meaning of the law to constitute burglary: *State v. Reid*, 20-413.

279. Entry with intent: The crime of entering a dwelling-house in the night-time

Burglary and other breakings and enterings.

with intent to commit a public offense, as defined by statute, is included in the crime of burglary, so that under an indictment for the latter, defendant may be convicted of the former: *State v. Maxwell*, 42-208.

280. Indictment; description of property: The offense is against the owner of the building, and his name, and not that of the owner of goods, etc., therein, which the accused intended to steal, should be given in the indictment. If the name of such owner is not known, it should be so stated: *State v. Morrissey*, 22-158.

281. An indictment charging burglary in breaking and entering a house described as the property of a man whose wife owned the legal title, the property being occupied as a homestead, *held* proper, the possession being in the person named, as head of the family: *State v. Short*, 54-392.

282. Where the indictment charged that the building broken and entered was the property of H., *held*, that proof that H. was in possession as tenant was sufficient proof of ownership: *State v. Golden*, 49-48.

283. Burglary is an offense against the possession. At common law the ownership was required to be laid in the tenant or person in possession, and this rule is not changed by any provision of statute, although under Code, § 4302, it would probably be immaterial whether the possession was laid in the land owner or the tenant if the offense was in other respects sufficiently described: *State v. Rivers*, 68-611.

284. In a prosecution for burglary, it is material only to prove that the person named in the indictment as owner was in occupancy and possession of the building: *State v. Teeter*, 69-717.

285. It is not necessary that the indictment for burglary should allege that some one was in the house at the time of the commission of the crime: *State v. Reid*, 20-413.

286. Time: In an indictment for burglary, *held*, that an allegation of breaking and entering on a certain day, in the night-time of said day, constituted a sufficient allegation that the offense was committed in the night-time: *State v. Ruby*, 61-86.

287. Intent: An indictment charging a breaking and entering with intent to commit larceny is sufficient without averring that the

intention was to steal property of a greater value than twenty dollars: *State v. Jones*, 10-206.

288. The fact that an indictment for burglary does not charge the breaking and entry as "burglarious" does not render the indictment bad. The breaking and entering with the required intent constitute the crime: *State v. Short*, 54-392.

289. While an indictment under § 3894 of the Code defining the crime of breaking and entering a building in which goods are kept for use, sale or deposit, with intent, etc., may be similar to an indictment for burglary, yet the use of the words mentioned by the statute as peculiarly descriptive of the former crime will be sufficient to indicate that that crime and not the crime of burglary is intended to be charged: *State v. Franks*, 64-39.

290. Burglary and larceny, the latter committed in connection with the former, are distinct offenses and not parts of a compound offense: *State v. Ridley*, 48-370.

An indictment charging the breaking and entering and also the commission of a specific crime, such as larceny, does not charge two crimes in such sense as to be bad for duplicity: See *infra*, §§ 982-986.

291. Evidence: Proof of a larceny committed after the breaking and entering is admissible as showing the intent with which the breaking and entry were committed: *State v. Golden*, 49-48.

292. The fact of the breaking and entry may be considered in determining the intent with which the breaking and entry were committed, in connection with the other circumstances of the case: *State v. Teeter*, 69-717.

293. The possession of goods recently stolen in connection with the commission of a burglary is not of itself sufficient evidence upon which to find defendant guilty of the burglary: *State v. Shaffer*, 59-290; *State v. Tilton*, 63-117.

294. But such possession, in connection with other evidence of guilty conduct, such as the possession of burglarious tools, etc., is *prima facie* evidence of guilt, sufficient to convict: *State v. Reid*, 20-413.

295. The mere possession of goods stolen from the building in which the burglary is alleged to have been committed does not

Arson and statutory burnings.—Larceny.

have the same tendency to connect the person found in the possession of such goods with the burglary, as it does with the larceny, and is not *prima facie* evidence of guilt of the burglary; but when it is shown that the two offenses were committed at the same time, and by the same person, the fact of the possession of goods stolen at that time from the building has necessarily the same tendency to prove the person in possession thereof guilty of burglary as of the larceny: *State v. Rivers*, 68-611.

296. Possession of burglarious tools within a few hours after the commission of the crime of burglary may be proven as tending to connect defendant with the commission of the crime, and such evidence is admissible for that purpose although it shows in itself a distinct substantive offense: *State v. Franks*, 64-39.

297. The intent being made a necessary element in the crime of burglary, intoxication may be weighed by the jury in considering whether such intent existed: *State v. Bell*, 29-316.

298. One who receives the stolen goods from a burglar is not an accomplice in the crime of burglary: *State v. Hayden*, 45-11.

b. Arson and statutory burnings.

299. Indictment: An averment that defendant set fire to certain material in the store of a person named is not sustained by proof that he set fire to such material in a building owned by such person but in a room occupied by a tenant as a store: *State v. Tenny*, 9-436.

300. But in such case an averment that the fire was applied in a room within the store building of such person, *held* proper: *Ibid*.

301. An indictment charging defendant with burning a certain "building, etc., called a barn," *held* sufficient, though in fact the building was not a barn but only a shed: *State v. Smith*, 28-565.

302. Attempt: Under a statutory provision for the punishment of any person setting fire to any material with intent to cause any building, etc., to be burnt, *held*, that one who was charged with setting a lighted candle in hay and other combustible material with in-

tent to burn was sufficiently charged with such crime although neither the barn nor the material was ignited nor burned: *State v. Johnson*, 19-230.

Setting out fire: As to liability in damages for setting out fire by which the property of another is injured or destroyed, see NEGLIGENCE, §§ 42-49.

c. Larceny.

303. Felonious taking: To constitute larceny, the property must have been feloniously taken from the owner without his consent, or obtained by false representations, etc. If given by the owner to the defendant by virtue of his employment as agent, servant, or otherwise, and afterwards converted, the offense is embezzlement: *Ennis v. State*, 3 G. Gr., 67.

304. A felonious taking is a taking without color of right or excuse for the act, and it may safely be said that there was no color of right or excuse if the defendant knew that he had no authority to take the property, and with this knowledge he knowingly carried it away and converted it to his own use: *State v. Rivers*, 60-381.

305. A taking from the person is not necessary to constitute larceny (a special penalty therefor being provided in Code, § 3905), and picking up money dropped by another, with unlawful intent, and converting the same to one's own use without the knowledge of the owner, is sufficient to constitute the offense: *State v. Pratt*, 20-267.

306. If the original possession of the property was innocent, a subsequent conversion will not constitute larceny: *State v. Wood*, 46-116.

307. Where an auctioneer employed to sell impounded animals sold one of them as his own, and it was taken away by the purchaser, *held*, that there was sufficient taking to constitute larceny on the part of the person selling: *State v. Hunt*, 45-673.

308. A pledgee has such special property in the thing pledged that a taking from him by the pledgor may be larceny: *Bruley v. Rose*, 57-651.

309. Intent: Taking property into possession with intent to appropriate it is larceny, although the property is afterward let go,

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the latter fact being proper to be considered by the jury in determining the intent with which possession was taken: *Georgia v. Keppord*, 45-48.

310. To warrant a conviction for larceny, the prosecution should show that possession was taken with the intent then existing in the mind of defendant to steal the property. Such intent, however, may be shown by subsequent acts and conduct: *State v. Wood*, 46-116.

311. If one sell or dispose of the property of another under the well founded, though erroneous, belief that he is authorized so to do, he is not guilty of larceny: *State v. Barrackmore*, 47-684.

312. The act of an employee in giving away the employer's property, although without authority, may not necessarily constitute larceny, if the circumstances are such as to negative a criminal intent: *Mielenz v. Quasdorf*, 68-726.

313. In a prosecution for larceny of two colts, *held*, that evidence that the sale of the colts by a former owner to the prosecutor was a mere sham, and that they had afterward been sold by such former owner to defendant, should have been admitted: *State v. Waltz*, 52-227.

314. A pretended claim that money taken is due for services will not constitute a defense if it appears from the circumstances that such claim was a sham and that defendant intended to fraudulently appropriate the money: *State v. Bond*, 8-540.

315. Lost property: To render the finding or conversion of lost property larceny, it must be shown that the person so finding and converting knew the owner of the property: *State v. Taylor*, 25-273.

316. The crime of larceny as to lost property consists in the original taking and not in a subsequent lack of diligence in attempting to find the owner, nor in a subsequent conversion. The omission to take the steps required by statute for the finding of the owner will not render the party guilty of larceny, if the owner was not known at the time of the taking: *State v. Dean*, 49-73.

317. If one picks up a pocket-book which has been dropped from the pocket of the owner, and with an unlawful intent converts it to his own use without the knowledge of

the owner, he is guilty of larceny: *State v. Pratt*, 20-267.

318. Ownership: In an indictment for larceny of chattels in which a person has a special property or which he holds in trust, the ownership may be laid in either the general owner or the one having the special property: *State v. Mullen*, 30-203.

319. The ownership of property need not be shown to have been in the party from whom it was taken, if it was in his possession: *State v. Stanley*, 48-221.

320. In the case of larceny of property in the possession of a receiver, the indictment may properly lay the ownership of the property in the receiver: *State v. Rivers*, 60-381.

321. From possession of officer: Larceny from a receiver in possession of property is not from the possession of an officer, in such sense as to constitute that specific crime as defined by statute: *Ibid*.

322. As intoxicating liquors seized by an officer on a warrant for their forfeiture are not subject to replevin, it would be a crime under the statute providing for the taking of goods from an officer to take possession of them under such a writ: *State v. Harris*, 38-242.

323. What property subject to larceny: A raccoon is not subject to larceny: *Warren v. State*, 1 G. Gr., 106.

324. Intoxicating liquors, although kept for sale contrary to law, are subject of larceny: *State v. May*, 20-305.

325. "Money" and "bank notes" are subjects of larceny: *State v. Carr*, 43-418:

326. Indictment; description of notes or bills: An indictment describing money and notes as "gold and silver coin" and "Clark's Exchange Bank bills of the value of," etc., *held* sufficient: *Munson v. State*, 4 G. Gr., 483.

327. So, also, an indictment *held* sufficient which charged the taking of "a promissory note for the payment of money, commonly called a bank note, purporting, etc., of the value of," etc.: *State v. Bond*, 8-540.

328. So also one charging the larceny of "\$180 in bank notes, usually known and described as greenbacks:" *State v. Hockenberry*, 30-504.

329. So *held*, also, where the property was described as bank bills of the amount and

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value of, etc., "the number and denomination of which are to the jury unknown:" *State v. Hoppe*, 39-468.

330. It is not required that, in an indictment for larceny of an instrument in writing, the property shall be more particularly described than any other stolen property; therefore, *held*, that an indictment charging that defendant took, etc., a bill of exchange, to wit, an order for the payment of money (describing it), and of the value of \$20.97, was sufficient: *State v. Pierson*, 59-271.

331. Where the indictment alleges the value of a check charged to have been stolen, such allegation must be taken as equivalent to an allegation that the instrument called for at least that amount of money: *Ibid*.

332. Indictment for larceny from a bank, describing the property as seven one hundred dollar notes, of the value and denomination of one hundred dollars each, consisting of national bank notes, national currency notes, called greenbacks, and all of the aggregate value of seven hundred dollars, *held* sufficient as to description: *State v. Graham*, 65-617.

333. Evidence: A pertinent, well-connected chain of circumstances, showing that certain money found is the same as that taken from the prosecutor, is sufficient evidence of larceny of such money from him, although he cannot identify any of the particular bills: *State v. Hoppe*, 39-468.

334. In a particular case, *held*, that the evidence was sufficient to identify the bills found on the person of defendant to be the same as those charged to have been stolen from the prosecutor, the general appearance, manner of folding and denomination of the bills being the same: *State v. Buckley*, 60-471.

335. Proof that defendant charged with the larceny of bank notes, and in whose possession notes resembling those stolen were found soon after the larceny, had money of the same denomination some two or three months before the larceny was committed, would not be admissible in behalf of defendant: *State v. Graham*, 65-617.

336. Evidence in particular cases *held* sufficient to sustain a conviction for larceny: *State v. Lillard*, 59-479; *State v. Day*, 60-100.

337. *Corpus delicti*: Where the evidence in a prosecution for larceny showed that the horse charged to have been stolen was put into the stable at night and was gone the next morning, *held*, that the *corpus delicti* was sufficiently proven: *State v. Rodman*, 62-456.

338. Circumstantial: In a prosecution for larceny, *held* proper to instruct the jury that the evidence to establish the facts necessary to convict the defendant may be direct or circumstantial, or partly direct and partly circumstantial: direct, as by persons who saw the act; or circumstantial, as by evidence of facts from which the guilt of defendants may be fairly presumed: *State v. Brady*, 27-126.

339. Proof of non-consent: The rule requiring the production of the best evidence of which the nature of the case admits would require the introduction of the owner of the stolen goods to prove his non-consent to the taking except in cases where the property is stolen from a bailee, or some other person holding possession thereof, or where it is impossible to produce the evidence of the owner: *State v. Osborne*, 28-9.

340. Proof of intent: In a prosecution for larceny, defendant offered to prove by one at whose house he stopped that his acts were such as to show that it was not his intention to steal the property; *held*, that such offer was too indefinite and the evidence was properly excluded: *State v. Hart*, 29-268.

341. Recent possession of stolen property: Possession of the stolen property immediately after a larceny is presumptive proof that the party so in possession is guilty of the larceny: *State v. Brady*, 27-126; *State v. Golden*, 49-48.

342. Such presumption is sufficient to convict unless rebutted: *State v. Hessians*, 50-135.

343. Recent possession of stolen property, unexplained, is evidence of guilt: *Johnson v. Miller*, 63-529.

344. But such possession is presumptive proof only after the stealing has been proved: *State v. Taylor*, 25-273.

345. The possession must be recent in order that it shall be admissible in evidence to prove the guilt of the accused: *Warren v. State*, 1 G. Gr., 106.

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346. What is to be deemed recent possession depends very much on the character of the goods stolen. If they are such as to pass readily from hand to hand, the possession, in order to raise a presumption of guilt, should be much more recent than if they are of a class of property which circulates more slowly or is rarely transmitted: *State v. Walker*, 41-217.

347. There may be cases where the possession is so long after the commission of the crime that the court will refuse to submit the question to the jury, deciding as a matter of law that the possession is not recent, but in all other cases the question is one of fact: *Ibid.*

348. In a particular case, *held*, that an instruction directing the jury that, as a matter of law, proof of possession of part of the stolen goods four months after the commission of the crime was recent possession from which a strong presumption of guilt arose, unless such possession was satisfactorily explained, was erroneous: *Ibid.*

349. The admission of defendant that ten months previous to the time the property is found in his possession he had no such property does not show the possession of the property to be recent in such sense as to throw upon him the burden of explaining such possession: *State v. Wallace*, 47-660.

350. To warrant conviction of defendant on proof of subsequent possession of the stolen property, the identity of the property should be satisfactorily established: *State v. Osborne*, 45-425.

351. In a particular case, *held*, that the method of finding the goods at a place not in the dwelling-house of the defendant, and under circumstances indicating a knowledge on the part of others as to their location, were sufficient to prevent the recent possession relied upon from being satisfactory evidence of guilt: *Warren v. State*, 1 G. Gr., 106.

352. Where a stolen horse when found soon after the larceny was being ridden by a traveling companion of the defendant, *held*, that evidence of such fact was a circumstance tending to prove defendant's guilt, and sufficient to warrant his conviction: *State v. Pennymann*, 68-216.

353. It seems that where the party in whose possession recently stolen goods are

found claims to have bought them of a real person, naming him, or of the thief, when there was no previous acquaintance or evidence of collusion, such explanation must be negatived by the state; but an explanation by such party that he bought of a stranger is not sufficient to oblige the state to disprove the statement before the presumption of guilt will arise: *State v. Brown*, 25-561.

354. The person charged with larceny may explain his possession of stolen property by showing what was said to him at the time he acquired possession: *State v. Jordan*, 69-506.

355. Evidence of recent possession of stolen property and falsity of explanations made thereof, *held* sufficient in a particular case to warrant a conviction: *State v. Hallett*, 68-259.

356. While the presumption of guilt from recent possession, being recognized by the law, may be termed a presumption of law, it may also be termed a presumption of fact, as implying that from such fact the law will raise a presumption: *State v. Kelly*, 57-644.

357. The presumption arising from the recent possession of stolen goods may be overcome by testimony establishing facts inconsistent with guilt. Good character may serve in some cases to overcome such presumption: *Ibid.*; *State v. Richart*, 57-245.

358. Where the prosecution relies upon possession by defendant of recently stolen property, the defendant is not required to overthrow such presumption by a preponderance of evidence of the honesty of such possession. Evidence sufficient to raise a reasonable doubt in his favor is sufficient: *State v. Richart*, 57-245; *State v. Emerson*, 48-172.

359. In such cases it is sufficient to authorize an acquittal if the evidence is such as to raise a reasonable doubt whether defendant honestly came into possession of the stolen goods. An instruction that the jury should acquit if the evidence left it reasonably doubtful whether defendant acquired the possession by theft, *held* correct: *State v. Peterson*, 67-564.

360. If the jury fail to find from the evidence that defendant was in any manner engaged in the larceny of the property they should acquit, although he has failed to show that he came honestly into possession: *State v. Jones*, 33-9.

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361. The fact that recent possession of stolen property has not been explained in a manner consistent with defendant's innocence will not in itself necessarily establish his guilt: *State v. Jordan*, 69-506.

362. Possession of other stolen property than that for the larceny of which defendant was on trial, held admissible, not as showing the commission of another crime, but as contradicting the explanation made by defendant as to the possession by him of the property stolen in the commission of the larceny for which he is on trial: *State v. Ditton*, 43-677.

363. Recent possession of property acquired by breaking into a store-room, if not explained, raises the presumption that the breaking and entering were with intent to commit larceny: *State v. Golden*, 49-48.

364. Grand and petit larceny: There are not two degrees in the crime of larceny, but only in the punishment; and a conviction for petit larceny bars a subsequent prosecution for grand larceny: *State v. Murray*, 55-530.

365. So, also, a conviction for petit larceny bars a prosecution for larceny from the person: *State v. Gleason*, 56-203.

366. Under an indictment for larceny of property of greater value than twenty dollars, defendant may be convicted upon proof of a larceny of part of the property less than twenty dollars in value. The offense is the same: *State v. Hessian*, 58-68.

367. In a trial upon an indictment for larceny charging the value of the property as exceeding twenty dollars, it is not necessary to instruct the jury as to the difference in the degrees of the offense of larceny. They should merely be instructed to find the value of the property: *Ibid.*

368. The finding of the jury that the value of the property did not exceed twenty dollars will not deprive the court of jurisdiction, under an indictment for larceny, to impose the proper sentence for the lesser offense, although larceny of goods less than twenty dollars in value is a misdemeanor exclusively cognizable before a justice of the peace: *State v. Church*, 8-252; *State v. Stingley*, 10-488.

369. Where the jury are in reasonable doubt as to whether the value of the property stolen exceeds twenty dollars in value,

they should only convict of the lesser crime: *State v. Wood*, 46-116.

370. Value of property stolen: The verdict on an indictment for larceny should fix the value of the property stolen, so that the court may know of which degree of the offense the defendant is convicted. If the verdict does not so fix the value, a new trial should be awarded: *Ray v. State*, 1 G. Gr., 316.

371. Such new trial will not be unlawful as putting the defendant twice in jeopardy. (Const., art. I, § 12): *State v. Redman*, 17-329.

372. The jury should be instructed to assess the value of the property at what it would bring in the market, and not at what it was worth to the owner: *State v. Smith*, 48-595.

373. The fact that the value of the property was over twenty dollars, as well as the stealing itself, must be made out beyond a reasonable doubt to warrant a conviction of the higher offense. A preponderance of evidence alone will not be sufficient: *State v. Wood*, 46-116.

374. The question whether the offense is to be tried as a felony or a misdemeanor is to be determined by the value of the property as stated in the indictment or information, and not by the value as found by the trial jury: *State v. Church*, 8-252.

375. It is error to instruct the jury that the question is as to the value of the property to the owner. The true rule is the real value of the property in the market: *State v. Smith*, 48-595.

376. Where the testimony as to the value is conflicting, the supreme court will not reverse the case unless there is such want of evidence in support of the verdict as to give rise to the presumption that it was not the result of an honest and intelligent exercise of judgment by the jury: *State v. Scott*, 48-597.

377. Venue: Where property is stolen within the jurisdiction of another state and brought within this state, the offense is punishable as larceny in this state on the principle that the continued possession of property stolen is in itself larceny. Every act of the thief in the removal of the property and keeping it from the possession of the owner is, in contemplation of law, an offense: *State v. Bennett*, 14-479.

Compound larcenies.—Embezzlement.

378. In an indictment for larceny the venue may be laid in any county in which the thief was possessed of the stolen goods: *State v. Lillard*, 59-479.

379. Recovery of stolen property: Where stolen property is sold to a third person and afterwards retaken from him by the owner, he may recover the price paid in an action against the seller, even though the seller has not been convicted of the larceny: *Barton v. Faherty*, 3 G. Gr., 327.

d. Compound larcenies.

380. Nature of: Code, §§ 3903-3905, merely points out certain circumstances which are an aggravation of the offense of larceny, and will subject the offender to a severer penalty. The facts of the time and place of the commission affect only the degree of punishment which shall be imposed upon the offender: *State v. Elsham*, 70—.

381. Larceny from a dwelling-house in the night-time and in the day-time are not different offenses; but each differs from simple larceny only in the circumstances affecting the degree of punishment, and they may be charged in the same indictment: *Ibid.*

382. Where defendant was indicted for stealing personal property of less than twenty dollars in value from a dwelling-house in the day-time, *held*, that the offense was one within the jurisdiction of the district court: *State v. Dawson*, 17-584.

383. An acquittal of larceny from a dwelling-house in the night-time prevents a subsequent prosecution for robbery in the same transaction, as each includes the crime of larceny: *State v. Mikesell*, 70—.

384. Larceny from the person: A prior conviction or acquittal of the offense of larceny will bar a subsequent trial for larceny from the person committed in the same transaction charged on the first trial. Stealing from the person is larceny and nothing more: *State v. Gleason*, 56-203.

385. All the elements of the crime of larceny from the person are embraced in the crime of robbery as defined by statute. The fact that the evidence shows the additional element of putting in fear, such as to make the act robbery, will not prevent the punishment of defendant in a prosecution for larceny from the person: *State v. Graff*, 66-482.

386. Common thief: Under a statute providing that, if a person previously convicted of larceny commits another larceny or is convicted therefor, or is at the same term of court convicted of three distinct larcenies, he shall be deemed a common and notorious thief and subject to a punishment greater than that for larceny, *held*, that the punishment prescribed should be inflicted when the facts authorizing it appeared on the trial of the accused for larceny, and that the statute did not describe a distinct crime or contemplate that the indictment should state the facts necessary to show the accused to be a common and notorious thief or charge him with being such: *State v. Riley*, 28-547.

e. Embezzlement.

387. By public officer: The statute (Code, § 3908) making it criminal in a public officer to loan, convert, use or invest public moneys in his hands, differs from the statute (Code, §§ 911, 912) providing a penalty for loaning out public funds for private purposes, in this: that the latter sections contemplate cases where no loss results, while the former refers to cases where the money is unaccounted for. An indictment under the former section should allege that the money is unaccounted for: *State v. Brandt*, 41-593.

388. To constitute the offense of embezzlement described by Code, § 3908, just referred to, the money must have been both misapplied and lost, and the crime consists only in converting, using or loaning so much of the public money intrusted to the officer for safe-keeping as is taken and unaccounted for: *State v. Parsons*, 54-405.

389. It being provided that the boards of directors of independent school districts shall elect a treasurer, *held*, that an indictment against such treasurer, designating him as "treasurer of the board of directors of the independent school district of," etc., was sufficient: *Ibid.*

390. A deputy state treasurer is an officer within the meaning of the section just referred to: *State v. Brandt*, 41-593.

391. One who has acted *de facto* as a public officer cannot deny that he is such an officer when indicted for malfeasance: *State v. Stone*, 40-547.

392. Conversion is established by showing

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demand and refusal, unless a sufficient excuse is shown for such refusal: *State v. Bryan*, 40-379.

393. A county treasurer prosecuted for embezzlement may show that the defalcation took place at such time that the prosecution is barred by the statute of limitations, although, by fraudulent statements to the board of supervisors, he made it appear subsequently to such actual defalcation that he had on hand the necessary balance and that his accounts were correct. The rule of estoppel applicable in a civil action against the treasurer cannot be enforced in a criminal prosecution: *State v. Hutchinson*, 60-478.

394. The fact that the officers of a municipal corporation loaned the public funds in violation of the statute does not prevent the same being recovered in an action by the corporation against the person to whom they were so loaned or his surety: *District T'p v. Calvin*, 59-189.

395. By common carrier: The offense of embezzlement by a common carrier can only be committed upon property which has, within the language of the statute, "been delivered to be carried for hire:" *State v. Stoller*, 38-321.

396. By officer, agent or servant: To constitute the crime of embezzlement as defined by statute in case of officers, agents, clerks, servants, etc., there must exist the relation of master and servant, or employer and employee, and the property stolen or converted must have been received by virtue of such employment: *State v. Johnson*, 49-141.

397. Under the statutory provision (Code, § 3909) an agent of a corporation may be guilty of embezzlement, although he is under the age of sixteen years: *State v. Goode*, 68-593.

398. Under this section an agent may be guilty of embezzling his employer's money by actual conversion, or by secreting with intent to convert: *Ibid.*

399. Where the owner of a watch delivered it to another under an agreement that the latter was to trade it for a wagon and receive a certain sum as compensation for his services, *held*, that the relation between the parties was such that the wrongful conversion by the person intrusted with the watch

constituted embezzlement: *State v. Foster*, 37-404.

400. The clause of the statute, "without the consent of his employer," relates to the embezzling and converting as well as to the taking and secreting therein referred to, and the fact that the embezzling and converting is without the consent of the employer should be charged in the indictment: *State v. Foster*, 11-291.

401. Conversion may be shown either by direct proof of the fact of conversion or by proof of demand and refusal, but mere proof of the receipt of funds and failure to account therefor on demand, while sufficient to establish embezzlement by a public officer, under provisions above referred to, is not sufficient to show embezzlement by an agent or servant: *State v. Bryan*, 40-379.

402. The crime of embezzlement embraces all the elements of larceny except the actual taking of the property or money embezzled: *State v. Baldwin*, 70—.

403. Where the taking is not *animo furandi*, but the property is delivered to the defendant voluntarily while he is in the employ of the owner, and afterwards is appropriated by him, the crime is not larceny but embezzlement: *Ennis v. State*, 3 G. Gr., 67.

404. Where an agent, in order to make his books balance and cover up deficiencies on account of sums of money before appropriated to his own use, reported certain sums as unpaid which were in fact received by him, *held*, that he was guilty of embezzling such sums: *Bowman v. Brown*, 52-437.

405. "Money or property," as used in the statute, includes bills of exchange, etc. The crime of embezzlement as there defined is similar to that of larceny, and covers cases where, by reason of the trust reposed in defendant, the act would not be larceny at common law. Whatever would be property under one section would be under the other: *State v. Orwig*, 24-102.

f. Receiving stolen property.

406. Merely assisting the defendant by giving him his breakfast and feed for stolen horses, knowing that they were stolen, *held* not sufficient to warrant a conviction of this offense. The accused must have aided in

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concealing or hiding the property: *Upton v. State*, 5-465.

407. The fact of aiding in concealing stolen goods, knowing them to be stolen, necessarily implies a felonious intent: *State v. Turner*, 19-144.

408. The crime of concealing stolen property may be committed as to property procured by burglary or robbery as well as by larceny: *Ibid.*; *State v. Lane*, 68-384.

409. To receive stolen property, with knowledge of the theft, is sufficient to constitute the crime: *State v. Lane*, 68-384.

410. Evidence in a particular case, held sufficient to support a verdict for receiving and aiding in concealing, although no physical possession of the goods by defendant was shown: *State v. St. Clair*, 17-149.

411. Defendant's explanations in a particular case as to how he came into possession of the property being conflicting and unsatisfactory, a verdict of guilty of receiving stolen goods was held proper: *State v. Mayer*, 45-698.

g. Malicious mischief; trespass upon land; injuries to animals.

412. An indictment charging in one count that accused "injured and defaced" a building is not objectionable on the ground of duplicity. The clauses in the statute (Code, § 3985), being disjunctive, either one or all the acts there specified may be charged in one count and constitute the same offense: *State v. Hockenberry*, 11-269.

413. Malicious injury to a church building is punishable under this section of the statute, and it is sufficient to aver ownership in the trustees, as such, without setting out the character of their title: *State v. Brant*, 14-180.

414. Trespass upon land: A person may be punished for the crime of malicious trespass committed in cutting and carrying away timber from school land, although the title to the land is still in the United States: *Chalfont v. United States*, Mor., 214.

415. An indictment charging the cutting down and carrying away of standing timber upon the land of another is not sustained by proof that defendant carried away wood being on such land: *State v. McConkey*, 20-574.

416. The name of the owner of the land

upon which the trespass is charged to have been committed should be set out in the indictment, or, if unknown, the indictment should so state: *Ibid.*

417. Where the statute did not make the punishment of the offense of wilful trespass depend upon the value of the property, held, that the value of the property need not be found by the jury, as it did not necessarily fix the amount of punishment: *State v. Gigher*, 23-319. (But the present statute, Code, § 3983, makes the punishment less in case the value of the property does not exceed fifty dollars.)

418. Injuries to animals: An indictment alleging the malicious killing of a sow held sufficient, without alleging and proving that a hog is a domestic beast within the language of Code, § 3977: *State v. Enslow*, 10-115.

419. An indictment charging the maiming and disfiguring of an animal is not bad for duplicity; any one or all of the acts mentioned may be charged in the same indictment, and the proof need only cover so much of the allegation as constitutes a complete offense. To constitute the offense of disfiguring the disfigurement need not be permanent or great: *State v. Harris*, 11-414.

420. While mere wanton injury to an animal without malice against any person may not be sufficient to constitute the offense of malicious injury to animals, yet though the owner may be unknown, if the act is done maliciously, for the purpose and with the intent of injuring such person, it is sufficient: *State v. Linde*, 54-139; *State v. Williamson*, 68-351.

421. The infliction of a wilful and wanton injury upon an animal is evidence that the act is malicious both as to the animal and the owner: *State v. Williamson*, 68-351.

422. A party has no right to prevent malicious trespass by the use of means dangerous to life, or by inflicting great bodily injury, as by a spring gun: *Hooker v. Miller*, 37-613.

3. Cheating, fraud and conspiracy.

a. Cheating by false pretenses and otherwise.

423. False pretenses: The statute changes the common law rule as to cheats, and a per-

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son may be guilty of cheating by false pretenses, consisting of representations and acts, although no false tokens are used (Code, § 4073; *State v. Reidel*, 26-420.

424. The crime of cheating by false pretenses may be committed by means of false representations. Therefore, *held*, that the indictment charging defendant with obtaining the signature of prosecutor to a promissory note, by means of false representations and pretenses that such note was an order for a certain number of patent churns, etc., well knowing such representations to be false, was sufficient: *State v. Joaquin*, 43-131.

425. A false promise will not sustain the charge of a crime under this section. There must be a pretense and representation, in fact, that is false, and which was relied upon by the party defrauded; but the fact that a false promise was combined with the false pretense does not take away the criminal character of the act: *State v. Doue*, 27-273.

426. So, where a party, under the pretense of having come to pay a debt, on a promise to pay the same, fraudulently procured from his creditor and got into his possession a receipt for his debt, *held*, that the facts constituted an offense as here contemplated: *Ibid*.

427. An indictment for this offense cannot be predicated upon representations which are mere matters of opinion: *State v. Webb*, 26-262.

428. An indictment charging that by means of false token and pretenses, etc., the defendant obtained the property described, *held*, to sufficiently charge that the party to whom the pretense was made relied thereon: *State v. McConkey*, 49-499.

429. By statute (Code, § 3006) it is made larceny to obtain property by falsely personating another with intent to convert such property to one's own use. Such a case would not be larceny at common law, as it does not involve a trespass: *State v. Brown*, 25-531.

430. Where defendant was indicted for obtaining property in exchange for a lot of a certain description which he pretended to point out, but it was in fact located elsewhere than was indicated and was of no value, *held*, that the party to whom the lot was shown was justified in believing the lot described was located as indicated, and that it

was not error to refuse to instruct the jury that it must be shown that the party to whom the representations were made exercised ordinary prudence and diligence to inform himself of the truth of the representations: *State v. McConkey*, 49-499.

431. Also *held* that in such case the crime would have been complete, even if it had appeared that defendant was the owner of the lot which he pointed out as that conveyed by him: *Ibid*.

432. Representations made by acts or declarations intended to induce the belief that the person making them is some one else may be sufficient to constitute the crime, although not amounting to direct representations that the party's name is that of the person whom he personates: *State v. Golle*, 60-447.

433. False promises, coupled with false statements of fact, may amount to false pretenses: *State v. Montgomery*, 50-195.

434. The question is for the jury whether the false representations actually misled the person claimed to have been defrauded, and in determining that question they should take into account his age, experience, state of health, etc.: *Ibid*.

435. Where defendant had borrowed money on the representation that his brother was to arrive with money, coupled with the promise to use it in payment of the sum borrowed, *held*, that such representation and promise amounted to a pretense that he had the money: *State v. Fooks*, 65-196.

436. To support a conviction, it need not appear that the false pretenses were the only inducements for giving credit or delivering property to the accused. It is sufficient if they had such effect that without their influence upon the mind of the party defrauded he would not have parted with the property or given credit: *Ibid*.

437. If the false representations are made with the design of deceiving and thereby obtaining property, and have that effect, the guilty party cannot escape on the ground of weak credulity: *Ibid*.

438. Where defendant procured property by representing that he had purchased a farm in the neighborhood, *held*, that the crime was committed: *State v. Fooks*, 65-452.

439. Where a buyer acquires property by

Cheating by false pretenses and otherwise.

reason of statements by him to the seller respecting his condition, made to induce the sale, which statements he knows to be false, it is no defense that he nevertheless intended to pay for the property: *State v. Neimeier*, 66-634.

440. Indictment: In a particular case, *held*, that the indictment sufficiently charged that the party defrauded parted with his property on the faith of defendant's false representations: *Ibid*.

441. In an indictment for obtaining money under false pretenses, the false pretenses should be particularly set forth: *United States v. Ross*, Mor., 164.

442. Sentence: In a trial for obtaining money under false pretenses, the jury should be told that it is necessary to prove that defendant made the false representations, knowing them to be false, and that the other party was deceived and thereby induced to act: *State v. Rivers*, 58-102.

443. Evidence; other acts: Where defendant was indicted for false pretenses in procuring a bank to accept as collateral security an invalid mortgage, *held*, that previous and subsequent dealings with the bank might be shown as throwing light upon the intent of the defendant and the fact as to whether the cashier was in fact deceived: *Ibid*.

444. Obtaining property: To constitute the crime, the person must have obtained, by means of the false pretenses, either the title to the property, or the unqualified right of possession thereof, for some length of time: *State v. Anderson*, 47-142.

445. Obtained an indorsement of credit on a note by false pretenses, with intent to defraud, does not constitute an offense under this section: *State v. Moore*, 15-412.

446. An indictment charging the obtaining by false pretenses of certain notes, designating them as property, and in a second count charging the obtaining in the same manner of the same notes, but designating them as written instruments, the false making of which would be forgery, does not charge two offenses. Such charges might be contained in the same count without rendering the indictment bad for duplicity: *State v. House*, 55-466.

447. That the false representations were made in another county will not prevent the

offense being punishable in the county where the property was obtained. The latter county is the one where the offense was committed: *Ibid*.

448. Gross frauds and cheats: Punishment is provided by statute (Code, § 4081) for gross frauds and cheats, and under this provision all frauds and cheats are certainly not punishable. Slandorous words charging a person with cheating, defrauding, etc., are, therefore, not actionable *per se*: *Lucas v. Flinn*, 35-9.

449. Sleight of hand: The statute (16 G. A., ch. 102; McClain's Ann. Stat., 1031) providing a punishment for swindling by three-card monte, sleight of hand, or other device, etc., embraces any sleight of hand performance, whether done by the use of cards or other devices: *State v. Quinn*, 47-368.

450. False brands: The fact of making and branding, with intent to deceive, without reference to whether the articles so marked or branded are to be sold or not, is sufficient to constitute a crime under the statute providing a punishment for the false marking or branding of packages: *State v. Burge*, 7-255.

451. False receipts: Where an auditor gave a paper purporting to be a certificate or receipt stating that a person had paid to the treasurer of the county certain interest due the school fund, which statement was false, *held*, that the giving of such paper was a crime under the statutory provision (Code, § 3908) relating to the giving of false receipts, and that an intent to defraud need not be charged: *State v. Morse*, 52-509.

452. Disposing of property covered by warehouse receipt: Under the statutory provision (Code, § 4088) prohibiting the selling, shipping, or removal by a warehouseman or other such person of any property received for safe-keeping and for which a voucher or receipt has been given, without the written consent of the person holding such receipt, it is not competent for a defendant charged with such crime to show that the shipment or disposal of the property was with the knowledge or verbal consent of the person holding the receipt. The provision is intended for the protection of the community as well: *State v. Stevenson*, 52-701.

Wrongful disposal of property.—Conspiracy.

b. *Wrongful disposal or conversion of property; selling mortgaged property.*

453. Fraudulent conveyance: The intention to hinder and delay creditors is the essential element of the crime defined by the statutory provision prohibiting the conveyance, etc., of property with intent to defraud creditors, and an instrument such as is referred to in the statute is void (Code, § 4074): *Davenport v. Cummings*, 15-219.

454. To establish the crime, a fraudulent intent in fact, as distinguished from an intent which may be presumed in law, must be shown: *Lillie v. McMillan*, 52-403.

455. The intention with which a conveyance is made cannot render the act criminal, if no legal or equitable rights of others are affected thereby. The statute applies only to cases where some one has or may have a claim or right to the property which may be enforced at law or in equity: *Day v. Lown*, 51-364.

456. Selling mortgaged property: The indictment under the statutory provision for the punishment of the illegal sale of mortgaged property (Code, § 3895) should aver that the mortgage remains unsatisfied: *State v. Gustafson*, 50-194.

457. The consent of the mortgagee, as referred to in the statute, while it prevents the act from being a crime, does not constitute a waiver of his lien on the property: *Oswald v. Hayes*, 42-104.

458. It is the selling of mortgaged property without the consent of the then holder of the mortgage that is made criminal. Consent of the mortgagor given before the execution of the mortgage, that the mortgaged property may be sold, may, however, constitute a continuing consent, at least until the act consented to could properly be done, and may prevent an act in accordance with such consent from being criminal. The rule as to the inadmissibility of parol evidence to contradict a written contract is not applicable in such case. If the consent is such, in whatever way it may be given, that the seller honestly believes that he is authorized to sell the property, his honest act cannot be converted into a criminal one by the rules of evidence: *Walker v. Camp*, 69-741.

459. Where a mortgage of personal property provided that, if the mortgagor removed it from the county, the mortgagee might take possession of and sell it, *held*, that a mere removal from the county would constitute no offense under this section, and a subsequent concealment or sale would not be an offense in the county where the mortgage was executed; but it seems the offense would be committed in the county from which the property was thus subsequently taken for the purpose of concealment and sale: *State v. Julien*, 48-445.

460. A subsequent mortgage of the same property by the mortgagor is not void under this statutory provision: *Tootle v. Taylor*, 64-620.

461. Driving away stock: Under the statute providing a penalty for the driving away of stock without the consent of the owner and allowing the recovery of damages therefor (Code, § 3896), it is necessary, in order to recover damages as provided, to allege and prove that defendant had knowledge of the fact that the animal entered his drove and was being taken away: *Chamberlain v. Gage*, 20-303.

c. *Conspiracy.*

When actionable, see CONSPIRACY.

462. What constitutes: To constitute the crime of conspiracy, the accused must confederate together to do, either a criminal act, or an act which is not criminal by criminal means. In the latter case the acts constituting the illegal means must be specifically charged: *State v. Potter*, 28-554; *State v. Stevens*, 30-391; *State v. Jones*, 13-269.

463. In order that the object of the conspiracy may be criminal, the injury intended should appear on the face of the indictment to be a criminal one, such an injury as the statute makes an offense: *State v. Stevens*, 30-391.

464. An indictment charging conspiracy with fraudulent intent wrongfully to injure the character of prosecutrix by obtaining a divorce from her by making false charges of adultery, etc., does not charge facts sufficient to constitute conspiracy as against such prosecutrix: *Ibid*.

465. Where the conspiracy is to do a criminal act, it is sufficient if it be described by

Conspiracy.— Forgery and counterfeiting.

the proper name or term by which it is usually known in law: *State v. Potter*, 28-554; *State v. Savoye*, 48-562.

466. Therefore, *held*, that an indictment charging a conspiracy to seduce prosecutrix was sufficient, without alleging that she was unmarried and of previously chaste character: *State v. Savoye*, 48-562.

467. An indictment charging defendants with conspiracy to procure prosecutrix to go with them with a view of bringing about a sham marriage and thus causing her seduction, *held* sufficient to charge a conspiracy to commit a crime: *Ibid*.

468. A charge that defendants conspired to "cheat and defraud," *held* not sufficient to charge the crime of conspiracy: *State v. Jones*, 13-269.

469. Where the intended act charged is not criminal, the indictment should charge with what means the act was to be done; but if the intended act charged is criminal, an indictment charging a conspiracy to commit such injury need not charge the means intended to be used: *State v. Ormiston*, 66-143.

470. While the offense of conspiracy may be complete without the commission of the overt act which the conspirators agreed to commit, and it is unnecessary to charge the commission of the overt act, even if committed, yet it is usual to set out the commission of the act by way of aggravation of the offense; and where the overt act is thus charged, it does not follow necessarily that the indictment is designed to charge anything more than conspiracy, and if it does not appear that defendant was or was intended to be put on trial for anything but the crime of conspiracy, such indictment will not be defective as charging more than one crime: *Ibid*.

471. An allegation that defendants conspired to assault a person with intent to inflict great bodily injury charges conspiracy to assault and inflict such injury, and is not open to the objection of charging conspiracy with intent to intend: *Ibid*.

472. The crime is completed when the conspiracy is formed, and it is immaterial whether the object intended be accomplished or not: *State v. Savoye*, 48-562.

473. A conspiracy to take from an offi-

cer on a writ of replevin intoxicating liquors seized under information for their forfeiture is a conspiracy to do an unlawful act, and therefore punishable by statute: *State v. Harris*, 38-242.

474. A charge of conspiracy to injure the property of another will not be supported where it appears that the acts complained of were done in the exercise of an avowed legal right, the existence of which the testimony strongly, if not conclusively, establishes, and that they were not done as a result of a conspiracy to wrongfully injure said property: *State v. Flynn*, 28-26.

475. The combination and agreement of the parties to commit a crime may be proven by the circumstances connected with the transaction which is the subject of the accusation. In other words, conspiracy may be shown by circumstantial evidence: *State v. Sterling*, 84-443.

476. An indictment for a conspiracy to "rob and steal" is not bad as charging more than one offense. Even should the conspiracy contemplate the commission of several distinct felonies, the crime would be single: *Ibid*.

As to how far the acts and declarations of one conspirator are receivable as against another, see *infra*, §§ 1479-1484.

4. Forgery and counterfeiting.

477. Forgery defined: Forgery is the feloniously making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability: *State v. Johnson*, 26-407; *State v. Thompson*, 19-299.

478. In a prosecution for forgery in altering a receipt, the fact that defendant could not reap any personal advantage from the alteration is not a defense; the making or alteration of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery: *State v. Wooderd*, 20-541.

479. The criminal intent, inferred from forging an instrument and using it in support of a claim, cannot be negated by proof that the claim is a just one: *Ibid*.

480. In order to constitute forgery it is not necessary that the signature of the instru-

Forgery and counterfeiting.

ment be false; a fraudulent alteration, making the instrument such as was not signed by the maker, is sufficient: *Caulkins v. Whisler*, 29-493.

481. Alteration of an undated receipt by affixing a date thereto, so as to make it appear as a receipt for a subsequent account, is sufficient to constitute forgery: *State v. Maxwell*, 47-454.

482. The detaching of a condition from an instrument, by which it is converted from a non-negotiable to a negotiable instrument, held to constitute forgery: *State v. Stratton*, 27-420.

483. Where the defendant counterfeited the certificate of a justice of the peace as to the presentation and destruction of gopher scalps, for which a bounty is allowed by statute, held, that the act was sufficient to constitute forgery: *State v. Johnson*, 26-407.

484. To constitute forgery of a bill of exchange or order, it is not necessary that it contain the name of a payee or drawee. It is sufficient that it purports to create a liability against the person signing it: *State v. Bauman*, 52-68.

485. In a prosecution for forgery, held, that a particular instrument therein set forth sufficiently purported to create a liability against the person whose name was written thereto: *Ibid.*

486. It is not necessary to aver the genuineness or validity of the instrument forged. The essence of the crime consists in the doing of the act with intent to defraud. If the writing is invalid on its face, it cannot be the subject of forgery, but it may be if the invalidity must be made out from extrinsic facts: *State v. Pierce*, 8-231; *State v. Johnson*, 26-407.

487. The forwarding of a forged application for insurance by an insurance agent for the purpose of procuring the commission due to him upon such application, held to constitute forgery although the company refused to issue a policy upon such application: *Fountain v. Smith*, 70—.

488. The alteration of an unsigned indorsement, on the back of a note, of money paid, will not constitute forgery, where it does not appear but that such indorsement was a mere private memorandum made by the holder

and not intended as a receipt: *State v. Davis*, 53-252.

489. The act of one who is intrusted with the making of an instrument, and who fraudulently makes a promissory note which is voluntarily signed by the other party, is not such a fraudulent making of the note as to constitute forgery: *Douglass v. Matting*, 29-498.

490. Where the indictment charged the forgery of an instrument signed by "Wright and Whaley," and the instrument when offered in evidence appeared to be signed "Wright Whaley," and it also appeared that this signature was an attempted signature of "Wright and Whaley," held, that the instrument was properly admissible: *State v. Nichols*, 38-110.

491. An indictment alleging in substance that the defendant falsely and feloniously, and with intent to defraud, made a negotiable promissory note, describing it and setting out a copy, is sufficient to charge the crime: *State v. Stuart*, 61-203.

492. The instrument should be set forth in the indictment, or some excuse for not doing so should be shown, but no technical form of words is necessary: *State v. Johnson*, 26-407.

493. It is not necessary that the indictment allege the name of the person to whom the instrument was uttered: *State v. Hart*, 67-142.

494. Forgery, and uttering and publishing as true a forged instrument, are distinct offenses, and an indictment charging both is bad for duplicity (overruling *State v. Nichols*, 38-110): *State v. McCormack*, 56-585.

495. Evidence: On a trial for the forgery of receipts, it is competent to show the payment of the indebtedness receipted for: *State v. Wooderd*, 20-541.

496. While proof of another act of forgery or uttering forged paper may be introduced, it is doubtful whether it ought not to be confined to a case where the former transaction was with reference to paper of the identical character of that involved in the act charged: *State v. Saunders*, 68-870.

497. When such other transaction is sought to be shown in evidence, it must appear that in the transaction a crime was committed: *Ibid.*

498. And it is necessary that the other in-

Forgery and counterfeiting.— Offenses against public justice.

strument referred to must be produced or its absence accounted for: *Ibid.*; *State v. Breckinridge*, 67-204.

499. That defendant, on the trial of a civil cause in the county of his residence, produced the forged instrument which he is charged with forging, may be considered by the jury as tending to show that the forgery was committed in that county: *State v. Thompson*, 19-299.

500. **Passing forged instruments:** The fact that defendant, in uttering a forged note, falsely represented himself to be the payee of the note, is sufficient evidence of intent without other evidence that he had knowledge of the forgery: *State v. Williams*, 66-573.

501. To justify a conviction for passing a forged instrument, the jury must find beyond a reasonable doubt that defendant had knowledge of the forgery: *Ibid.*

502. **Having counterfeit money in possession:** On the trial of an indictment for having five or more pieces of counterfeit money in possession, knowingly, with intent to pass, it should be proved that accused had in his possession five or more pieces, in order to make out the offense: *State v. Pepper*, 11-347.

503. In the section of the Code, § 3925, providing that if any person forges or counterfeits coin, "and has in his possession five or more pieces," etc., the word "and" is construed to mean "or," and either of the acts prescribed will constitute the offense. Therefore an indictment charging both of them will charge but one offense and will not be open to the objection of duplicity: *State v. Myers*, 10-448.

504. So, if the indictment charges the counterfeiting and the having in possession with intent, etc., in different counts, it will not be bad if both counts refer to the same transaction: *State v. McPherson*, 9-53.

505. The possession, as contemplated in the statute, may consist in having the counterfeit coin deposited in a secret place, within the knowledge and the control of the accused: *State v. Washburn*, 11-245.

506. **Counterfeiting:** It is not necessary in an indictment for counterfeiting to charge that the coin was counterfeited in a similitude to the current coin of the United States, or that it was of any value: *State v. Williams*, 8-533.

507. The counterfeiting of coin of the United States may be punished under the state statute providing for the punishment of that offense; the jurisdiction of the federal courts over such offense is not exclusive: *State v. McPherson*, 9-53.

508. **Intent to defraud:** In an indictment for having in possession counterfeit bank bills, with intent to defraud, knowing them to be counterfeit, copies of the bills must be set out: *State v. Callendine*, 8-288.

509. In such case, intent to defraud any person or corporation need not be averred. An averment in the statutory language, charging the having in possession with intent to defraud, is sufficient. Nor need it be averred that the intent was felonious or wilful: *Ibid.*

510. The description of bank bills in a particular case held insufficient: *Ibid.*

511. The person intended to be defrauded, or the extent or particulars of the fraud, need not be stated: *State v. Maxwell*, 47-454.

512. It is not necessary, in such case, to charge an intent to defraud any particular person: *State v. Barrett*, 8-536.

513. But if the name of the bank intended to be defrauded is mentioned, it must be proved as stated: *State v. Newland*, 7-242.

514. The existence of the bank or corporation must be proved, but proof of that fact by reputation is sufficient: *Ibid.*; *State v. Barrett*, 8-536.

515. And this is equally applicable to the charge of falsely indorsing a note or bill: *State v. Pierce*, 8-281.

516. An indictment charging accused with uttering, passing and tendering in payment, etc., is not bad as charging more than one offense: *State v. Barrett*, 8-536.

517. In an indictment for the uttering of counterfeit money, the name of the person injured must appear, if known, and if not known such fact must be stated. The provision that no indictment shall be quashed if an indictable offense is named therein does not apply to such defect: *Buckley v. State*, 2 G. Gr., 162.

5. Offenses against public justice.

a. Perjury.

518. **What constitutes:** The matter falsely sworn to must be material, and its materiality

Perjury.

must be established by the evidence, and cannot be left to presumption or inference: *State v. Aikens*, 82-403.

519. *Held*, that a defendant, who, under a former statutory provision that a claim barred by the statute of limitations might be established by the testimony of the opposite party, was called by plaintiff as a witness for the purpose of establishing a claim by his own testimony, and who testified falsely, might be punished for perjury: *State v. Voght*, 27-117.

520. Under the provisions of the bankruptcy act requiring a schedule to be sworn to and providing that false swearing should prevent the applicant's discharge, and also providing that he might be examined, and for false swearing in such examination should be deemed guilty of perjury, *held*, that mere false swearing in the schedule would not constitute perjury: *United States v. Dickey*, Mor., 412.

521. Falsely swearing in an affidavit for continuance that a witness is absent from the county will constitute perjury, and it cannot be said that the oath is not material to the issues in the case: *State v. Shupe*, 16-36.

522. Indictment: The materiality of the false testimony must be shown by averment in the indictment, but this may be done either by express averment or the statement of such facts as show its materiality: *State v. Cunningham*, 66-94.

523. In an indictment for perjury in making a false return to the assessor under oath, it must be averred, not only that certain property was withheld from the statement, but also that such property was assessable within the township within which the assessor was authorized to act: *Ibid*.

524. Indictment for false statement in a schedule sworn to in a proceeding in bankruptcy should state wherein such statement is false and incorrect: *United States v. Morgan*, Mor., 341.

525. An indictment charging perjury in testifying before a grand jury, and alleging that they were investigating a specified charge against a party named; that they had authority to investigate such charge, and that the matters sworn to by the defendant (particularly stated and their falsity charged) were material in that investigation, *held*

sufficient. It is not necessary in such a case to allege that the party charged with the offense under investigation by the grand jury was or was not guilty thereof, in order to state the facts constituting such offense: *State v. Schill*, 27-263.

526. In an indictment for perjury, it is not necessary nor usual to aver that the court trying the case in which the perjury was committed had jurisdiction of such acts. It is sufficient to aver that the issue was duly joined in such court which came on for trial in due form of law: *State v. Newton*, 1 G. Gr., 160.

527. By statute (Code, § 4312), it is sufficient to set forth the substance of the offense charged and before what court the oath was taken, averring such court to have full power to administer the same, etc.: *Ibid*.

528. It is sufficient to charge that defendant was duly sworn before a court having authority, etc., and it is not necessary to allege that the oath was administered by any one: *State v. O'Hagan*, 38-504.

529. But an indictment not averring that the court or person before whom the oath was taken had authority to administer the same, is not sufficient: *State v. Nickerson*, 46-447.

530. An indictment for perjury is bad which alleges that the oath was administered by one not clothed with authority to administer it: *State v. Phippen*, 62-54.

531. Therefore where the indictment charged that the oath was administered by a certain person as an officer, but at a time which by law was prior to the time when he was authorized to enter upon the discharge of his duties, *held*, that the indictment was subject to demurrer: *Ibid*.

532. It is necessary to aver the jurisdiction and authority of the officer before whom the oath was taken to administer the oath, but this may be done by express averment that the officer had such right or by setting out such facts as make it judicially to appear that he had such authority and jurisdiction. Under the averment that he was authorized and empowered by law to administer the oath, the facts essential to his jurisdiction and authority to administer it may be shown: *State v. Cunningham*, 66-94.

533. An indictment for perjury need not

Perjury.—Compounding felonies.—Resisting officers.

charge that the prisoner knew the falsity of the matter sworn to, unless the assignment of perjury is upon a statement of the accused as to his belief: *State v. Raymond*, 20-532.

534. Variance: Where the indictment charged that defendant testified that he saw M. enter upon premises of "Jason P." and saw him "getting and carrying away" corn therefrom, while the negative averment was that defendant did not see M. enter the premises of said "Joseph P." nor see him "gather and carry away" said corn, *held*, that the substitution of Joseph for Jason was clearly a clerical error, not affecting the substantial rights of the party, and that the effect of "gather" was, in the connection used, the equivalent of the word "getting:" *Ibid*.

535. Knowledge: Under a statute defining perjury as "wilfully and corruptly deposing, affirming or declaring any matter to be fact, knowing the same to be false, or denying any matter to be fact knowing the same to be true," *held*, that an indictment was not sufficient which omitted to charge such knowledge: *State v. Morse*, 1 G. Gr., 503.

536. It should be clearly and distinctly averred in the indictment that defendant swore "falsely," that word being used in the statutory definition: *State v. Nickerson*, 46-447.

537. An indictment for perjury which charged that defendant at a certain time testified to certain matters whereas he "did know" they were false, *held*, by fair construction, to charge knowledge at the time defendant testified and to be sufficient in that respect: *State v. Wood*, 17-18.

538. Advice of counsel: In a prosecution for perjury, it being material to determine whether the testimony given was wilfully false, the fact that advice of counsel was taken by defendant as to the facts about which he testified is material: *State v. McKinney*, 42-205.

539. Evidence: It is not necessary that there be two witnesses to the giving of testimony upon which the perjury is assigned, but only as to its falsity: *State v. Wood*, 17-18.

540. The evidence of one witness as to the falsity of the matter sworn to, supported by evidence of strong corroborating circumstances, is sufficient to warrant a conviction: *State v. Raymond*, 20-532.

541. While the jury cannot consider any other perjury than that assigned in the indictment for the purpose of determining defendant's guilt as to such other perjury, yet when the evidence thereof is legitimately brought out, and relates to the subject-matter of the perjury charged, it may be considered in determining defendant's corrupt intent: *Ibid*.

b. Compounding felonies.

542. If a person corruptly exacts a consideration from another for an agreement not to prosecute, he is guilty of compounding, although he took such consideration for the benefit of another: *State v. Ruthven*, 58-121.

543. The fact that a person guilty of the crime of compounding a felony is an officer, and therefore punishable as such under other statutory provisions, does not exempt him from the higher punishment prescribed for the compounding: *Ibid*.

544. A contract entered into for the compounding of a felony is void, and the law will not afford either party thereto affirmative relief: *Allison v. Hess*, 28-388.

545. An instrument based upon an agreement not to prosecute for a felony is void: *Peed v. McKee*, 42-689.

Further as to contracts for compounding felonies, see CONTRACTS, §§ 854, 855.

546. A delivery of a forged note to the forger on payment thereof by him which he is authorized to make, although made with the intent of enabling the party to destroy or suppress such paper and thereby to hinder and prevent a prosecution for the forgery, does not constitute the offense of compounding: *Deere v. Wolff*, 65-32.

c. Resisting officers; assisting prisoners to escape.

547. Resisting service of process: It is no defense, in a prosecution for resisting an officer (under Code, § 3960), that the process under which he acts is irregular or defective, if it is one that the magistrate has authority to issue: *State v. Foster*, 10-435.

548. It will be presumed that the officer was proceeding to execute the process in a proper manner, and the indictment need not set forth the acts showing that he complied

Offenses against right of suffrage.—Against chastity, etc.

with the requisites of the statute: *State v. Freeman*, 8-428.

549. The officers contemplated are those only who are authorized to execute legal writs, orders, etc., and resistance to a road supervisor engaged in removing obstructions from a public road in his district is not within this section: *State v. Putnam*, 85-561.

550. Under a statute providing for the punishment of any person resisting an officer in executing process, *held*, that one who resisted a peace officer in making an arrest without a warrant was not punishable: *State v. Lovell*, 23-304. (But the statute now provides otherwise: Code, § 3960.)

551. One who resists an officer in making arrest of another cannot justify such resistance on the ground that the person to be arrested was not guilty: *Montgomery v. Sutton*, 67-497.

552. A receiver properly appointed and directed by the court to take possession of property is an officer within the meaning of the statutory provision, and resistance to him in an attempt to take such possession is a crime under the statute: *State v. Rivers*, 66-653.

553. Assisting a prisoner to escape from an officer having him in charge under a warrant issued by a magistrate for threatening to commit a public offense is a crime under the statute. Whether the prisoner had in fact threatened to commit the offense as charged in the warrant is immaterial: *State v. Bates*, 23-96.

d. Wrongfully acting as officer.

554. Falsely assuming to be officer: Where a constable who was re-elected proceeded to perform the duties of his office without qualifying anew as required by statute, *held*, that he was not guilty of the crime of falsely assuming to be an officer: *State v. Bates*, 23-96.

555. Exercising office without authority: A constable may be guilty of this offense: *State v. Berans*, 37-178.

556. False entries by officer: It is not necessary in charging this offense to charge an intent to defraud any particular person: *State v. Morse*, 52-509.

557. Illegal fees: Any contract for higher fees than those provided by law or for an

amount which might prove to be higher would be void: *Gilman v. Des Moines Valley R. Co.*, 40-200.

6. Offenses against right of suffrage.

a. Bribery of electors.

558. It does not constitute bribery at an election to relocate a county seat, for persons interested in the location at a particular place to agree to give certain facilities for the convenience of the whole county, such as offering a building for courts and officers, conveying real estate to the county, paying money toward the erection of a bridge, subscribing toward a high school, etc.: *Dishon v. Smith*, 10-213; *Hawes v. Miller*, 56-395.

559. A promise by a candidate to pay into the public treasury, if elected, a part or all of his compensation, is an offer of a bribe to electors, and disqualifies the person making it, if elected, for holding the office: *Carrothers v. Russell*, 53-346.

b. Illegal voting.

560. In an indictment for this offense, it is not necessary to show that the election was held by the proper and legal officers, or to state the manner in which defendant was disqualified: *State v. Douglass*, 7-413.

561. It is no defense in a prosecution for illegal voting that defendant consulted others (not persons learned in law) as to his right to vote, and was advised that he was qualified: *State v. Sheeley*, 15-404.

562. Voting in a township other than that of the voter's residence is an offense under the statute, and it is not necessary to charge that accused voted for or against any one. The casting of a ballot being proved, it will be presumed that it designated the name of some person for some office: *State v. Minnick*, 15-123.

7. Offenses against chastity, morality and decency.

a. Seduction.

As to civil action for SEDUCTION, see that title.

563. What constitutes: Mere unlawful sexual commerce for a consideration paid is

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not seduction. There must be some artifice or false promise by which the virtuous female is induced to surrender her person. But the allegations in the indictment in a particular case, of representations as to the innocence of the act and promises of presents, etc., *held* sufficient on demurrer: *State v. Fitzgerald*, 63-203.

564. To "debauch" implies to "have carnal knowledge of" (*arguendo*): *Wood v. Mathews*, 47-409.

565. Where the evidence fails to show artifice, promise, flattery, deception, or the like, it will not be sufficient to sustain a conviction: *State v. Crawford*, 34-40.

566. An indictment charging that defendant seduced and debauched, etc., etc., is sufficient, without charging the facts as to the means made use of to accomplish such end: *State v. Curran*, 51-112; *State v. Conkright*, 58-338.

567. Evidence: The exact amount or kind of seductive arts necessary to establish the offense cannot be defined. Every case must depend upon its own peculiar circumstances, together with the conditions in life, advantages, age and intelligence of the parties: *State v. Higdon*, 32-202.

568. It is not necessary that the false promises or seductive arts be reasonable in their character and likely to have been relied upon by the prosecutrix; but the fact that they were extraordinary and made by a person who, to the knowledge of the prosecutrix, was not capable of performing them, should be considered by the jury in determining whether they were sufficient: *State v. Groome*, 10-303.

569. The fact that false promises of marriage were made at the time, with intent to break them, would be immaterial. Such false promises of marriage would be sufficient: *State v. Prizer*, 49-531.

570. To warrant a conviction of defendant upon the evidence of prosecutrix, there should not be any strained construction put upon her language in order to sustain the verdict. It is to be expected that she should, so far as possible, shield herself and cast the blame upon defendant. Therefore, in a particular case, a conviction was reversed on the ground that the evidence of prosecutrix did not, by fair and reasonable construction,

show any arts, false promises, etc.: *State v. Haven*, 43-181.

571. Where, in a prosecution for seduction, prosecutrix testified that she resisted, and defendant overcame such resistance by force, *held*, that the court should have instructed the jury that, if they found such to be the fact, defendant was entitled to an acquittal, the crime under such facts being rape, and not seduction: *State v. Lewis*, 49-578.

572. In a particular case, *held*, that it sufficiently appeared from the evidence that prosecutrix was an unmarried woman; also that the seductive arts were such as were sufficient to constitute the crime, being promises to marry, etc.; also, that the corroboration was sufficient: *State v. Heather-ton*, 60-175.

573. Where it appeared that defendant was a suitor of prosecutrix before and for some time after the illicit intercourse, *held*, that his conduct during the entire time might be inquired into in determining whether her consent was gained by seductive means: *State v. Curran*, 51-112.

574. Previously chaste character of prosecutrix: The word character as used in the statute defining the crime as the seduction of any unmarried woman "of previously chaste character" is used in its true sense as distinguished from reputation, but a female may be of unchaste character without being guilty of any act of sexual intercourse. Obscenity of language, indecency of conduct and undue familiarity with men may serve to indicate the true character. It is for the jury to decide, under all the circumstances, as to the character of the prosecutrix: *Andre v. State*, 5-389; *Boak v. State*, 5-430.

575. A female who has been unchaste may reform and acquire a chaste character, such as is referred to in the statute: *State v. Carron*, 18-372.

576. Evidence that prosecutrix has a bad reputation for chastity is not admissible, but evidence that her reputation in that respect is good may be received in rebuttal of evidence tending to prove acts of lewdness: *State v. Prizer*, 49-531; *State v. Shean*, 32-88.

577. Proof of unchaste conduct on the part of prosecutrix just prior to the alleged seduc-

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tion would entitle defendant to acquittal; therefore, an instruction that proof of such conduct should be considered against prosecutrix, *held* erroneous, in that it did not go far enough in stating the effect of such conduct: *State v. Carr*, 60-453.

578. Where the woman is examined as a witness to prove the seduction, she may, on cross-examination, be asked as to matters which would show a want of chastity previous to such seduction. The question of chastity is directly in issue: *State v. Sutherland*, 30-570.

579. Instruction as to effect of proof of improper liberties allowed to others than defendant, prior to the alleged crime, *held* misleading, in that the meaning of such term was left ambiguous: *State v. Carr*, 60-453.

580. Evidence of improper conduct of prosecutrix occurring eight years before the trial and when she was but fourteen years of age, *held* properly excluded: *State v. Dunn*, 53-526.

581. **Presumption:** The previous chaste character of the prosecutrix is presumed, and the *onus* is upon defendant to overcome such presumption by preponderance of evidence: *State v. Wells*, 48-671; *State v. Higdon*, 32-262; *Andre v. State*, 5-389.

582. Such presumption may be rebutted by proven or admitted facts or circumstances in the case: *State v. Bowman*, 45-418.

583. The presumption in favor of the chastity of the prosecutrix is not a presumption against the innocence of defendant. He is presumed innocent of the fact, but the presumption is also entertained in favor of the rectitude of her character: *Andre v. State*, 5-389.

584. An instruction that the presumption of chastity might be overcome by proof of wantonness or indiscretion indicating an unchaste character, but which made no reference to other matters which might indicate unchastity, *held*, not erroneous where there was no evidence of other facts indicating unchastity: *State v. Bell*, 49-440.

585. As to the presumption of chastity in a civil action for damages and evidence to overcome it, see *West v. Druff*, 55-335.

586. Only the previous character is put in issue, and all evidence of improper conduct after the time of seduction should be excluded: *State v. Wells*, 48-671.

587. Questions as to chastity refer to a time previous to
State v. Deitrick, 51-467.

588. Previously chaste character essential in a civil action by a seduction of a minor daughter
Bennett, 8-72.

589. **Corroboration:** Under provision (Code, § 4560) requiring prosecutions for seduction the person injured must be corroborated by other evidence tending to connect with the commission of the offense to warrant conviction, proof of attendant circumstances may be sufficient corroboration: *State v. Curran*, 51-112; *Bellnap*, 6-97, 103.

590. The corroborating evidence not be confined to the facts of course alone, but facts showing opportunity and inducement may be for that purpose: *Andre v. State*.

591. The mere proof of opportunity is not sufficient. Corroborating evidence must be such as connects defendant with the commission of the offense: *State v. Painter*, 50-31; *Smith*, 54-743; *State v. Araah*, 1-10.

592. A fact testified to by the prosecutrix alone cannot be considered as corroborating of her other testimony: *Kingsley*, 39-439.

593. Corroboration in particular instances may be sufficient: *State v. Shean*, 32-8; *Fitzgerald*, 63-268.

594. The court is to determine whether the evidence is corroborative, that is, whether it is competent, and the jury is to determine the credibility of the corroborating evidence and the weight of their testimony. Instruction to the effect that the jury determine whether the testimony of the prosecutrix was sufficiently corroborated: *State v. Bell*, 49-440.

Corroboration of the testimony of the prosecutrix is also required in a prosecution for seduction. See *supra*, §§ 220-223.

595. The rule requiring corroboration of the testimony of the injured party applies in bastardy proceedings by the putative father with the support of the child: *State v. McGlothlen*, 56-544.

Enticing away female child; defilement.—Adultery.

596. Resemblance of child: The resemblance of an infant three months old to its father is too indefinite and uncertain to constitute evidence of paternity, and it is error in a prosecution for seduction to allow a child of that age, claimed to be the result of the connection, to be shown to the jury. (Explaining *Stumm v. Hummel*, 39-478): *State v. Danforth*, 48-43.

597. But this rule is not applicable in case of a child two years old; and *held*, in a bastardy case, that a child of that age might be shown to the jury, and its family resemblance, if any, to defendant considered by them as tending to prove that defendant was its father: *State v. Smith*, 54-104.

598. Offer to compromise: Evidence that prosecutrix, after the commencement of the prosecution, offered to settle the case for a sum of money, *held* incompetent: *State v. Deitrick*, 51-467.

599. Marriage a bar: Under the statute providing that marriage of defendant with the person injured should bar the prosecution for seduction (Code, § 3838), *held*, that such a marriage is encouraged by the law, and that contracts entered into in contemplation thereof are not invalid as being made under duress, and will be upheld: *Armstrong v. Lester*, 43-159.

b. Enticing away female child; defilement.

600. Enticing away: Under a statute making it a crime to entice away an unmarried female under the age of fifteen years, from her parents, guardian or other person having legal charge of her, for the purpose of prostitution (Code, § 3865), *held*, that the fact that defendant believed and had good reason to believe that the female was over the age of fifteen years constituted no defense, if she was in fact under that age: *State v. Ruhl*, 8-447; and see *State v. Newton*, 44-45.

601. If the parents are dead and no guardian has been appointed, the persons with whom the female resides as a member of the family and who have her wholly under their care and protection would be the persons having "the legal charge of her person." *State v. Ruhl*, 8-447.

602. It is not sufficient to constitute an

offense under this section that the accused entice away the female for his own carnal enjoyment, and such enjoyment would not constitute prostitution: *Ibid*.

603. Defilement: No particular amount of force is necessary to constitute the offense of defilement under the statute (Code, § 3862), and it was probably intended to cover cases in which there is no force, excepting that which is constructive, and in which the act is accomplished principally by menace or duress, acting to subdue the will; but it contemplates at least an act against the will. The defendant is not required to show an affirmative act of consent to make out a defense: *Pollard v. State*, 2-567.

c. Adultery.

As a ground of DIVORCE, see that title.

604. Void divorce: Where a decree of divorce is void for want of jurisdiction, it will not bar a prosecution for adultery: *State v. Fleak*, 54-429.

605. Where a husband procured a divorce and remarried, but subsequently the decree of divorce was set aside and declared void at the suit of the wife on the ground that it was procured by fraud, *held*, that the divorce was no defense in a prosecution for adultery committed in cohabiting with the second wife: *State v. Whitcomb*, 52-85.

606. An erroneous belief of the validity of a divorce will not constitute a defense in a prosecution for adultery committed in a second marriage: *Ibid*.

607. Connection by force: The act may constitute adultery as to the man, although as to the woman it is effected by force and against her will: *State v. Donovan*, 61-278.

608. To constitute adultery on the part of the man, the consent of the woman need not be established. If willingly done on his part, the crime is complete: *State v. Sanders*, 30-582.

609. Commencement of prosecution by husband or wife: Under the statute (Code, § 4008) providing that no prosecution for adultery can be commenced but upon the complaint of the husband or wife, it is sufficient if the prosecution is commenced by the husband or wife. It may be continued without further co-operation on the part of such party: *State v. Baldy*, 17-39.

Adultery.

610. Where the wife instituted the proceedings before an examining magistrate, in which the defendant was held to answer, but did not appear before the grand jury or otherwise in the further prosecution of the case, *held*, that the prosecution was sufficiently commenced upon the complaint of the wife: *State v. Dingee*, 17-232.

611. An unmarried person may be guilty of the crime of adultery, and complaint against such person may be made by the husband or wife of the married party, although such married party is not prosecuted: *State v. Wilson*, 22-364.

612. The appearance of the wife before the grand jury, in response to a subpoena, and giving testimony against the husband without intending to prefer a charge, but supposing she was required to do so, would not constitute a complaint by the wife: *State v. Donovan*, 61-278.

613. The prosecution may be sufficiently commenced by the husband or wife, either by making complaint before the grand jury or by filing a preliminary information before a magistrate. If commenced by filing information it is not necessary that the husband or wife appear further in the proceedings. It is not necessary that the name of the husband or wife be indorsed on the indictment as private prosecutor: *State v. Briggs*, 68-416.

614. The words "husband or wife," as used in the statutory provision above referred to, refer to and mean the spouse of the person charged with the offense: *Bush v. Workman*, 64-205.

615. An averment in the indictment that the prosecution was commenced by the husband or wife is not conclusive, and if not so commenced, advantage of that fact may be taken by defendant: *State v. Roth*, 17-336.

616. It is essential that the state prove that the prosecution was commenced by the husband or wife. The averment in the indictment that it was so commenced will not be presumptive proof thereof: *State v. Henke*, 58-457.

617. The allegation that the prosecution was commenced under complaint of the husband or wife must be proven by the state like other material averments of the indictment, and is to be determined by the jury

upon the evidence given at the trial, and not by the court on affidavits upon a motion to dismiss the prosecution. The allegation of the fact in the indictment is sufficient to raise the question before the jury: *State v. Briggs*, 68-416.

618. The fact that the prosecution is commenced by the husband or wife does not enter into or constitute any of the facts which go to make up the crime, and therefore, although such fact must be proven, it is not necessary that it be established beyond a reasonable doubt: *State v. Donovan*, 61-278.

619. Failure to instruct the jury as to the necessity of the prosecution being commenced by the husband or wife is not error, where the fact appears without dispute in the evidence that the prosecution was so commenced and such instruction is not asked by the defendant: *State v. Hazen*, 39-648.

620. Indictment: As any act of adultery committed between the parties within the statutory period of limitation might be proven under an indictment charging one such act, the allegation in the indictment of other acts committed on divers other days may be rejected as surplusage, and the indictment will not be bad: *State v. Briggs*, 68-416.

621. The better practice is to indict the parties guilty of adultery separately, although they may be indicted jointly: *State v. Dingee*, 17-232.

622. Evidence: The provision that the prosecution can be commenced only by the husband or wife leads to the inference that the offense is a crime by the husband or wife against the other rather than against society in general, and upon such prosecution the one may be a witness against the other: *State v. Bennett*, 31-24; *State v. Hazen*, 39-648.

623. In a prosecution for adultery, record proof of marriage is not indispensable. It may be established by the testimony of the husband or wife: *State v. Wilson*, 22-364.

624. Admissions of defendant as to the fact of marriage, when voluntary, and not of the character of confessions exacted by improper inducements, are admissible as evidence of the marriage: *State v. Sanders*, 30-582.

Further as to evidence of MARRIAGE, see that title.

Bigamy.

625. Admissions of the woman with whom the husband is charged to have committed the crime are not competent evidence: *State v. McGuire*, 50-153.

626. The provisions of Code, § 4010, as to the presumption arising from absence, in the case of a prosecution for bigamy, do not apply as against a defendant in a prosecution for adultery to establish the validity of his marriage with a wife who had previously been married: *State v. Henke*, 58-457.

627. Different acts: Where but one act of adultery is charged and evidence as to different acts is introduced, but the prosecution after the close of the evidence elects to rely upon one particular act referred to in the evidence, such election withdraws from the jury the evidence as to the other acts and cures any errors which may have been committed in admitting evidence with reference thereto: *State v. Donovan*, 61-278.

628. Evidence of other acts of adultery committed between the same parties prior to the statutory period of limitation or in another county than that in which the indictment is found are admissible to show the disposition of the parties, and may be taken, in connection with opportunity to commit the crime within the statutory period and within the jurisdiction of the court, as evidence that the crime was then committed: *State v. Briggs*, 68-416.

d. Bigamy.

629. Continuing to cohabit within the state after a bigamous marriage is a crime by statute (Code, § 4009), whether the marriage was consummated within or without the state: *State v. Sloan*, 55-217; *State v. Nadal*, 69-478.

630. Defendant may be prosecuted for continuing to cohabit within the state, although a prosecution for the bigamous marriage is barred: *State v. Sloan*, 55-217.

631. Venue: The prosecution may be had in any county where the defendant unlawfully cohabits with a second wife, although the marriage was consummated in another county: *State v. Hughes*, 58-165.

632. Indictment: An indictment for this crime, stating that the date of the lawful marriage was to the grand jury unknown,

that it took place in Illinois, and that at the time of the second marriage the former marriage relation still existed, *held* sufficient as against the objections, first, that it did not state the date of the first marriage; second, that it did not state that such marriage was lawful and valid by the laws of Illinois; third, that it did not appear that the lawful wife was still living at the date of the second marriage: *Ibid.*

633. The indictment need not negative the facts of absence, etc., which are by another section of the statute made a defense: *State v. Williams*, 20-98.

634. Evidence: The testimony of a witness who saw the marriage is sufficient without record evidence thereof: *Ibid.*; *State v. Hughes*, 58-165.

635. While admissions of marriage or cohabitation will not authorize conviction, yet, when the evidence shows a long recognition by defendant of the woman as his wife, and actual marriage, proof of admission of marriage and cohabitation may be shown: *State v. Nadal*, 69-478.

636. The testimony of either husband or wife, together with proof of continued cohabitation as husband and wife, raises such a presumption of an actual legal fact as to make it incumbent upon the defendant to rebut such presumption: *Ibid.*

637. In a prosecution for bigamy in cohabiting in this state after a void marriage in another state, it is not necessary to prove the marriage to have been in accordance with the laws of such state, if it would have been sufficient under the laws of this state, there being no evidence that the laws of the state where it was celebrated are different from those of this state: *Ibid.*

638. Under an indictment alleging the celebration of the void marriage at a particular place, evidence will be sufficient which shows the celebration of the marriage anywhere within the same state: *Ibid.*

639. In a prosecution for bigamy in cohabiting with a second wife, evidence of the bigamous marriage in another county is proper, not to show a crime in that county, but to fix the nature of the subsequent cohabitation: *State v. Hughes*, 58-165.

640. It seems that the fact that defendant acted under reputable legal advice in con-

Incest.—Abortion.—Exposing child.—Prostitution, etc.

tracting the second marriage would be no defense: *Ibid.*

641. The crime is one by the husband or wife against the other within the statutory provision (Code, § 3841) allowing the husband or wife to be a witness against the other in such cases: *State v. Sloan*, 55-217; *State v. Hughes*, 58-165.

642. In a prosecution for bigamy, evidence of lewdness on the part of the injured party is incompetent: *State v. Nadal*, 69-478.

Further as to evidence of MARRIAGE, see that title.

e. Incest.

643. What constitutes: The marriage of persons sustaining to each other any of the degrees of relationship specified in the statute (Code, § 4030) is incest. Carnal knowledge in such case need not be alleged or shown: *State v. Schaunhurst*, 34-547.

644. The words brother and sister used in the statute refer to illegitimate as well as to legitimate children of the same parents: *Ibid.*

645. To constitute incest the parties must have carnal knowledge of each other. A woman who is ravished cannot be said to have carnal knowledge of the man. Connection between persons within the prohibited degrees, consummated by force, is rape and not incest: *State v. Thomas*, 53-214.

646. Under a statute providing that brother and sister who, being of the age of sixteen years or upwards, should have sexual intercourse together, having a knowledge of their consanguinity, should be guilty of incest, held, that it was essential in order to constitute the crime that both parties be over the age specified: *United States v. Hiler*, Mor., 330.

647. Evidence: The register of marriages is sufficient evidence of the incestuous marriage: *State v. Schaunhurst*, 34-547.

648. Admissions and declarations of the parties are also admissible to show the fact of marriage: *Ibid.*

Further as to evidence of MARRIAGE, see that title.

f. Abortion.

As to civil liability for, see ABORTION.

649. What constitutes: Abortion is the act of miscarriage and producing young be-

fore the natural time or before perfectly formed. It is not a violation of murder and is not criminally made so by statute: *Foshee*, 3-274.

650. The crime of administering, with intent of procuring, complete where the drugs are with the intent specified, and the crime is properly laid in the county in which the medicine is thus administered although the miscarriage occurred in another county: *State v. Hollenbeck*, 3-

651. It is not necessary to prove a crime that the woman should have a child, nor, providing there is no child, is it necessary that the substance administered should be such as would produce a miscarriage: *State v. Fitzgerald*, 4-

652. Under the provisions of the statute it is not a crime for a woman to procure an abortion on herself: *Hatfield*, 177.

653. Where death is caused in procuring an abortion, it is error to instruct the jury that defendant in procuring such death may be convicted of manslaughter. He will be guilty of murder in the second degree or nothing less: *Moore*, 25-128.

g. Exposing child

654. The statute (Code, § 387) that if "the father and mother expose" a child, etc., is to be construed to mean father or mother. Either may commit the crime: *State v. Rice*, 670.

h. Prostitution and lewdness, or leasing houses of ill-fame

655. What constitutes prostitution: It is for the jury to say what acts, under the circumstances, sufficient to constitute a prostitute, and it is not for the court to instruct as to what sexual intercourse is not sufficient to establish the crime: *State v. Rice*, 56-431.

656. Lewdness: Acts of prostitution are not sufficient to constitute lewdness as defined by statute: *State v. Rice*, 12-499.

Houses of ill-fame.—Betting and gambling.

657. Occasional acts of sexual intercourse in a secret manner between parties living in the relationship of master and servant may not be sufficient alone to constitute the crime of lewdness. But such acts and the birth of a child may be shown as tending with other circumstances to prove that the parties were in fact living together as husband and wife: *State v. Kirkpatrick*, 63-554.

658. An indictment for lewdness should charge that the parties were not married to each other: *State v. Clinch*, 8-401.

659. Evidence that defendant in a prosecution for lewdness had a wife and children whom he had deserted, *held* admissible: *State v. Lyon*, 10-340.

660. Keeping house of ill-fame: Evidence that the owner of a house kept as a house of ill-fame by the tenant was in the habit of spending a part of his time there, *held* insufficient to show that such owner was guilty as a keeper of such house: *State v. Pearsall*, 43-630.

661. Instructions to the effect that evidence showing that defendant was keeping a house and using it as his own, and exercising such control over it as men usually have over their own houses, will authorize the jury to find that defendant kept the house, and that the jury might find that defendant had knowledge of the character of the house and assented thereto, from the publicity of the lewd conduct carried on there and the public reports of its ill-fame, and his knowledge of such reports, as well as his personal conduct and his conversation with inmates and visitors, *held* proper: *State v. Wells*, 46-662.

662. An indictment against a person for keeping a house of ill-fame is sufficient if it charges the offense as committed within the county. The house need not be more specifically described: *State v. Shaw*, 35-575.

663. If the facts constituting the offense of keeping a house of ill-fame, as defined by statute, be properly described in the indictment, the fact that the term nuisance is used to designate it will not invalidate the indictment nor make it an indictment for the offense of keeping a nuisance as defined by statute: *Ibid.*

664. This offense is distinct from that of nuisance consisting in keeping such a house, in that, in the latter case, it must be to the

detriment of others: *State v. Odell*, 42-75; *State v. Alderman*, 40-375.

665. The previous conviction of keeping a nuisance consisting in the keeping of a house of ill-fame to the disturbance of others will not render a subsequent conviction for the offense of keeping such a house a second conviction for that offense so as to warrant the infliction of the penalty for a second conviction: *State v. Holmes*, 56-588.

As to the crime of nuisance committed in keeping a house of ill-fame, see *infra*, § 702.

666. Reputation as evidence: The state may prove the bad character of the house by evidence of the bad character of the persons resorting thereto, and of the inmates thereof; but the general reputation of the house itself should be excluded: *State v. Lyon*, 39-379.

667. The fact that defendant is the keeper of such a house cannot be proven by evidence of common reputation as to his character: *State v. Hand*, 7-411.

668. Leasing house for purposes of prostitution: The various acts described by the statute providing for the punishment of leasing a house for purposes of prostitution or lewdness, etc. (Code, § 4015), constitute but one offense, and an indictment charging all of them is not bad for duplicity: *State v. Abrahams*, 6-117.

669. To render the defendant guilty of *knowingly permitting* the use, something more must be shown than his mere inactivity, or failure to take steps to prevent such illegal use. Some act or declaration showing an affirmative assent must be shown: *Ibid.*; *Abrahams v. State*, 4-541.

i. Betting and gambling; keeping gambling-house.

Gambling contracts void, see CONTRACTS, §§ 333-353.

670. Game of chance: A horse-race is not a game of chance within the terms of a statute providing a punishment for betting upon such games: *Harless v. United States*, Mor., 169.

671. The offering by an agricultural society of a premium to the winner of a horse-race, held under its auspices, does not constitute the offense of making a bet or wager

Gambling-houses.—Lotteries.—Nuisances.

for money, etc.: *Delier v. Plymouth County Agl. Society*, 57-481.

672. Gambling and keeping gambling-house: To constitute gambling within the statutory provision for the punishment of any person keeping a house or place resorted to for the purpose of gambling, or permitting any person in any house or other place under his control to play cards, etc., "or other game for money or other thing" (Code, § 4026), it is not necessary that the money or "other thing" should be "put up." Playing at a game with the understanding that the loser shall pay for the drinks around, which arrangement is carried out, is sufficient: *State v. Maurer*, 7-406; *State v. Cooster*, 10-453; *State v. Leicht*, 17-28; *State v. Bishel*, 39-42.

673. Playing at billiards or "pin pool" with an agreement or understanding that the losing party shall pay for the game is gambling: *State v. Book*, 41-550; *State v. Miller*, 53-154.

674. Whether the game played is one of skill or one of chance is immaterial under this statutory provision: *State v. Miller*, 53-154.

675. But playing at cards for recreation or amusement is not prohibited: *State v. Leicht*, 17-28.

676. It is not necessary that the place occupied be generally or habitually resorted to, if it is kept for that purpose. One act of gambling, as well as many, will complete the offense: *State v. Cooster*, 10-453.

677. The offense of keeping a gambling-house is as complete if the house is kept for one day as if kept for a year. It does not consist in causing or continuing a public nuisance, as contemplated in other sections of the statute providing for the punishment of a person keeping a place where gambling, etc., is resorted to, to the annoyance of others. (Code, § 4091): *State v. Crogan*, 8-523.

678. An indictment substantially charging that defendant did keep a house, etc., in which he did permit divers persons, to the jurors unknown, to play at cards, etc., for money, cigars, beer and other things, held sufficient: *State v. Kaufman*, 59-273.

679. A charge that defendant keeps a house resorted to, sufficiently charges intent

and knowledge, and still more does the charge that he *permits*, etc., gambling, imply knowledge: *State v. Cure*, 7-479.

680. And an indictment charging that accused, being the keeper of a house resorted to for the purpose of gambling, knowingly and unlawfully did permit, etc., held sufficient, although it would have been better to have expressly charged that the house was under the control of accused: *State v. Middleton*, 11-246.

681. The "keeping," etc., and the "permitting," etc., constitute one and the same offense, and an indictment charging them both in separate counts is not objectionable on the ground of duplicity: *State v. Cooster*, 10-453.

682. An indictment against a tavern-keeper for suffering gaming in violation of statute need not state the names of the persons who played nor the sums of money for which they played, nor the property lost or won: *Romp v. State*, 3 G. Gr., 276.

j. Lotteries.

683. Under a statute (Code, § 4048) providing for the punishment of any person making or establishing a lottery or selling lottery tickets, etc., held, that a disposal of lands by a scheme in which parties were to buy tickets and draw for such land was a lottery and that a contract of purchase thus entered into was void: *Guenther v. Dewein*, 11-133.

8. Nuisances, including obstruction of highways and railways and keeping disorderly houses.

As to a civil action for damages for injury from a NUISANCE, see that title.

684. Public or private: While the acts mentioned in the statute (Code, § 4069) are each declared to be a nuisance, they are public or private nuisances as they tend to the public injury or only to the injury of private individuals: *State v. Close*, 35-570.

685. The close proximity of a nuisance, such as described by statute, to a public highway, so as to affect those passing, would constitute it a public nuisance. So would causing the water of a mill-dam to become

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corrupt and to overflow, thus rendering the adjoining land marshy, etc., whereby the air should become corrupt and infected: *Ibid.*

686. The punishment provided in Code, § 4098, is applicable to public as well as private nuisances embraced within the definition of § 4089: *State v. Kaster*, 85-221.

687. **Obstructing highway:** A party obstructing a highway, by fence or otherwise, may be punished under this statutory provision, although the road supervisor might under other provisions of the statute rightfully remove the obstruction: *State v. Berry*, 12-58.

As to when shade trees will constitute an obstruction to a highway and may be removed, see HIGHWAYS, §§ 126-128.

688. Platform scales erected in a public street for private business may be removed by order of the city council: *Emerson v. Babcock*, 66-257.

689. It is not a punishable offense to obstruct a highway which, by reason of natural obstacles, cannot be used by the public: *State v. Shinkle*, 40-131.

690. But if part of the line of road is traveled, it would not excuse a party who obstructs it that another part was impassable as laid out: *State v. McGee*, 40-595.

691. In prosecutions for obstructing a public highway, the state is not confined to documentary proof of the establishment thereof, but may show the highway by proof of consent and user, and the fact that the highway is not of statutory width will be no defense: *State v. Robinson*, 28-514.

692. A party failing to remove a fence where a newly established highway crosses his land is not liable to indictment for obstructing a highway, at least until after reasonable notice by the supervisor to remove the same: *State v. Ratliff*, 82-189.

693. Malice is not a necessary element of the offense of obstructing a highway; intent is only important to show whether it was wilful or merely accidental: *State v. Gould*, 40-372.

694. Where a highway is duly laid out, the fact that it is not yet traveled will not prevent the act of obstructing it from being criminal: *Harrow v. State*, 1 G. Gr., 439.

695. Error in the description of the highway, so long as its identity is not doubtful,

will not vitiate a conviction for obstructing it: *Ibid.*

696. Under an indictment for obstructing a "county road," a road established by statute only can be shown. Evidence of a highway by use or prescription is not admissible: *State v. Snyder*, 25-208.

Further, see HIGHWAYS, §§ 125-141.

697. **Defacing highway:** No one has a right to make a material change in a highway inconsistent with the plans of the road supervisor. To do so will constitute a defacing of the highway within the meaning of the statute (Code, § 3992½) providing a punishment for such defacement. The judgment of the supervisor must govern as to the proper plan: *State v. Hunter*, 68-447.

698. **Obstructing highway by railway track:** As a railroad company is allowed (Code, § 1262) to temporarily obstruct a highway for the purpose of constructing its track, an allegation in an indictment showing such obstruction will not be sufficient to charge a crime, without averments showing a violation of the provisions of that section of the statute: *State v. Chicago, B. & P. R. Co.*, 68-506.

699. **Obstructing railway track:** In a prosecution for obstructing the track of a railway (Code, § 3990), it is not necessary to allege or prove that the obstruction did actually obstruct and hinder trains: *State v. Clemens*, 88-257.

700. It being found that defendant knew the railroad was being used for the purpose of carrying freight and passengers, and intended to place the obstruction on the road, malice will be implied: *State v. Hessenkamp*, 17-25.

701. The fact that the land where the obstructions were placed on the track belonged to defendant, and the railroad company had no right of way over it, or had violated the covenants of its contract with respect thereto, would be no defense in a prosecution under this section: *Ibid.*

702. **Keeping disorderly houses:** "To the disturbance of others" is the feature of the offense of keeping a house of ill-fame, which renders it a nuisance under Code, § 4091, and distinguishes such a case from the offense of keeping such a house as defined by Code, § 4018: *State v. Alderman*, 40-875; *State v. Odell*, 42-75.

 Keeping disorderly houses; illegal sale of liquors.

As to the offense of keeping houses of ill-fame, see *supra*, §§ 660-665.

703. Failure to use the words "to the disturbance of others," in charging the keeping of a house where drunkenness, etc., are carried on, renders the indictment insufficient to charge a nuisance: *State v. Dean*, 44-648.

704. Although the quarreling, fighting, etc., relied upon to show that the place where they occurred was a nuisance, appears to have taken place on the sidewalk in front of, and not in, the house of defendant, yet if it is the character of the house which attracts the disorderly persons, the defendant is guilty of keeping a nuisance: *State v. Webb*, 25-285.

705. Where defendant, at a farm-house, kept and sold wine which was not drunk on the premises by the persons buying it, but upon the highway a half mile or more from the house, resulting in riotous conduct, etc., *held*, that the person keeping the house at which the wine was sold was not guilty of keeping a nuisance: *State v. Dieffenbach*, 47-638.

706. A defendant may be convicted of keeping a nuisance on proof that he kept a place described in the indictment as a brewery and saloon where drinking, quarreling, fighting and breaches of the peace were carried on and by the defendant permitted to be carried on, to the disturbance of others, although there is no recurrence of such acts, and this even though the indictment charges such acts as occurring on more than one occasion: *State v. Pierce*, 65-85.

707. The prosecution may show that drinking, quarreling, etc., occurred at the place, but without the building, if they occurred by defendant's permission or where occasioned by the business which he carried on in the building: *Ibid.*

708. Evidence is admissible to show that the actions and appearance of persons immediately after going from the place indicated that they were intoxicated: *Ibid.*

709. A person is drunk in the legal sense within the meaning of the statute when he is so far under the influence of intoxicating liquors that his passions are visibly excited or his judgment impaired: *Ibid.*

710. A boat may be, within the meaning

of the term, a house of ill-fame, as used in defining acts constituting a nuisance: *State v. Mullen*, 35-199.

711. An indictment charging all the offenses mentioned by statute in the alternative as constituting a nuisance is not objectionable as charging more than one offense: *State v. Spurbeck*, 44-667.

712. The nuisance may be single, although all the various acts which may constitute a nuisance by Code, § 4091, are charged: *Ibid.*

713. So, an indictment charging the doing of acts prohibited in the section last above mentioned, and also acts declared to be a nuisance in connection with the sale of intoxicating liquors, is not bad for duplicity. Such acts committed at one time constitute but one nuisance, and could not be the basis of separate indictments: *State v. Dean*, 44-648.

714. Intoxicating liquors: The punishment provided for the crime of nuisance is to be applied to a person found guilty of that offense under the statutory provisions with reference to keeping a building, etc., where intoxicating liquors are sold contrary to law: *State v. McGrew*, 11-112; *State v. Collins*, 11-141; *State v. Schilling*, 14-455; *State v. Little*, 42-51, 54; *State v. Dean*, 44-648.

715. A person keeping intoxicating liquors for sale for a proper purpose will not be guilty of the crime of nuisance on account of unlawful sales made by a clerk without his knowledge or authority: *State v. Hayes*, 67-27.

716. As the so-called prohibitory amendment submitted to the people by the Nineteenth General Assembly was not properly submitted, the act of selling beer which was therein prohibited did not become a nuisance within the general terms of the statute describing that offense: *State v. Johnson*, 61-504.

See further, INTOXICATING LIQUORS, V.

717. Public benefit no defense: A defendant indicted for nuisance will not be permitted to show that the public benefit resulting from his act is equal to the public inconvenience arising from it: *State v. Kaster*, 35-221.

718. Evidence of offense not charged: Under an indictment charging the use of premises for the keeping of hogs, etc., occasioning noxious exhalations, offensive smells,

 Abating nuisances.—Misdemeanors.—Riots.—Police regulations.

etc., *held*, that evidence of noise made by the animals at night, annoying persons living in the vicinity, was receivable as part of the facts connected with the nuisance, although such disturbance could not be proved under the allegation of "other nuisances" specified in the indictment: *Ibid*.

719. Abatement: A petition asking the abatement of a nuisance should be definite enough to enable the court to identify with certainty the obstruction to be removed: *Sloan v. Rebman*, 66-81.

720. Where it was shown that the nuisance was occasioned by the keeping of hogs within certain pens, *held*, that it was not proper in the abating of such nuisance to require the removal of lumber and materials composing the fence around such pens: *State v. Kaster*, 85-221.

721. The statutory provisions for the abatement of the nuisance do not take away the common law right of the person injured by the erection of a mill-dam from abating it as a private nuisance: *State v. Maffett*, 1 G. Gr., 247.

722. Punishment: The court may order a defendant, fined under the statute providing for the punishment of nuisances, to be imprisoned until the fine is paid, or imprisoned at hard labor under general statutory provisions: *State v. Jordan*, 89-387; *State v. Anwerda*, 40-151.

9. Misdemeanors in general.

723. Under the statutory provision (Code, § 8966) that when the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor, punishable as elsewhere specified, *held*, that supervisors violating the provisions of the statute by voting to erect a public building without submitting the question to vote, in a case where such submission to vote of the electors is required, were guilty of a misdemeanor: *State v. Conlee*, 25-237.

10. Riots.

724. In order to constitute a riot it is necessary that the persons implicated shall be actually engaged in some physical act of violence: *Spott v. United States*, Mor., 142.

11. Police regulations.

725. Importing diseased sheep: Under a statute prohibiting the importing of diseased sheep (Code, § 4055), *held*, that a contract for the sale of sheep having such disease as specified by the statute could not be enforced against the purchaser, even when he knew of such disease before purchasing, the statute being intended not for the protection of the purchaser only, but of the public. But *held*, that the statute would not apply where the seller did not know that the disease with which the sheep were inflicted was contagious, and that in such case the contract could be enforced: *Caldwell v. Bridal*, 48-15.

726. Running threshing machine without boxing tumbling-rod: The statute (Code, § 4064) providing a penalty for running a threshing machine without having the tumbling-rod boxed, etc., does not make a person guilty of such act absolutely liable for damages resulting. Proof of running a machine not secured as required establishes negligence, but the rule still applies that contributory negligence on the part of the person injured will defeat a recovery: *Reynolds v. Hindman*, 82-146.

727. A person injured through a violation of this provision has a right of action, and it is sufficient to allege the violation as the basis of the right to recover, and as constituting the negligence complained of: *Messenger v. Pate*, 42-443.

728. Where a contract was made for threshing to be done with a machine not boxed, etc., as here required, *held*, that the contract was void, and that such fact was a good defense in an action for services rendered thereunder: *Dillon v. Allen*, 46-299.

729. Allowing minors in saloons: Under the statute (15 G. A., ch. 59; McClain's Ann. Stat., 1019) providing a punishment for the keepers of billiard halls, saloons, etc., permitting minors to remain in such halls or saloons, it is the duty of saloon-keepers not only not to permit, but to prevent minors remaining in their saloons, and the same duty is imposed on their employees. If the keeper or employee fails to take proper measures to prevent, he is to be deemed to permit it, and the liability will not depend upon the knowledge of the keeper or his employee of the fact that

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the person is a minor: *State v. Probasco*, 62-400.

Selling intoxicating liquor to minors, see INTOXICATING LIQUOR, §§ 68-76.

III. PROCEDURE IN COURTS OF RECORD.

1. What deemed a criminal procedure.

730. Violation of a city ordinance: A proceeding before a magistrate in the name of the city accusing defendant of the violation of a city ordinance is a criminal prosecution: *Davenport v. Bird*, 34-524.

731. The violation of an ordinance of a city punishing acts therein specified by a fine is a crime, and a prosecution to enforce the punishment is a criminal proceeding: *Jaquith v. Royce*, 42-406; *State v. Vail*, 57-103.

732. A proceeding before a mayor of an incorporated town to punish the violation of an ordinance is in the nature of a criminal prosecution: *Columbus City v. Cutcomp*, 61-672.

733. The provision of the constitution requiring prosecutions to be in the name of the state of Iowa refers to such criminal prosecutions as shall be instituted and prosecuted before a tribunal provided for in the constitution under the statutes of the state, and does not refer to prosecutions for violations of city ordinances: *Davenport v. Bird*, 34-524.

734. In name of city: A proceeding for violation of a city ordinance may be brought in the name of the city when so provided by law or ordinance; but if such prosecution is brought in the name of the state, without objection thereto until upon appeal, an objection on that ground will not be sustained: *State v. King*, 37-462.

735. An appeal by a city in a proceeding commenced in its name before a mayor by information to punish for the violation of a city ordinance is to be governed by the rules regulating appeals in criminal cases: *Columbus City v. Cutcomp*, 61-672.

736. Penalty; forfeiture: Where the statutes provide for a forfeiture in behalf of the school fund and also authorize a recovery of a penalty by the party injured, the provisions not being in the alternative, the enforcement

of one does not prevent the enforcement of the other: *Herriman v. Burlington, C. R. & N. R. Co.*, 57-187.

737. Penalty implies prohibition, and where a penalty is imposed upon the doing of an act a prohibition is thereby implied, and a contract in violation of such prohibition is void: *Gilman v. Des Moines Valley R. Co.*, 40-200.

A bastardy proceeding is not criminal: See BASTARDY.

A proceeding to punish for contempt is quasi criminal: See CONTEMPT, §§ 20-22.

2. Prevention of crime; security to keep the peace.

738. Threats of violence to another may be ground to bind over to keep the peace, although coupled with a condition which includes the performance of a professional duty: *Ritchey v. Davis*, 11-124.

739. Appearance in court: The plaintiff is not bound to appear in the district court at the next term, and further prosecute the proceeding, and a failure to appear and prosecute does not subject him to judgment for costs: *State v. Holliday*, 22-397.

740. But he may become liable if he does further prosecute and his complaint is found groundless: *State v. Leathers*, 16-406.

741. If plaintiff does not appear, defendant is not entitled to a trial, but should be discharged. The decision of the justice in binding over is not to be called in question: *State v. White*, 47-555.

742. Evidence: Before the enactment of a statutory provision allowing defendant in a criminal prosecution to be a witness in his own behalf, he could not be a witness in his own behalf in a proceeding in the district court for security to keep the peace: *State v. Darrington*, 47-518.

743. That the evidence before the justice of the peace in a proceeding for security to keep the peace was not taken down in writing is not a ground for dismissing the proceeding against defendant in the district court. On the hearing, other evidence may be received than that produced before the justice: *Gribble v. State*, 8-217.

744. Costs: If defendant is discharged on the hearing in the district court, the costs in

Extent of jurisdiction.—Venue.—Change of.

such court cannot be taxed against him: *Ibid.*

745. A person bound over to appear in the district court under security to keep the peace may be held liable for the costs, although the prosecutor does not appear in that court: *Houston v. United States*, Mor., 174.

746. Action on bond: Insanity is a defense to an action for breach of a bond to keep the peace: *State v. Geddis*, 42-264.

3. Extent of jurisdiction.

a. Venue.

747. Offense on Mississippi river: Jurisdiction being given to the state to punish offenses committed on the Mississippi river between the north and south boundaries of the state, the jurisdiction of the district court of each county bounded upon the river extends over the crimes committed upon such river between the north and south boundaries of such county: *State v. Mullen*, 35-199.

748. The jurisdiction of such court may extend to the punishment of the act of keeping a nuisance upon a boat moored to the east shore of an island situated on the east side of the center of the channel, and floating or resting upon the ground according to the stage of the water: *Ibid.*

749. Venue in larceny: Stealing property in another state and bringing it within this state constitutes the crime of larceny in the county into which the property is taken: *State v. Bennett*, 14-479.

750. Such offense is not, however, a crime commenced in one state and consummated in another, within statutory provisions as to such cases: *Ibid.*

751. Offenses committed near county boundaries: Under the statutory provision that an offense committed within five hundred yards of the boundary line of two counties may be prosecuted in either, *held*, that the county which had taken jurisdiction of the crime committed in an adjoining county within five hundred yards of the boundary between the two could not recover from the county in which the crime was committed the costs of the prosecution: *Floyd County v. Cerro Gordo County*, 47-186.

752. Offense partly in one county: The provision that an offense committed partly

in one county and partly in another may be prosecuted in either does not apply to the crime of administering a drug to procure abortion, where the drug is administered in one county and the miscarriage takes place in another. In such case the crime is completed where the drug was administered with that intent: *State v. Hollenbeck*, 36-112.

753. Offense on boat: Under a statutory provision (Code, § 4161), an offense committed on a boat, raft, or vessel, may be prosecuted in any county through which such boat, raft or vessel may pass in the course of the voyage: *Nash v. State*, 2 G. Gr., 286.

754. Evidence as to venue: In a prosecution for assault it is sufficient for the state to prove the county in which the offense was committed. It is not requisite to prove either the village, city or township: *State v. Gibson*, 29-295.

755. The venue of a crime must be proven to warrant a conviction. Therefore where the prosecuting witness testified that the offense was committed at her father's house, and her father testified that he lived in the county where the case was tried, but there was no proof to show where he lived when the offense was committed, *held*, that the venue was not sufficiently proven: *State v. Carr*, 60-453.

756. Testimony in a particular case considered, and *held* to show that the crime charged in the indictment was committed in another county than that in which the indictment was found, and that the conviction was erroneous: *State v. Byam*, 54-409.

757. Judicial notice: The court will take judicial notice of the county in which an incorporated town is situated. Proof of the commission of the act in a certain town is sufficient proof of the commission within the county in which the town is located: *State v. Reader*, 60-527.

b. Change of venue.

758. Affidavits: Where the petition is based upon the prejudice of the judge, the statute does not require affidavits in support thereof, nor contemplate the introduction of testimony, but the judge is not required to allow a change in such case as a matter of course: *State v. Mewherter*, 46-88.

Change of venue.

759. In a particular case, *held*, that the showing for a change was sufficient to render the action of the court in refusing it erroneous: *State v. Nash*, 7-347, 366.

760. An attorney appointed by the court to defend a prisoner is not incompetent to make an affidavit to prove the facts necessary to entitle the prisoner to a change of venue: *State v. Mooney*, 10-506.

761. Counter-affidavits: In a prosecution for violation of a city ordinance, it is not improper to consider, upon an application for a change of venue, counter-affidavits of the citizens of the city that there is no such prejudice against such defendant in the county as to entitle him to such change: *State v. Wells*, 46-662.

762. Discretion of the court in granting: The question of allowing the change rests in the sound discretion of the court, and unless such discretion has been abused the supreme court, on appeal, will not interfere with the decision: *State v. Ostrander*, 18-435, 447; *State v. Ross*, 21-467; *State v. Collins*, 32-86; *State v. Feller*, 32-49.

763. But this discretion is not absolute, nor an arbitrary discretion: *State v. Hutchinson*, 27-212.

764. If it appear that this discretion has been improperly exercised, the action of the court will be reviewed and reversed; and in a particular case the refusal to grant a change was held error: *State v. Canada*, 48-448.

765. The rule that the court is to pass upon the question of granting a change of venue in the exercise of a sound discretion applies to cases where the change is asked on the ground of prejudice of the judge, or excitement and prejudice of the people of the county, and although these grounds may be averred in the very language of the statute, they do not entitle the prisoner to a change as a matter of right (explaining *State v. Nash*, 7-347; *State v. Mooney*, 10-506): *State v. Arnold*, 12-479; *Gordon v. State*, 8-410; *State v. Barrett*, 8-536.

766. Abuse of discretion in denying a change of venue must be made to appear, or the decision of the court will not be interfered with, even when the ground alleged is the prejudice of the judge: *State v. Ray*, 50-520; *State v. Knight*, 19-94; *State v. Ingalls*,

17-8; *State v. Freeman*, 1 *Mewherter*, 46-88.

767. To justify a reversal of the action of the judge in granting a change of venue, it must be shown affirmatively that there was an abuse of the discretion reposed in the court in terminating the same: *State v. ...*

768. Therefore, where an application for a change of venue was a mere matter of belief of the applicant that he was prejudiced, founded on alleged facts, the existence of which the applicant could not prove by personal knowledge, *held*, that such showing was insufficient to overcome the discretion arising from the action of the court in granting the change: *Ibid.*

769. Even though the petition for a change of venue is based upon the prejudice of the judge, it shows sufficient ground, if the change is granted, it does not follow that the petition should be granted as a matter of course. Some latitude is left to the judge in granting or refusing upon such petition. He may consider the feelings, as well as the paper evidence, in denying the change as he may deem proper. In a particular case, showing for a change in such venue was sufficient to require the reversal of the court in refusing it: 65-61.

770. Where an application for a change of venue on account of the prejudice of the judge, and overruled, and in response to an objection to the change by defendant, the judge refused to grant it, intended to give the defendant a fair trial, than he was entitled to, *held*, that the mark showed prejudice on the part of the judge, and that the motion for a change of venue should have been sustained: 49-85.

771. Where the record fails to show that the evidence is all that was presented at the hearing of the application for a change of venue, the supreme court cannot review the correctness of the action of the court: *State v. Mallory*, 11-241, 416.

772. Where a showing is made for a change of venue based on the ground of excitement and prejudice of the inhabitants of the

Change of venue.—Limitation.

resisted by affidavits on the part of the state, the supreme court will, on appeal, be slow to interfere with an order denying the change. The record must show that there was an abuse of discretion in determining the matter: *State v. Williams*, 63-185. And in a particular case held that the showing was not sufficient to necessitate a reversal: *State v. Perigo*, 70—.

773. It does not follow that because a change of venue on the ground of prejudice of the inhabitants of the county has been improperly denied, and the case is reversed on that ground, that when the case comes on for trial anew, the defendant will be entitled to such change on the affidavits before filed: *State v. Nash*, 7-347, 374.

774. Error in overruling an application for change of venue will not entitle the defendant to a release on *habeas corpus*: *Jackson v. Boyd*, 58-536.

775. In police court: There is no provision for change of venue in proceedings before a police court for violation of a city ordinance. The provisions in that respect with reference to prosecutions before justices of the peace do not apply: *Zelle v. McHenry*, 51-572.

776. The transcript of record entries which is required to be made by the clerk in transferring the case upon change of venue to another county does not include the indictment itself, which is required to be transmitted in its original form: *Sharp v. State*, 2-454.

777. It is not error to allow the clerk of the court from which a change of venue is taken to amend his certificate by interlineation to supply an omission, there being no question as to the truthfulness of the amendment: *State v. Gibson*, 29-295.

778. Where an indictment upon which defendant is put on trial appears to have been properly found in the county from which the change is taken, and no objection is made thereto until after verdict, defendant cannot object that it is not filed in the court in which the trial is had: *Sharp v. State*, 2-454.

779. Bail: The clerk of the court to which the change is granted has power to take a recognizance for the appearance of the prisoner: *State v. Merrihew*, 47-112.

780. The form of bond required upon granting a change of venue is substantially

the same as that prescribed in other cases of bail: *Ibid*.

781. The statutory provision as to giving a new bond upon change of venue, for appearance in the court to which the case is changed, is directory, and does not operate to release the sureties on the original bail bond, who are still responsible for defendant's appearance: *State v. Brown*, 16-314.

782. Costs: Under a statutory provision that the county from which a criminal case is taken by change of venue shall pay to the county to which it is taken all costs of the change and trial, "which shall be audited and allowed by the court trying the cause" (Code, § 4381), held, that an indorsement by the judge not purporting to act as the court, recommending the allowance of an amount for costs, was not an auditing and allowance binding upon the county: *Barnes v. Marion County*, 54-482.

4. Limitation of time for commencing prosecution.

783. How raised: The statute of limitations in a criminal proceeding cannot be raised by demurrer to the indictment: *State v. Hussey*, 7-409; *State v. Groome*, 10-808; *State v. Deitrick*, 51-467.

784. The clause of the section of the statute of limitations in criminal proceedings providing that the statute shall not run during the time of the non-residence of defendant is not to be restricted to offenses committed when the defendant is out of the state, but applies equally to all cases: *State v. McIntire*, 58-572.

785. A defendant in a prosecution for embezzlement is not estopped by subsequent fraudulent statements from showing that the defalcation actually took place at such time that the prosecution therefor is barred: *State v. Hutchinson*, 60-478.

786. Under former provisions, held, that the filing of information before a justice of the peace under which defendant was arrested and bound over to appear before the district court was a sufficient commencement of the prosecution: *State v. Groome*, 10-808. (But the present statute requires the indictment to be found within the time specified: Code, § 4166.)

Acquiring jurisdiction; arrest; extradition.

787. It is not error to instruct the jury that they must find that the crime was committed on or about the time charged or at any date within the statutory period of limitations prior to the finding of the indictment: *State v. Fry*, 67-475.

788. Where an offense is charged as committed on a particular day, defendant may be convicted by proof of the commission of the offense on any day within the statutory period of limitations: *State v. Briggs*, 68-416.

Further as to allegations in the indictment as to the time of commission of the offense charged, see *infra*, §§ 1029-1036.

5. Acquiring jurisdiction; arrest; extradition.

789. Jurisdiction first acquired: The court first acquiring authority over the accused by his arrest, or by otherwise obtaining custody of his person through its officers, first acquires jurisdiction of the case. The finding of an indictment does not confer jurisdiction of the person of the accused: *Ex parte Baldwin*, 69-502.

790. The power to imprison necessarily includes the power to arrest: *Davenport v. Bird*, 34-524.

791. What constitutes arrest: It is not essential in order to constitute an arrest that the sheriff should have informed the prisoner of his intention to make the arrest, and that he was a peace officer. While the prisoner might ordinarily be entitled to such information, the legality of the arrest as between the sheriff and other parties is in no manner affected by the sheriff's failure in these respects: *Miller v. Dickinson County*, 68-102.

792. Peace officer: A special constable appointed by a justice of the peace under the provisions of Code, § 3630, is not a peace officer: *Foster v. Clinton County*, 51-541.

793. The marshal is a peace officer and may therefore arrest a person guilty of vagrancy and serve the order of a justice of the peace committing such person to imprisonment, and hold the prisoner under such order: *State v. Watson*, 66-670.

794. Bench warrant: The issuance of a bench warrant is not essential to give the court jurisdiction of defendant. Appearance

and submission to the jurisdiction of the court renders a warrant unnecessary: *v. Ray*, 50-520.

795. Warrant, when returnable: That the warrant for arrest is returnable after its issuance, instead of being void, does not render it void: *State v.*

796. Arrest by officer without warrant: Where an officer makes an arrest without a warrant on proper cause, he is not liable for taking an offender for a reasonable time before a magistrate, and will not be liable for doing so: *Hutchinson v. San*, 340.

797. A peace officer may arrest without a warrant, when a person has in fact been committed, and he is not liable for believing that the person has committed it; and it is not error to charge the jury in such a case that an officer makes an arrest without a warrant, and he will be liable, unless the person was likely to escape: *Montgo*, 67-497.

798. Resistance to arrest: Where a person is arrested for murder committed in violation of a lawful arrest, the information under which the arrest was made may be given in evidence: *Meshek*, 61-316.

799. Wrongful arrest out of state: It is no defense that defendant was arrested in another state without a warrant, and brought to this state by force: *State v. Ross*, 21-467.

800. A court will not, upon a plea of not guilty, inquire into whether or not the defendant was properly or improperly brought within the jurisdiction of the court: *State v.*

As to reward for arrest: See *CONTRACTS*, §§ 57-63.

801. Search of person of arrested: Police officers upon the arrest of a person with felony may make search of the person for stolen property, instruments of the crime, or anything that may give a clue to its commission: *Lee*, 44-101.

802. The sheriff is justified in

Extradition.—Preliminary examination.

the person arrested and taking from him money or property connected in any way with the crime charged, or which may serve in identifying the prisoner, or be used by him in effecting an escape: *Commercial Exchange Bank v. McLeod*, 65-665.

803. Property thus taken from a prisoner by the officer, and which is not connected with nor the fruit of the crime for which he is arrested, is in the possession of the officer for the person under arrest, and is no more subject to attachment than if it were in the prisoner's personal possession: *Ibid*.

804. But where the money taken from the prisoner was the money obtained by him through the commission of the crime for which he was arrested, *held*, that it was subject to garnishment in the hands of the officer at the suit of the person rightfully entitled thereto: *Reifsnnyder v. Lee*, 44-101.

Further, see SEARCH WARRANTS.

805. Extradition; fugitive from justice: To constitute a person a fugitive from justice, he must have been in the state where the crime is alleged to have been committed, must have there committed the crime, and must have fled therefrom to escape punishment. The state is not bound to surrender one of its citizens who has constructively committed a crime in another state, without having been there in person: *Jones v. Leonard*, 50-106.

806. The fact that the governor considers the evidence submitted to him sufficient, and issues his warrant accordingly, does not preclude inquiry by the courts as to the sufficiency of such evidence, and his decision may be questioned in a *habeas corpus* proceeding: *Ibid*.

807. The sufficiency of evidence in a particular case, doubted: *Ibid*.

808. Compensation of officer: Under Code, § 4172, a contract to pay an officer a fee or reward for arresting and bringing back an escaped prisoner by means of a requisition is not valid, even though entered into by a surety on the bail bond of such prisoner: *Day v. Townsend*, 70—.

809. Detention to await requisition: Under a statute (Code, § 4176) authorizing the arrest and binding over of a person found within the state liable to be demanded from another state upon requisition, *held*, that

such a proceeding was only applicable where the person arrested was charged with a crime committed in some other state, before some court, magistrate or other officer of such state by an indictment, information or other accusation known to its laws, and that unless such fact was made to appear, the magistrate had no jurisdiction to bind over the person arrested to await a requisition: *State v. Hufford*, 28-891.

810. If in such case bail is taken without its being shown that the person arrested is properly charged in some other state, the proceedings are void and a recovery cannot be had on the bail bond: *Ibid*.

811. A party thus arrested charged with murder in the second degree is entitled to release on bail under the provisions of the constitution: *Ibid*.

6. Preliminary examination.

812. Defendant as a witness: Before the Code was amended so as to allow defendant in a criminal prosecution to be a witness in his own behalf, he might testify in a preliminary examination: *State v. Laffer*, 38-422.

813. But he was not a competent witness for himself on a trial on an information for security to keep the peace: *State v. Darrington*, 47-518.

814. Minutes of the evidence taken down by the examining magistrate as required by law are not competent as evidence on the trial of the case: *State v. Collins*, 33-36; *State v. Hull*, 26-292.

815. Neither are such minutes admissible for the purpose of impeaching the witness on the trial: *State v. Hayden*, 45-11.

816. But the testimony given on the preliminary examination, by a witness who dies before the trial, may be proved on the trial by witnesses who heard it: *State v. Fitzgerald*, 63-268.

817. Although the minutes are not properly certified to by the magistrate, yet if the grand jury act thereon, and return a proper memorandum thereof to the court in connection with the indictment, as required by Code, § 4289, the defendant cannot object to the calling of witnesses whose names are indorsed on the back of the indictment, and a memorandum of whose testimony is thus returned: *State v. Kepper*, 65-745.

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818. Fees: The magistrate or a person appointed by him to write out the minutes of the testimony cannot recover compensation therefor from the county. The usual fees of the magistrate, in such cases, for conducting the examination are all that are allowed: *Sanford v. Lee County*, 49-148.

819. The magistrate is entitled to be reimbursed by the county for expenses of stationery used in taking down minutes of the evidence: *Evans v. Story County*, 35-126.

820. Commitment; warrant: The warrant of commitment in a particular case held sufficient: *Cowell v. Patterson*, 49-514.

821. The fact that the defendant was bound over by the justice will be presumed in an action on a bail bond given upon such commitment, but if it appears that no such order was made, that fact is a proper matter of defense: *State v. Patterson*, 23-575.

822. Prosecuting witness: The person filing complaint is to be treated as the prosecuting witness, and the fact that he is subpoenaed as a witness by the state does not change his situation: *In re Trenchard*, 16-58.

823. Appeal by prosecuting witness from an order taxing the costs of the prosecution to him must be taken at the time judgment is rendered and not afterwards: *State v. Knapp*, 61-522.

824. Putting witness under bond to appear; witness fees: A witness who is required by a committing magistrate to enter into a written undertaking, with security, to appear and testify on the trial of the case, and is committed to jail for failure to furnish security, is not entitled to witness fees for the time he is thus held in confinement: *Markwell v. Warren County*, 53-422.

7. Grand jury and its action.

a. Formation; challenges.

825. Irregularity in jury lists: It is not a valid objection to a grand jury that the judges of election, in making returns of names of persons to serve as grand jurors, returned in all eighty-five names instead of seventy-five, as required by law, if the extra names had been stricken off before the grand jury was drawn and fifteen jurors have been regularly drawn and summoned.

Neither is it a sufficient objection that the names thus returned were not entered in the election book: *State v. Knight*, 19-94.

826. Filling panel: If a grand juror is discharged subsequently to the formation of the jury, the panel should be filled by the summoning of another juror: *Norris' House v. State*, 3 G. Gr., 513.

As to filling panel after challenges have been allowed, see *infra*, §§ 862-867.

827. Objection to the substitution of one grand juror for another without having the vacancy filled in the manner required by law must be made at the time of such substitution: *State v. Howard*, 10-101.

828. New precept: The provision of statute (Code, § 244) for the issuance of a new precept applies only to a case where all the jurors fail to appear, or it is determined that the whole panel has been illegally selected or drawn. Such provision has no reference to the case of failure of jurors to attend: *State v. Pierce*, 8-231.

829. Where a part of the grand jury fails to appear, the court may orally direct the sheriff to summon a sufficient number to complete the panel, which order should be entered of record, but a written precept is not necessary: *State v. Miller*, 53-84; *State v. Miller*, 53-154.

830. The discharge of one grand juror and the impaneling of another to which there is no objection except the fact that the first has been erroneously discharged will be no ground for quashing an indictment found by the second: *State v. Hughes*, 58-165.

831. At least this is so where there is no allegation or showing of prejudice or possible injustice to defendant from the fact of the discharge of the first jury: *State v. Hart*, 67-142.

832. Re-summoning: A grand jury having once been discharged may be re-summoned at the same term: *State v. Reid*, 20-413.

833. Talesmen chosen to fill the places of absent grand jurors are to serve during the term at which they are summoned, and if the jury is discharged and re-summoned during the term, such talesmen are to be re-summoned with the others: *Ibid.*

834. Expiration of term: The grand jury does not terminate by reason of the fact that

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the term of court commencing within the year for which they were chosen extends into the following year without an adjournment of the term; *State v. Winebrenner*, 67-230.

835. Defects, how raised: Under a statute requiring the board of county commissioners to deliver copies of jury lists to the clerk thirty days before the commencement of the term, *held*, that failure to comply therewith was a defect in the proceedings which might be raised by plea in abatement: *United States v. Cropper*, Mor., 190.

836. The court has no power to remove, reform or change the members of the grand jury: *Keittler v. State*, 4 G. Gr., 291.

837. Irregularities not prejudicial: Where there has been no substantial departure in the selection, drawing, etc., of the grand jury affecting substantially the rights of defendant, a motion to set aside the indictment for irregularities in connection with their selection should not be sustained: *State v. Brandt*, 41-593.

838. It would seem that deviations from the method pointed out for the selection, etc., of the grand jury, of a slight and unimportant nature, should not be regarded: *State v. Carney*, 20-82.

839. Selection of foreman may be made either from grand jurors regularly drawn or from those summoned to supply a deficiency: *State v. Brandt*, 41-593.

840. Grounds of challenge; exemptions from service: Although justices of the peace, supervisors, ministers of the Gospel, etc., are exempt from service upon a grand jury, they are not necessarily incompetent, and their presence will not vitiate the panel. The exemption is a personal privilege which may be waived: *State v. Adams*, 20-486.

841. Alienage: That a member of the grand jury is an alien is a ground of challenge, but not a ground for setting aside an indictment: *State v. Gibbs*, 39-318.

842. Alienage will not be presumed. The party asserting it as a ground of challenge has the burden of proving it: *State v. Haynes*, 54-109.

843. Bias; opinion of guilt or innocence: Under a statute somewhat different from the one now in force, *held*, that it was only where a juror had formed or expressed an

unqualified opinion of defendant's guilt that he was disqualified as a juror, and that the fact that he had formed an opinion which, upon further interrogation, he stated was not unqualified, did not render him incompetent: *State v. Hinkle*, 6-380.

844. The statement of a juror that he had read some portion of the evidence taken at a coroner's inquest upon the body of the person with whose killing defendant was charged, but did not know that he had read the whole of it, and that he thought he had formed an opinion from what he had read as to the guilt of defendant, but that he had no prejudice or bias such as would prevent him from listening to the evidence and passing upon the question of guilt as impartially as though he had never heard of the case, held, not sufficient to show that he was disqualified: *State v. Shelton*, 64-333.

845. Where a case is sent back to the same grand jury after a former indictment found by them is set aside, it is a sufficient cause of challenge to the jurors that they have heard the evidence upon which the previous indictment was found, and by the finding of such indictment have formed and expressed an opinion as to the guilt of defendant: *State v. Gillick*, 7-287; *State v. Osborne*, 61-330.

846. It seems that a challenge to a grand juror may be allowed for any cause that would constitute an objection to a petit juror: *State v. Gillick*, 7-287.

847. Challenge to panel: That the grand jury is reorganized during the term is not a ground of challenge to the panel: *State v. Mooney*, 10-506.

848. Who may challenge; prosecution: In the absence of express statutory authority the prosecution has no right to challenge members of the grand jury: *Keittler v. State*, 4 G. Gr., 291. (Such challenge is authorized as to individual jurors by Code, § 4259.)

849. Defendant bound over: Where defendant was bound over to appear before the grand jury after the grand jury was organized, *held*, that he was still entitled to exercise his right of challenge to such grand jury: *State v. Mooney*, 10-506.

850. A defendant under arrest in a preliminary proceeding but not yet bound over to appear before the grand jury is not entitled to challenge grand jurors although it is

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possible that his case may afterwards come before them: *State v. Fitzgerald*, 63-268.

851. Time for challenge: The time within which the right of challenge to grand jurors shall be exercised is not prescribed, and the prisoner ought to be permitted to exercise it at any time before the consideration of his case. Therefore, where a case is re-submitted to the same grand jury after a previous indictment has been set aside, the prisoner should be allowed an opportunity to challenge the members of such grand jury on the ground that they have previously formed and expressed an opinion in returning the first indictment: *State v. Osborne*, 61-330; *State v. Gillick*, 7-287.

852. Defendant should exercise his right of challenge at the proper time or it will be held waived: *State v. Harris*, 38-242.

853. Where defendant was in court to answer an indictment, and on motion the indictment was quashed, and the court then referred the matter to the grand jury for further consideration, and they returned an indictment charging defendant with a different crime, held, that an objection to the panel should have been then raised, and could not be taken advantage of afterwards: *State v. Ruthven*, 58-121.

854. An objection to the grand jury must be made before pleading to the indictment: *State v. Reid*, 20-413.

855. A defendant held to answer before the formation of the grand jury cannot interpose an objection to the grand jury or an individual juror after the jury is sworn: *Diron v. State*, 3-416; *State v. Hinkle*, 6-380; *State v. Ingalls*, 17-8; *State v. Gibbs*, 39-318.

856. Defendant not held to answer; method of raising objection: A defendant not bound over to appear before the grand jury before the finding of an indictment against him cannot be deprived of the right to attack the indictment for causes which would have been grounds of challenge: *Du-tell v. State*, 4 G. Gr., 125; *Norris' House v. State*, 3 G. Gr., 513.

The objection in such case is to be raised by motion to set aside the indictment: See *infra*, §§ 1084-1086.

857. Waiver of challenge: A defendant bound over to answer may waive his right to challenge the grand jury, and will not be in

default if he does not appear: *State v. Klingman*, 14-County v. Ross, 40-176.

858. Presence of defendant; the right of challenging an individual juror may be exercised or waived by the defendant's attorney in the absence of the defendant even on a trial for felony. The presence of the defendant at this proceeding is essential. At any rate, where it appears that there was any objection to the defendant, the defendant could have challenged the error in forming the grand jury. The defendant's absence will be excused if it is not prejudicial: *State v. Felter*, 25-67.

859. Burden of proof as to challenge: A challenge to the grand jury may be demurred or pleaded to by the defendant. The defendant must introduce evidence of his challenge or it will be overruled: *v. Gillick*, 10-98.

860. The burden of showing ground of challenge in the selection of grand jurors: The party making the challenge: *St. v. Man*, 10-589.

861. The party asserting a ground of challenge has the burden of proving it: *State v. Haynes*, 54-109.

862. Filling panel: A judgment of conviction will not be reversed on the ground that, subsequently to the formation of the grand jury, one of the jurors was removed and a person substituted, as the defendant did not have opportunity to challenge his right of challenge, it not appearing that the new juror was disqualified or that the defendant was prejudiced: *State v. Fowler*, 18-485.

863. In case of the challenge of an individual juror, there is no provision for supplying another juror in his place. A juror thus challenged does not cease to be a member of the grand jury, and his place is not to be supplied; and an indictment returned by the requisite number of grand jurors, of whom no cause of challenge by the defendant has been interposed will be good: *State v. Man*, 10-589.

864. But where, by challenge, the number of grand jurors is reduced below twelve, held, that the court may, upon application of the district attorney, have ordered the vacancies in the panel to be filled: *State v. Garhart*, 31-100.

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865. So where six grand jurors were challenged, it was held not error to reorganize the jury and fill up the panel: *State v. Mooney*, 10-508.

866. If a member is discharged from service upon the grand jury, his place should be filled: *Norris' House v. State*, 8 G. Gr., 513.

867. Where, by reason of the sustaining of challenges to individual jurors, the panel is left with a less number than fifteen jurors qualified to act in the case in which the challenges have been allowed, it is competent for the court to order the panel to be filled by an addition of the requisite number of jurors to act only in such case; and it is the duty of the court to thus fill the panel where by challenges it is reduced to less than twelve, but it is not error to refuse to thus fill the panel where twelve or more of the regular jurors remain unchallenged: *State v. Shelton*, 64-388.

868. Error not cured by conviction: The fact that defendant is convicted does not cure any error in refusing him the privilege of challenging grand jurors: *State v. Osborne*, 61-830.

869. The impaneling is the final formation by the court of the grand jury, the act immediately preceding the swearing of the jury which ascertains who are to be sworn: *State v. Ostrander*, 18-485, 446.

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870. Investigation of officers: Although it is by statute (Code, § 4278) made the special duty of the grand jury, among other things, to inquire into wilful and corrupt misconduct in office of county officers, yet the grand jurors cannot report to the court the result of such inquiry otherwise than by indictment, and the members of a grand jury charging a county officer with misconduct otherwise than by indictment may render themselves liable to an action for libel: *Rector v. Smith*, 11-302.

871. Receiving improper evidence: The examination of an incompetent witness by the grand jury will not vitiate the indictment: *State v. Tucker*, 20-508.

872. Witnesses: Under statutory provision, where defendant has been bound over be-

fore a committing magistrate and the minutes of the examination have been returned, the grand jury may find an indictment upon such minutes without having the witnesses again before them: *State v. Rodman*, 62-456.

873. Where an indictment is set aside and the case recommitted to the same grand jury, they may consider evidence of witnesses who have already been before them without their being recalled: *State v. Clapper*, 59-279.

874. Secrecy: The statutory provision (Code, § 4284) enjoining secrecy on the members of the grand jury as to their proceedings is general and without limit as to time, and a grand juror cannot make affidavit to the fact that twelve jurors did not concur in finding a bill: *State v. Gibbs*, 89-318.

875. The fact that a bailiff was present in the grand jury room during their proceedings, though not when the final vote was taken, held not sufficient to affect the validity of the indictment: *State v. Kimball*, 29-287.

876. Returning minutes of testimony: The minutes need not be attached to, or made a part of, the indictment, and a mere failure to file the same should not deprive the state of its evidence: *State v. Postlewait*, 14-446.

877. It is sufficient that they be returned into court and filed with the clerk: *State v. Hamilton*, 42-655.

878. That they are handed to the clerk and deposited with him sufficiently constitutes a filing: *State v. Guisenhouse*, 20-227.

879. That the minutes include testimony taken in other cases does not necessarily invalidate them: *Ibid.*

880. The minutes, when returned, become a part of the record and cannot be impeached by affidavits: *State v. Little*, 42-51.

881. Failure of the clerk to file the minutes of testimony returned by the grand jury cannot be raised by demurrer to the indictment: *State v. Briggs*, 68-416.

882. If the minutes of testimony are returned by the grand jury with the indictment and placed by the clerk in his office, and remain there as a part of the record, this is a sufficient filing within the requirement of the statute, although it would be better practice for the clerk to indorse such minutes as filed: *Ibid.*

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883. The minutes of the testimony thus returned by the grand jury cannot be introduced as independent evidence on the trial: *State v. Ostrander*, 18-435.

884. Nor are such minutes admissible to impeach a witness on the trial by showing a conflict between his evidence and that appearing to have been given by him before the grand jury: *State v. Hayden*, 45-11.

885. The fact that the minutes of the evidence returned by the grand jury do not support the indictment is not ground for quashing it or setting it aside: *State v. Harris*, 36-268.

886. Although the minutes of the evidence taken before the committing magistrate are not certified to as required by statute in such cases, yet if the grand jury act upon such minutes and return with the indictment a memorandum of the testimony thus submitted to them, it will be presumed that they had before them sufficient evidence that the minutes on which they acted were true minutes of the evidence before the magistrate, and the witnesses whose evidence is thus returned and whose names are properly indorsed upon the indictment cannot be excluded from testifying on the trial: *State v. Kepper*, 65-745.

887. **Indorsing names of witnesses on indictment:** The objection that the names of witnesses examined before the grand jury are not indorsed on the indictment should be raised in the trial court or it will be regarded as waived: *Harriman v. State*, 2 G. Gr., 270.

888. Names of witnesses before the grand jury who do not give any material testimony, and the minutes of whose testimony are not returned, need not be indorsed on the indictment: *State v. Little*, 42-51.

889. Affidavits cannot be received to show that witnesses whose names are not indorsed, and minutes of whose evidence are not returned, were examined before the grand jury: *Ibid.*

890. It is not error in the court to permit, upon motion of the district attorney, an indorsement to be made on the back of the indictment of the name of a witness who has been before the grand jury: *State v. Robinson*, 47-489.

That witnesses whose names are not indorsed on the indictment, and the minutes of whose evidence are not returned with the in-

dictment, cannot be called by on the trial except upon not given; and also as to what indorsement of witnesses' name title prosecution to call the §§ 1171-1180.

891. **Indorsing name of prosecutor:** The requirement of § 4292 that the name of a private person at whose instance the indictment shall be indorsed thereon is for the purpose of enabling the costs against such prosecution to be recovered if the prosecution fails. The requirement that a prosecution for adultery be commenced only on complaint of the husband or wife of the offending person renders it necessary that the husband or wife be indorsed on the indictment as prosecutor: *State v. J.*

892. **Indorsement by foreigner:** The indorsement of the name of the foreigner by the initials of his Christian name and his full name, held sufficient: *Groome*, 10-308.

893. The requirement that the name be subscribed to the indictment is merely directory, and it does not appear that the indictment returned by the grand jury, without the proper indorsement by the prosecutor, can be taken advantage of after the trial: *Wau-kon-chaw-neek-kaw v. State*, 11 Mor., 332.

894. **Presentation to the court:** The requirement that the indictment be presented, etc., is directory only. The failure of the clerk to make the indictment a part of the record will not invalidate the indictment: *State v. Glavin*, 249; *State v. Axt*, 6-511; *State v. Axt*, 10-126.

895. In the absence of an affidavit to the contrary, it will be presumed that the requirements of the statute relating to the presentation were complied with: *State v. Axt*, 59-267.

896. Where defendant moves to quash the indictment from the files because the indictment has been altered by erasure and insertion of words, held, that the affidavit of the district attorney disproved the defendant's allegations: *State v. Hughes*, 58-165.

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897. Indorsement by the clerk: No record of the filing of the indictment, other than the indorsement of the clerk on the indictment itself, need be made, at least not until after the arrest of the accused: *Wrocklege v. State*, 1-167; *Herring v. State*, 1-205.

898. It is not essential that the indorsement on the indictment should recite that it was presented by the foreman, in the presence of the grand jury, to the court: *State v. Jolly*, 7-15.

899. A mistake in the indorsement on the indictment as to the county in which it was filed, *held* not a fatal error, where it appeared that it was presented and filed in the proper county: *State v. Smouse*, 50-43.

900. Indorsements in particular cases, *held* to be in substantial compliance with the provisions of the statute as to presenting and filing: *Dixon v. State*, 4 G. Gr., 381.

901. The court should be named in the indorsement, although a failure to do so will not be fatal: *State v. Jolly*, 7-15.

902. Failure of the clerk to file the indictment will not invalidate the proceedings: *State v. Rivers*, 58-102.

903. Substitution of lost indictment: If the indictment is lost or abstracted after the arraignment of defendant, the court may, upon motion, substitute a copy and proceed upon the record thus made, the same as upon the original indictment: *Ibid.*; *State v. Stevisiger*, 61-623.

904. Where, an indictment being lost, a second one was returned for the same offense, which being *held* defective, and the original being found, a trial was had under the first indictment, *held*, that such proceedings were proper and could not be dismissed on the ground of another indictment pending: *Reddan v. State*, 4 G. Gr., 137.

905. Defect in indorsement or filing: The fact that it does not appear that the indictment is indorsed "a true bill" and marked filed by the clerk cannot be raised for the first time on appeal: *Hughes v. State*, 4-554.

906. Waiver of objection: Objection on account of irregularity in the finding of an indictment is waived by pleading and submitting without objection to the verdict: *Harriman v. State*, 2 G. Gr., 270.

907. Concurrence of grand jurors, how shown: It is not necessary that the record,

on appeal, state that the indictment was found by a legal grand jury, nor that it contain their names. The indorsement of the indictment by the foreman as a true bill is conclusive evidence that it was duly found and concurred in by a sufficient number of the grand jury: *Ibid.*

908. Record conclusive: Where the record shows that an indictment was found by a full grand jury, the fact that such grand jury was composed of less than the required number of jurors cannot be shown by evidence *aliunde*: *Hall v. State*, 4 G. Gr., 73.

909. The court cannot inquire into the character of evidence upon which the grand jury acted in finding an indictment. So *held* where it was claimed that after the witnesses were examined one of the grand jurors was discharged and his place supplied by a bystander, the evidence not being again presented: *State v. Fowler*, 52-103.

910. Affidavits of grand jurors and others cannot be received to show that witnesses testified before the grand jury whose names are not indorsed on the indictment, and minutes of whose evidence are not returned: *State v. Little*, 42-51.

911. Affidavits of grand jurors are not competent for the purpose of proving that an indictment duly returned was not concurred in by twelve grand jurors: *State v. Gibbs*, 39-318; *State v. Meurherter*, 46-88.

912. After an indictment has been presented and become a matter of record, it is not competent for the grand jurors who found it to testify that they did not vote to find the bill, or how they voted, or what they intended to find. Therefore *held*, that where the indictment charged acts constituting murder in the first degree, it was not competent to present affidavits of the grand jurors showing that they had refused to find an indictment for murder and intended to charge only manslaughter, even though, in the introductory part of the indictment, the crime was named as manslaughter: *State v. Davis*, 41-311.

8. *The indictment, its form and requisites.*

913. Formal parts: The expressions "State of Iowa" and "The State of Iowa" are es-

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essentially the same: *Harriman v. State*, 2 G. Gr., 270.

914. An indictment in which the presentment is "in behalf of the state of Iowa" is good, although the expression "In the name and by the authority of the state of Iowa" is a more appropriate style. It need not be expressed in each proceeding in the conduct of a prosecution, that it is made "in the name and by the authority," etc.: *Wrocklege v. State*, 1-167.

915. An indictment improperly naming the court, or failing to state the term thereof, is not subject to demurrer on that ground: *State v. Schill*, 27-263.

916. A mistake in the name of the state, or in the spelling of the name of the county, will not vitiate the indictment. These facts are not such as to prejudice the substantial rights of the defendant: *State v. Gurlock*, 14-444.

917. The fact that on the face of the indictment there is no title to the action, in accordance with the form given by statute, where the body of the indictment sets forth the names of the parties, does not constitute a valid objection thereto on motion or demurrer: *State v. McIntire*, 59-264; *State v. McIntire*, 59-267.

918. It is not essential that the indictment be signed by the district attorney: *State v. Ruby*, 61-86; *State v. Wilmoth*, 63-380.

919. An indictment signed A. B., "Pros. Atty. pro tem.," etc., held sufficient: *Wrocklege v. State*, 1-167.

920. Laying the venue: An indictment commencing "The grand jury of the county of Dubuque, in the name, etc., of the state of Iowa," charging the burglarious entering, etc., of a house "there situate," held to sufficiently lay the venue in Dubuque county: *State v. Reid*, 20-413.

921. An indictment for larceny corresponding in form to the statutory provision, charging the offense as committed "in the county aforesaid," held sufficiently specific as to the venue of the crime: *State v. Lilard*, 59-479.

922. An indictment in the form specified by statute sufficiently charges the offense as having been committed in Iowa: *State v. Winstrand*, 37-110.

923. Conclusion: In an indictment under a statute, it is not necessary in the conclusion

to refer specifically to the which the indictment is for: *State*, 4 G. Gr., 526.

924. The formal ending of "and so the jurors, etc., do say," etc., is but a legal conclusion and cures any defect in the charge: *State v. Parsons*.

925. A mistake in the conclusion of the indictment in reciting the name of the injured, such name being correct in the body of the indictment, held not to vitiate: *State v. McCunniff*, 70—.

926. Requisites; statement of facts: An indictment must state facts of the offense in language direct and concise, and the circumstances which are necessary to show a crime punishable by law. It may be aided by its omissions: *State v. Potter*, 28-508; *Chicago, B. & P. R. Co.*, 63-50.

927. Where the acts charged are lawful under certain circumstances, it is not sufficient to charge them as unlawfully done, but the facts showing the acts to be unlawful must be alleged: *State v. Chicago, E. & M. R. Co.*, 63-508.

928. Statutory modification: A constitutional provision requiring that a crime be committed on which to put defendant does not make it necessary that the indictment shall conform in every particular to the requirements of the constitution: *State v. Berans*, 37-178.

929. But the leading requisites of an indictment at common law are not changed by statute: *State v. Calhoun*.

930. Defects not cured: The indictment cannot, by making special arraignments upon indictment, be cured of defects therein consisting in a want of certainty as to the acts constituting the offense: *States v. Ross, Mor.*, 164.

931. A mere clerical error discovered and corrected by amendment of the indictment itself will not render the indictment fatally defective: *State v. Crockett*.

932. Immaterial defects: (Under a statutory provision) the procedural defects in an indictment are not to be affirmed if they are not tending to

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the substantial rights of the defendant upon the merits: *State v. Gurlock*, 14-444; *State v. Emeigh*, 18-122; *State v. White*, 32-17.

933. Description of the offense: It is sufficient (by statutory provision) to describe the offense in such a manner as to enable a person of common understanding to know what is intended and the court to pronounce judgment: *State v. Hockenberry*, 30-504; *State v. Close*, 35-570.

934. The technical exactness of the common law as enforced in criminal prosecutions, whereby many guilty persons escaped the just penalties due their crimes, and which justly became the reproach of that system of jurisprudence, has been wisely superseded in this state by statutory provisions: *State v. Thompson*, 19-299; *State v. Johnson*, 28-407.

935. So, if the proof offered in support of the charge in an indictment is such as would not mislead a person of common understanding, it is competent: *State v. Thompson*, 19-299.

936. Ordinary language is sufficient, if a person of common understanding may know therefrom what is intended: *State v. Stanley*, 33-526.

937. An indictment for larceny of bank bills, stating that their number and denominations are unknown, is sufficient: *State v. Hoppe*, 39-468.

938. A description of property in an indictment for larceny as "\$180 in bank bills usually known and described as greenbacks," held sufficient: *State v. Hockenberry*, 30-504.

939. Where an information charged the illegal sale of beer, held, that the quantity sold was immaterial and need not be alleged: *State v. King*, 37-463.

940. Under an indictment for illegal sale of intoxicating liquors, held, that the sum for which the illegal sale was made being immaterial, uncertainty in stating such amount would not render the indictment bad: *Clare v. State*, 5-509.

941. Only such facts need be stated in the indictment as are required to be proved on the trial: *Nash v. State*, 2 G. Gr., 286, 294.

942. If the act is charged to have been against the statute, it need not be charged to have been done unlawfully: *Ibid.*

943. In the case of a misdemeanor, where

the facts related in the indictment appear to have been unlawful, it is not necessary to allege them to have been unlawfully done: *Capps v. State*, 4-502.

944. In a prosecution for illegal voting, the indictment need not state the date of the general election at which the crime is alleged to have been committed, nor what officers were to be voted for at such election: *State v. Minnick*, 15-128.

945. In charging a threat to kill, the fact may be stated without setting out the words used: *State v. O'Mally*, 48-501.

946. Matter of defense need not be negatived in the indictment: *State v. Williams*, 70—.

947. Arabic figures: The use of Arabic figures in place of words in an indictment will not vitiate it: *Winfield v. State*, 3 G. Gr., 389.

948. Numeral figures with the prefix A. D. are a sufficient statement of the year: *State v. Seamons*, 1 G. Gr., 418.

949. Deadly weapon: Where an indictment charges an assault as committed with different weapons described as deadly, it is immaterial whether it be proven that defendant used one or all of such weapons: *State v. McClintock*, 1 G. Gr., 392.

950. Under a statute prescribing punishment for assault with a deadly weapon, held, that no other description of the weapon used was essential: *State v. Seamons*, 1 G. Gr., 418.

951. Under an indictment for an assault with a deadly weapon, charging the assault as made by throwing an axe, held, that the court would take judicial notice of the fact that an axe used in such a manner was a deadly weapon, although such fact was not averred: *Dollarhide v. United States*, Mor., 283.

952. Naming the offense: An indictment which sufficiently describes the offense charged will be good although the offense is not named therein: *State v. Hessenkamp*, 17-25; *State v. Baldy*, 17-39.

953. An indictment properly describing the offense will be sufficient without naming it, but naming the offense without stating the facts constituting it will not be sufficient. If the facts are properly stated, a wrong name will not vitiate the indictment, but

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will be mere surplusage: *State v. Shaw*, 35-575; *State v. Davis*, 41-311.

954. Indictments under statute: An indictment under a statute is sufficient if it follows the language of the statute: *State v. Seamons*, 1 G. Gr., 418; *State v. Chambers*, 2 G. Gr., 308; *Romp v. State*, 3 G. Gr., 276; *State v. Brewer*, 53-735.

955. If the indictment charges the crime substantially in the words of the statute, or in language equivalent thereto, it is sufficient: *Buckley v. State*, 2 G. Gr., 162; *Munson v. State*, 4 G. Gr., 483.

956. An indictment following the statute, and using the language there employed in defining the offense of unlawfully exposing a child with intent to abandon it, *held* sufficient: *State v. Smith*, 46-670.

957. Where an offense is created by statute, it is sufficient to charge it in the words of the statute, unless the words used are such that they do not necessarily charge the offense. Therefore, *held*, that an indictment charging that defendant did "seduce and carnally know and debauch" was sufficient, without charging the means employed in the seduction: *State v. Curran*, 51-112.

958. Language in a particular case *held* sufficiently equivalent to that used in the statute in describing the offense of misconduct in office by public officers: *State v. Conlee*, 25-237.

959. Where the statute uses descriptive language to define a public offense, that language must be followed or words of the same meaning must be used: *Fouts v. State*, 4 G. Gr., 500.

960. While it is not necessary that the indictment should follow the very language of the statute, it should charge the facts and circumstances constituting the offense in substantial compliance with the statute: *Reddan v. State*, 4 G. Gr., 137.

961. If the statute contains evident tautology, or terms some of which necessarily include the others, it is not essential that all be used. It is sufficient if the indictment fully describe the offense: *United States v. Lapoint*, Mor., 146.

962. The substance of the statutory definition must be contained in the indictment: *United States v. Dickey*, Mor., 412.

963. The words used must have a substantial meaning and import in the statute, and the material which constitute the offense must be stated in such a degree of certainty and in such a manner as to enable a person to understand to know what was charged, and to pronounce judgment upon the conviction according to the statute: *State v. Allen*, 32-491.

964. Therefore, where a statute charged that liquor was sold, *held*, that it was not necessary to state the person to whom the sale was made, although the statute provided for the punishment of any person selling or giving liquor "to a person." *Ibid.*

965. The facts constituting the offense must be charged in the indictment when a statute creating such an offense describes it in general terms. In such a case, the indictment must describe the offense in such a manner as to enable the jury to reach a legal conclusion, the indictment must specifically describe the offense in such a manner as to enable the jury to reach a legal conclusion: *Brandt*, 41-593, 607.

966. As to whether, in a case where a public officer for loaning public money, an indictment stating that defendant loaned a certain sum of money "with intent to defraud," etc., was too general, *held*, that it was not, as the court have stated the person to whom the money was loaned, the court was satisfied: *Ibid.*, 609, 617.

967. Separate counts: A defendant may be charged with two distinct offenses in a single count. In felony, if the offenses are distinct, the indictment should contain separate counts for each offense, although in misdemeanor cases the offenses may be quashed or the prosecution may elect on which charge to proceed. In such election will not be required where several counts are in the indictment for the purpose of meeting the purpose of meeting the charges may transpire, the charges are distinct for the same offense: *Sonson*, 9-53.

968. After the jury has returned a verdict of guilty on one count and a motion for arrest of judgment and a new trial, based upon this alleged misjoinder, has been overruled, and there is no error on appeal that the several counts should have been separate, the court will affirm the verdict on the count which was not the subject of the motion.

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separate transactions, the objection on that ground will not be sustained: *Ibid*.

969. In charging the same offense in different forms, the pleader is not compelled to use alternative forms of expression: *State v. Watrous*, 13-489.

970. An indictment charging the same transaction in different forms in separate counts is not objectionable for duplicity: *State v. Brannon*, 50-372; *State v. House*, 55-466.

971. Requiring prosecution to elect: Where an indictment is not otherwise assailed for charging distinct crimes, the prosecutor ought to be required to elect upon which charge he will proceed: *State v. Fident*, 35-541.

972. Duplicitly; charging distinct crimes: Although the statute (Code, § 4300) prohibits the charging of more than one offense in the same indictment, yet where two counts of the indictment charged two distinct offenses, one committed in the county where the indictment was found, and the other in another county, *held*, that the latter count was mere surplusage and did not render the indictment bad: *State v. Smouse*, 50-48.

973. The same rule is applicable in case of an information: *State v. Smouse*, 49-634.

974. Objection to the indictment on the ground of duplicity cannot be raised for the first time in the supreme court: *State v. Henry*, 59-391.

975. And *held*, that where one of the counts was dismissed before the introduction of any evidence, and the plea of guilty entered as to the remaining count, the defect in the indictment was cured and the defendant properly convicted: *State v. Buck*, 59-382.

976. An indictment charging a conspiracy to rob and steal does not necessarily charge more than one offense. The fact that the conspiracy, if consummated, would involve several distinct felonies would not render the indictment for the conspiracy bad for duplicity: *State v. Sterling*, 34-443; *State v. Kennedy*, 63-197.

977. Where the indictment charges a conspiracy to commit a crime and also the commission of the overt act, it appearing that it was not intended to charge nor put defendant on trial for any other crime than that of

conspiracy, the indictment will not be considered objectionable: *State v. Orniston*, 66-148.

978. But where the indictment charged other crimes outside of the conspiracy and not merely the overt act, *held*, that it was fatally defective: *State v. Kennedy*, 63-197.

979. An indictment charging an assault and battery does not charge two offenses. Every battery includes an assault: *State v. Twogood*, 7-252.

980. Nor does an indictment charging assault and battery with intent to commit great bodily injury charge more than one offense: *Cokely v. State*, 4-477.

981. Charging threats to kill two persons does not render the indictment objectionable as charging two offenses, the threat being the gist of the offense: *State v. O'Mally*, 48-501.

982. Compound offenses: When the same act or transaction at the same point of time constitutes two or more offenses, it is a compound offense, and the different crimes thus committed may be charged in the same indictment, under Code, § 4300; but the two offenses, of breaking and entering with intent to commit larceny, and the crime of larceny alone, cannot be so committed by the same act as to constitute such compound offense: *State v. Ridley*, 48-370; *State v. Rhodes*, 48-702.

983. In such a case the crime of breaking and entering with unlawful intent is completely consummated before the larceny is committed: *State v. Ridley*, 48-370.

984. Burglary is not a compound offense including larceny, and an indictment charging both burglary and larceny is improper, as charging two offenses: *State v. McFarland*, 49-99.

985. Where an indictment charges breaking and entering with felonious intent, and the felonious taking, stealing and carrying away of personal property, the charge of stealing may be regarded as a mere pleading of evidence, or surplusage; and if the case is tried as upon the indictment for the breaking and entering with the criminal intent, a conviction thereunder will not be erroneous on the ground of duplicity in the indictment. It is otherwise where under such indictment the defendant is convicted of larceny: *State v. Shaffer*, 59-290.

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986. The offense of larceny in the night-time from a dwelling-house, and that of larceny from a dwelling-house in the day-time, are not different offenses from that of larceny, but differ from it only in the circumstances affecting the degree of punishment, and they may be charged in the same indictment: *State v. Elsham*, 70—.

987. An indictment charging in one count forgery, and in a second the uttering of the forged instrument, charges two offenses, and is bad (overruling *State v. Nichols*, 38-110): *State v. McCormack*, 56-585.

988. Rape, committed by a man upon a woman who is related to him within the prohibited degrees (Code, § 4030), does not constitute incest, and an indictment charging both offenses is bad for duplicity: *State v. Thomas*, 53-214.

989. Distinct acts of adultery, committed with different persons, could not be charged in the same indictment; but where different acts of the same person were charged, *held*, that as any such criminal act, committed within the period of limitations, could be proven under an indictment charging but one act of adultery, the allegation that adultery with the person named was committed on divers other days might be rejected as surplusage, and the indictment was not objectionable for duplicity: *State v. Briggs*, 68-416.

990. Different violations of ordinances: It may be provided in an ordinance that any number of violations may be included in one prosecution: *Eldora v. Burlingame*, 62-33.

991. Continuing offenses: In an indictment for retailing intoxicating liquors by the dram, any number of acts may be charged without constituting duplicity, the offense being a continuing one: *Zumhoff v. State*, 4 G. Gr., 526.

992. Under an ordinance making each separate unlawful sale of intoxicating liquor an offense, *held*, that an information charging the sale of liquor to persons unknown was not bad for duplicity, as it, in effect, charged one sale to several persons jointly: *State v. King*, 37-452.

993. Various acts constituting same offense: Where a statute contains several things in the alternative, an indictment charging all of them will not be considered

as charging more than one
Cocster, 10-453; *State v. M*

994. So an indictment charging, passing, and tendering, a counterfeit bill (Code, § 3922) is not a misdemeanor offense: *State v. Barrett*, 8

995. And so *held*, in case for a nuisance, charging th all the acts of illegally sell liquors, keeping the same f within the terms of Code, *State v. Dean*, 44-648; *Sto* 44-667; *State v. Winebren*

996. The prosecution in *su* be required to support and alternative charges with its p much as will show that the c mitted in some of the ways *v. Cooster*, 10-453.

997. Under a statute providing for every person who receives or aid in the concealment of goods, the indictment may charge receiving and aiding with reference to the goods. *State v. Abrahams*, 6-117.

998. So under a statute punishing a landlord for letting a house, the lessee intends to use it for such purposes, and knowingly permits it to be used for such purposes, he is guilty of the offence, although he is not charging both the letting and the use with the prohibited use. *Ibid.*

999. Under a statute providing for maliciously injuring a dwelling-house, *held*, that charging defendant with maiming and defacing a dwelling-house was not actionable for duplicity: *State v. ...* 11-269.

1000. Under a statute providing for the punishment of any person who maliciously kill, maim or disfigure another, that an indictment charging that an indictment charging did maliciously maim and disfigure another was not objectionable: 11-414.

1001. Under a statute prohibiting for sale or the selling of liquors, *held*, that an indictment both did not charge distinctly. *v. Becker*, 20-438.

1002. Under a statute in

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sance to manufacture, sell, or keep with intent to sell, intoxicating liquors contrary to law, either or all of such acts may without duplicity be charged in the same indictment: *State v. Baughman*, 20-497.

1003. Objection for duplicity, when raised: The court should, on application, allow the defendant to withdraw his plea of not guilty for the purpose of making objection to the indictment on the ground of duplicity. Indeed there would be no impropriety, it seems, in requiring an election to be made in such case, without the plea being withdrawn: *State v. Abrahams*, 6-117.

That defendant may be convicted of any offense necessarily included in that charged in the indictment, see *infra*, §§ 1238-1255.

1004. Surplusage: Where a defective averment may, without detriment to the indictment, be wholly omitted, it may be considered as surplusage and disregarded. It is only an inconsistency in the material allegations that will vitiate the indictment: *State v. Freeman*, 8-428.

1005. An unessential portion of the indictment may be rejected as surplusage, if without it the allegations are sufficient to charge the offense: *State v. Ormiston*, 66-143.

1006. Where a portion of the indictment might have been omitted without vitiating it, such portion may be considered as surplusage, and its insertion will not render the indictment defective: *State v. Ansaleme*, 15-44.

1007. Where, in an indictment for embezzling the funds of a corporation, it was alleged that defendant was over sixteen years of age, that fact not being material in case of embezzlement by the agent of a corporation, *held*, that the allegation was surplusage and might be disregarded: *State v. Goode*, 68-593.

1008. Where an information for illegal sale of liquors charged the selling and giving, *held*, that although the giving was not punishable, the charge was sufficient, and the allegations as to the giving would be treated as void and not affecting the information: *State v. Finan*, 10-19.

1009. Words in a particular case *held* to be surplusage: *State v. Schilling*, 14-455.

1010. Where an information charges two classes of nuisances, one of which is punishable under an ordinance under which the

prosecution is commenced, and the other is not thus punishable, the allegations as to the latter will be deemed surplusage and will not affect the charge of the offense which is within the jurisdiction of the court to punish upon the information: *Eldora v. Burlingame*, 62-32.

1011. An information for the seizure of intoxicating liquors on the ground that they were to be sold in violation of law stated that they were "intended to be sold in violations of the provisions of chapter six, Code of Iowa," there being many chapters of that number in said Code: *held*, that the information was defective, and that although the allegation that the liquors were intended to be sold in violation of law would have been sufficient, the other portions of the indictment could not be rejected as surplusage: *State v. Thompson*, 44-399.

1012. Needless particularity: Where a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of the description must be proved: *State v. Newland*, 7-242; *State v. Hesner*, 55-494.

1013. So *held* where the kind of liquor sold was specified in an indictment for illegal sale: *State v. Hesner*, 55-494.

1014. Therefore, under an indictment for passing counterfeit bills on a certain bank, *held*, that the existence of such bank must be established, although by statutory provision the name of the bank need not have been charged: *State v. Newland*, 7-242.

1015. Where the place is stated in the indictment as a matter of local description and not of venue, it is necessary to prove it as laid although it need not have been stated: *State v. Crogan*, 8-523.

1016. But on the same point the supreme court was equally divided in *State v. Verden*, 24-126.

1017. Videlicet: Where time is immaterial, if alleged under a *videlicet*, it need not be proved, and a repugnance between the allegations under the *videlicet* and other portions of the indictment will not vitiate it. If time is material, even though it be alleged under the *videlicet*, it is conclusive and traversable, and if repugnant to the premises will vitiate the indictment: *State v. Freeman*, 8-428.

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1018. Exception or proviso: It is only necessary to negative an exception when it occurs in the same clause of the act which creates the offense: *Romp v. State*, 3 G. Gr., 276.

1019. It is only necessary that the indictment should negative exceptions made in the enacting clause. Matters of exception contained in a subsequent act need not be negatived, but must be pleaded and proven by defendant if relied on as a defense: *State v. Beneke*, 9-203.

1020. An exception in the purview of an act must be negatived in pleading, but a proviso need not, though found in the same section, if it is not referred to in and engrafted upon the enacting clause. *State v. Stapp*, 29-551.

1021. Therefore under a former statutory provision that the prohibition of the sale of intoxicating liquors should not apply to wine from fruit grown in the state, etc., *held*, that an indictment for illegal sale of liquor need not allege that it was not made from native fruit: *Ibid.*; *State v. Curley*, 33-359; *State v. Miller*, 53-84.

1022. Where a criminal offense is created by statute, no presumption arises of an intention to render any person liable not clearly within the provisions of the statute. But if the statute is simply declarative of a common law offense, and limitations are annexed as to the persons to be prosecuted or the manner of prosecution, one claiming exemptions from its penalty must show himself clearly within its limitations: *State v. Roth*, 17-336.

1023. If provisos and exceptions are contained in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions or to negative the provisos it contains: *State v. Williams*, 20-98.

1024. Therefore, *held*, that an indictment for bigamy need not negative the absence of defendant's former husband or wife for the statutory period, etc., stated in a subsequent section of the statute as an exception: *Ibid.*

As to burden of proving exemption under a proviso, see *infra*, § 1594.

1025. Venue: In an indictment for retailing intoxicating liquors by the dram, *held*, that it was sufficient to state the crime as

committed within the county, specifying the particular precinct or town within which the act was committed: *Bohff v. State*, 4 G. Gr., 526.

1026. Where the county is named in the margin at the beginning of the indictment, and the county is to be taken as "said county," and it is averred that the grand jury selected, impaneled and sworn to sufficiently shows that a legal grand jury: *Ibid.*

1027. In an indictment for the sale of liquors, it is not necessary to state the specific location of the place where the sale was made: *State v. ...*

1028. Under an indictment alleging that the void marriage was celebrated at a particular place, the fact of such marriage anywhere in the same state would support the indictment. The alleged place of marriage not being a jurisdictional matter, or as to the specific character of the offense, it is not proved as laid: *State v. Nadeau*.

1029. Time: The time alluded to in an indictment need not be proved, *held*, that under an indictment for the illegal sale of intoxicating liquors at another time than that specified in the indictment would support a conviction: *State v. Knouse*, 33-365.

1030. Where defendant was charged with several counts with distinct offenses, such as retailing intoxicating liquors on a specified day, *held*, that it was sufficient to refuse to charge the jury to find the defendant guilty as charged in each count, and to find that he sold to the persons named therein charged: *State v. ...*, 239.

1031. It is not material that the indictment specify the time at which the offense is alleged to have been committed should be so charged within the statutory period for the prosecution of the offense. The precise time need only be stated for acts which were only committed at some particular time: *State v. ...*, 467.

1032. That the allegation of commission of the offense

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it within the statutory period of limitation is not a ground of demurrer to the indictment: *State v. Hussey*, 7-409; *State v. Groome*, 10-308.

1033. Where an indictment charges that the offense was committed on a day certain, the prosecution may still prove the commission of the offense at a time prior to the day named and within the period of limitation: *State v. Kirkpatrick*, 63-554.

1034. Where the prosecution introduced evidence that the crime was committed at the particular time alleged in the indictment, and defendant's evidence was to the effect that he was not at the place where the offense was alleged to have been committed within three or four days of such time, *held*, that the jury were properly instructed that they might convict if they found the crime was committed on another day than that charged, and within the time prescribed by the statute of limitations for the prosecution of the crime: *State v. Bell*, 49-440.

1035. Where it is averred in an indictment that an offense was committed on a particular date, the state is permitted to prove its commission, on that or any other date, before the finding of the indictment, within the time prescribed by the statute of limitations within which an indictment for the offense may be found: *State v. Johnson*, 69-623.

1036. The same rule governs when the prosecution is by information: *Ibid*.

And further, as to the statute of limitations, see *supra*, §§ 783-788.

1037. Continuing offenses: An indictment charging a nuisance as committed "on or about" a day specified is sufficient as to time: *Cokely v. State*, 4-477.

1038. In an indictment for a continuing offense, such as keeping a nuisance, no particular day need be alleged, but the doing of the prohibited act may be laid with a *continuando*. If so alleged, the trial will prevent another prosecution for the act charged at any time previous to the finding of the indictment: *Our House v. State*, 4 G. Gr., 172.

1039. Time material: While time is not material, yet where the offense of selling intoxicating liquors on a certain day was alleged and defendant pleaded guilty, *held*, that the time thus specified would determine the law under which the court was author-

ized to act, the law as to method of trial having been changed previous to the time alleged for the commission of the offense: *State v. Rollet*, 6-535.

1040. While the allegation of the day upon which the offense was committed is not usually material, yet if, in an indictment for perjury, it is alleged that the oath was administered by a certain person as an officer before the date when, by law, he became entitled to enter upon the discharge of the duties of his office, the time will be deemed material and the indictment bad: *State v. Phippen*, 62-54.

1041. Name of defendant: It is only where the defendant's name cannot be discovered that the state is permitted to describe him by a fictitious name, with the statement that his name is unknown. The description of the defendant as "a man in Turner Hall whose name to the grand jury is unknown," *held* not sufficient: *Geiger v. State*, 5-484.

As to effect of misnomer and method of taking advantage thereof, see *infra*, §§ 1063, 1064.

1042. Name of person injured: Under the provisions of the statute (Code, § 4302), neither the name of the party injured, as used in the indictment, nor a name having the same sound, need necessarily be proved: *State v. Emeigh*, 18-122.

1043. And *held*, that an indictment for stealing from the person certain property, in which the property was charged to be that of the party from whose person it was stolen, while the proof showed it to belong to him and another jointly, was sufficient: *State v. Cunningham*, 21-433.

1044. Where, in an indictment for resisting an officer, the name of the officer was misstated, *held*, that under the provisions of the statute above referred to, an erroneous allegation respecting the name of the person injured was not material, and a variance with respect thereto was not fatal: *State v. Flynn*, 42-164.

1045. Where an indictment for robbery incorrectly stated the name of the person alleged to have been robbed, *held*, that a conviction of defendant thereunder was not improper: *State v. Carr*, 43-418.

1046. In an indictment for the illegal sale of intoxicating liquors, it is not necessary to

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set out the names of the persons to whom the liquor was sold: *State v. Becker*, 20-438.

1047. Under an information charging sales of intoxicating liquors to persons unknown, *held*, that proof of a sale to one person did not constitute a variance: *State v. King*, 37-462.

1048. A misnomer of the person assaulted will not render an indictment for assault with intent to kill fatally defective, it appearing that defendant was in no way prejudiced by such mistake: *State v. Crawford*, 66-318.

1049. Where, in an indictment for embezzlement, the name of the corporation whose property was alleged to be embezzled was erroneously stated, by reason of using the word "railroad" therein in place of railway, *held*, that such slight error was immaterial: *State v. Goode*, 68-593.

1050. A mistake in stating in the conclusion of the indictment, the name of the person injured, *held* not material, his name being correctly stated in the charging part: *State v. McCunniff*, 70—.

1051. Idem sonans: Where the orthography of an indictment composes a name which by the ordinary rules of pronunciation produces a different sound from the true one, the two names will not be considered equivalent: *Donnel v. United States*, Mor., 141.

1052. Variance as to name: In an indictment for bigamy charging the second marriage to have been with "Jane Jaco," while the proof showed the name of the person to have been "Jane Frances Jaco," *held*, that there was no variance: *State v. Williams*, 20-98.

1053. Description of property: Ordinary certainty in the description of property involved is required. So *held* in a proceeding against a building as constituting a nuisance: *Norris' House v. State*, 3 G. Gr., 513.

1054. Name of owner of property: An indictment for trespass in cutting down trees and carrying away the timber, which fails to set out the name of the owner of the land upon which the alleged trespass is committed, is properly demurrable: *State v. McConkey*, 20-574.

1055. The name of the owner of the building should be set out in an indictment charging the breaking and entering thereof with

intent to commit a felony, the owner is unknown, it sh: *State v. Morrissey*, 22-158.

1056. In an indictment jury to a church building unincorporated association, the property may be alleged holding it in trust for such a character of the title or if persons need not be set out: 14-180.

1057. Where the indictment the initials instead of the full of a person in possession of a the crime of burglary was been committed, *held*, that rights of the defendant were by refusal of the court to char ant was entitled to an acqu: *Short*, 54-392.

1058. Where the indictment larceny of goods from a rail naming it, belonging to particular jurors unknown, *held*, that it was sufficient: *State v. McL State v. McIntire*, 59-267.

1059. It does not render an effective that in describing a d it describes it as belonging to person deceased: *State v. Fra*

9. Proceedings on the in fore trial.

a. Arraignment and r

1060. Presumption: If the as to the arraignment, it wil that defendant was duly arraig arraignment: *State v. Winstr*

1061. Where it does not ap record that defendant has b and has pleaded, the judge: versed on appeal: *Powell v. Mor.*, 17.

1062. Waiver: Voluntarily pleading to an indictment is a raignment: *State v. Winstrax*

1063. Misnomer: If misnor advantage of on arraigme afterward be raised, and wi *Ibid*.

1064. Where defendant ans indicted in his right name, h

 Presence of defendant.— Counsel.

trial, object that he is not properly named. So *held*, where in the same indictment the defendant was designated by different names: *State v. White*, 32-17.

b. *Presence of defendant at arraignment, and afterward; mental condition.*

1065. Presumption: If defendant is shown to have been present at the beginning and conclusion of the trial, his presence at other times will be presumed, unless the contrary is shown: *State v. Wood*, 17-18.

1066. If it is not shown that defendant was not present at the rendition of the verdict, the presumption will be he was present: *State v. Kline*, 54-183.

1067. If the record shows that defendant was present at arraignment, it will be presumed he was present at the rendition of the verdict where the contrary does not appear: *Harriman v. State*, 2 G. Gr., 270.

1068. When necessary: Where the record as to defendant appearing and waiving arraignment was defective, and at a subsequent time was corrected on motion, *held*, that the presence of defendant at the time of said correction was not essential: *State v. Westfall*, 49-328.

1069. A defendant held to appear before the grand jury is not required to be present at the time of impaneling such jury, and will not be in default on his bail bond for failure to appear at that time; his right to challenge is one which may be waived: *State v. Klingman*, 14-404; *State v. Felter*, 25-87; *Ringgold County v. Ross*, 40-178.

1070. In a prosecution for murder, presence of defendant at the time of verdict is essential: *Harriman v. State*, 2 G. Gr., 270.

1071. The trial at which defendant accused of a felony is required to be present ends with the verdict; his presence at the argument and determination of a motion for new trial is not essential: *State v. Decklotts*, 19-447.

1072. Where defendant is put on trial for felony, but only convicted of a misdemeanor, his presence when judgment is rendered is not necessary: *Hughes v. State*, 4-554.

1073. In case of conviction for assault and battery the presence of defendant is not re-

quired, even though he has been on trial for a felony: *State v. Shepard*, 10-126.

1074. Mental condition: The preliminary investigation provided for by statute, as to the prisoner's mental condition at the time of arraignment, or upon other occasions when it becomes necessary, relates to his condition at such time, and not his condition at the time of the commission of the offense. In determining whether doubt exists as to his sanity, the judge may, before impaneling a jury, investigate the whole matter, obtain all the light reasonably attainable, and determine from all the circumstances as to whether the necessity for impaneling a jury to determine defendant's mental condition exists: *State v. Arnold*, 12-479.

1075. That a person called as a juror in the trial of the case has heard the evidence upon such a preliminary inquiry as to the prisoner's sanity is not a ground of challenge: *Ibid*.

c. *Counsel for defendant and for prosecution.*

1076. Ability to employ counsel: Statements of the defendant in open court that he has no means to employ counsel is a solemn admission which may be used against him if that fact becomes material to any issue in the case: *State v. Fooks*, 65-196.

1077. Dismissal of counsel: When defendant during the trial dismissed his counsel, and had new counsel appointed by the court to defend him, *held*, that it was not error to refuse a continuance of several days, on the appointment of such new counsel, it not appearing of record that there was any good ground for the dismissal; defendant's guilt being conclusively shown, and his ability to understand his own case being apparent: *State v. House*, 55-466.

1078. Additional counsel for prosecution: The practice of allowing district attorneys to have the assistance of associate counsel has been too long acquiesced in, in this state, to be called in question. There can be no objection to leaving the matter of allowing associate counsel to the discretion of the court and district attorney: *State v. Fitzgerald*, 49-260.

1079. It is entirely proper, with the con-

Motion to set aside indictment.—Demurrer.—Pleas.

sent of the prosecuting attorney, that other counsel be employed to assist in the prosecution, and such counsel may be employed by the prosecuting witness for that purpose: *State v. Montgomery*, 65-483.

1080. That the district attorney, at his own request, is assisted in the prosecution by another attorney, is not a ground of objection on the part of defendant: *State v. Ormiston*, 66-143.

d. Motion to set aside indictment.

1081. Grounds for: That the evidence of an incompetent witness was received by the grand jury is no reason for setting aside an indictment: *State v. Tucker*, 20-508.

1082. That the minutes of the evidence returned by the grand jury do not support the indictment is not a ground for setting it aside: *State v. Harris*, 36-268.

1083. Failure to return minutes of evidence: A motion to set aside an indictment on the ground that the names of witnesses summoned before the grand jury, and whose testimony was taken by them, are not indorsed on the indictment, and that the minutes of their evidence are not returned therewith, cannot be supported by affidavits to show that witnesses other than those whose names appear on the indictment, and the minutes of whose evidence is returned, were summoned before the grand jury. The minutes of the grand jury as to the testimony taken before them are a part of the record, and cannot be thus impeached by affidavit: *State v. Little*, 42-51.

1084. For error in impaneling grand jury: The proper method of taking advantage of irregularity in the selection, summoning or impaneling the grand jury, where the defendant has been held to answer before the formation of the grand jury, is by challenge to the panel: *State v. Hart*, 29-268; *State v. Hinkle*, 6-380; *Dixon v. State*, 3-416; *State v. Howard*, 10-101.

1085. In order to support the action of the court below in overruling a motion to set aside the indictment on this ground, if it does not appear whether defendant was held to answer before indictment or not, it will be presumed that he was, and that the motion was overruled on that ground: *State v. Gibbs*, 39-318.

1086. The objection that was improperly summoned before pleading to the indictment: *Reid*, 20-413.

As to what is sufficient of the provisions as to the fee of grand jury, and the finding and return of an indictment being set aside on motion, *supra*, III, 7.

e. Demurrer to indictment.

1087. Under the provisions of 1851, it was held that the demurrer must be specific: *B* 1-542; *State v. Maurer*, 7-Groome, 10-308. (But the provisions are different in this state.)

1088. Questions as to the statement of facts in the indictment constitute the crime charged can demurrer, and the sufficiency of the indictment as a pleading is then to be determined by its averments. The fact that the indictment was returned before the grand jury at the clerk cannot be raised in demurrer: *State v. Briggs*, 68-416.

The fact that the time of trial of the offense, as stated in the indictment, indicates that the period of prosecuting the offense has expired is no ground of demurrer: See *supra*.

f. Pleas.

1089. Immaterial fact: That the issue of jury trials in criminal cases is whether the accused is guilty or not, and it is not proper for the prosecution to issue upon a fact which, although it is an item of evidence, is not connected with the innocence of defendant. That in a prosecution for the sale of intoxicating liquors without a license, the defendant had a license is not a proper issue for trial: *Peter Gr.*, 74.

1090. Presumption as to plea: That the record does not show that the record does not show that the reversal of a conviction by the court. It will be presumed that the plea upon which the trial was held was a plea of not guilty: *Foster*, 40-303.

Pleas.—Dismissal of prosecution.

1091. Plea by counsel: The plea of not guilty may be entered by defendant's counsel in the absence of defendant: *State v. Jones*, 70—.

1092. Failure to plead: Where, upon the overruling of a demurrer to the indictment, the court proceeded to try defendant as though the plea of not guilty had been entered, and the jury returned a verdict of guilty, *held*, that the conviction was valid, and that defendant could not, upon motion in arrest of judgment, have it set aside, and interpose the plea of not guilty: *State v. Greene*, 66-11.

1093. It does not constitute reversible error to put defendant on trial without a plea having been entered: *State v. Hayes*, 67-27.

1094. Plea of guilty: The fact that defendant pleads guilty upon an expression of opinion by the district attorney, that the court will thereupon impose a fine of not exceeding a certain amount, does not entitle him to a new trial in the event of sentence for the payment of a greater fine: *State v. Reininghaus*, 43-149.

1095. A plea of guilty, even though made when the defendant is under no obligation to plead, constitutes an admission of guilt which may be shown in evidence against him: *State v. Briggs*, 68-416.

1096. Withdrawal of plea: The court should, on application, allow defendant to withdraw his plea of guilty, for the purpose of raising the objection that the indictment charges more than one offense: *State v. Abrahams*, 6-117.

1097. Under a statutory provision (Code, § 4862), defendant has the right to withdraw the plea of guilty, and substitute therefor a different one: *State v. Oehlslager*, 38-297.

1098. Where defendant pleaded guilty before a justice of the peace, and sentence was passed thereon, *held*, that, on appeal to the district court, such plea might be withdrawn: *State v. Kraft*, 10-330; *State v. Abrahams*, 6-117.

1099. It is error to refuse to allow defendant to withdraw his plea, and file a motion to set aside the indictment on the ground that the grand jury was not properly selected: *State v. Hale*, 44-90.

1100. Where judgment was entered upon

a plea of guilty and a motion for leave to withdraw such plea and for new trial was filed, based on the ground that defendant was surprised by the punishment inflicted being greater than expected, *held*, that the alleged ground of surprise was not sufficiently established to entitle the defendant to relief: *State v. Buck*, 59-382.

1101. Pleading over: After verdict against the defendant on a plea of former conviction or acquittal, not accompanied with the plea of not guilty, if he does not ask to plead over, he may be sentenced without further trial: *State v. Green*, 16-289.

g. Dismissal of prosecution.

1102. After the trial is entered upon, a dismissal of the proceedings by the court or the district attorney (except under the circumstances authorized by the statute: Code, §§ 4613 *et seq.*) will operate as an acquittal, and defendant cannot be again put on trial: *State v. Callendine*, 8-288.

1103. Where the failure to have a trial at the next regular term after the finding of the indictment results from a default of defendant, or from his seeking to have the verdict set aside, and without a demand on his part for trial, or objection to continuance, he is not entitled to a dismissal: *State v. Arthur*, 21-322.

1104. Where, by mistake, the court announces the case as dismissed, and so marks it on his calendar, and afterwards rescinds such order, there is not such a dismissal as to prevent further proceedings: *State v. Manley*, 68-344.

1105. At any time before the impaneling and swearing of a jury, it is competent for the prosecutor to *nol. pros.* the entire indictment, or any count or number of counts therein. The same thing may be done in case of a verdict upon an indictment containing several counts, where the jury has failed to respond to a part of the charge, and judgment may then be taken upon the balance: *State v. McPherson*, 9-53.

As to when a prosecution, although dismissed, will amount to jeopardy, so as to bar another prosecution, see *infra*, §§ 1338-1340.

Trial.—Time; continuances.—By jury.

10. TRIAL; NEW TRIAL; ARREST OF JUDGMENT; SENTENCE.

a. *Time; continuances.*

1106. Trial term: Under a statutory provision, not now in force, as to the time of trial in criminal proceedings, *held*, that until the time fixed by law, or by the court in accordance with the provisions of statute, defendant could not be legally compelled to go to trial or show cause for continuance: *State v. Harris*, 33-356.

1107. Continuance: Defendant is not entitled, as a matter of right, to a continuance of a case to the term next after that which the indictment is found: *State v. Arnold*, 12-479.

Change of counsel by defendant after commencement of the trial is not necessarily a sufficient ground for continuance: See *supra*, § 1077.

As to CONTINUANCE, in general, see that title.

b. *Trial by jury; formation of jury; challenges.*

1108. Waiver of jury trial: Defendant cannot waive a jury trial and consent to a trial by the court, there being no provision in the code of criminal procedure by which the court, without a jury, has jurisdiction to try the issues of fact in a criminal case: *State v. Carman*, 63-130; *State v. Larrigan*, 66-426.

1109. As the defendant in a criminal action may waive a statute enacted for his benefit, he may consent that the trial proceed with a jury of less than twelve jurors; and will be bound by the verdict rendered: *State v. Kaufman*, 51-578.

1110. Drawing jury: The provisions as to the method of drawing names of jurors are directory; and the failure of the clerk to comply therewith will not amount to error sufficient to reverse the judgment, unless it be shown that the court, on application, refused to require the statutory directions to be carried out; or unless it be otherwise shown that some substantial prejudice has resulted to defendant: *State v. Gillick*, 7-287.

1111. When special jurors are summoned on a special *venire*, to fill up a jury for the

trial of a particular case, it call them successively in the they are summoned, but it is their names on ballots and drawing regular jurors; and this practice when they are summoned entire term: *State v. Green*, 2

1112. Where the court, at the commencement of a criminal case, has knowledge that the jury contained from the regular panel a special *venire* be issued, and were summoned to act as jurors, the regular panel being secured a jury in such case called from this special panel, which their names appeared that the action of the court was: *State v. Ryan*, 70—.

Further as to method of summoning JURY, see that title.

1113. Disqualification of sheriff: Disqualification of sheriff on the part of the sheriff by Code, § 350, as disqualifying summoning a jury or otherwise a pecuniary interest. The prov effect of such disqualifications in criminal cases: *State v. Ha-*

1114. Attachment for absconding juror: While the defendant may, under a statute (Code, § 4391), insist on issuing for jurors who are not the original panel, he must appear right before the jury is called; cannot object to a juror because a member of the original panel: *State v. Ha-* 53-84.

1115. A challenge to the panel: A challenge to the panel made after challenges to individual jurors: *State v. Davis*, 41-311.

1116. If a *venire* is returned with defects, the defendant must show facts as they really exist, and may make challenges to the panel which may be raised, before challenging individual jurors: *State v. Bryan*, 40-379.

1117. While by statute it is provided that on the trial of a challenge to an officer whose irregularity in conducting the formation of the panel is made, the mode of challenge may be examined, it is not provided how he shall be examined and the court may require the

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nation be by affidavit and refuse to hear oral evidence: *State v. Linde*, 54-139.

1118. Challenges to jurors; bias: Under the provisions of the statute, an opinion of a juror in regard to some of the transactions involved in the case is not sufficient to disqualify him. In order to disqualify, the opinion must be as to the guilt or innocence of the prisoner: *State v. Bryan*, 40-379.

1119. Having formed and expressed an opinion as to the killing, in a case of homicide, is not sufficient: *State v. Thompson*, 9-188.

1120. Having formed a hypothetical opinion, based upon rumors, but which would not prevent the juror from rendering a true verdict upon the evidence, will not disqualify him: *State v. Ostrander*, 18-435, 451.

1121. Where a juror stated that he had not formed an unqualified opinion, that if what he had heard should be proved, he had an opinion made up, but that he thought he had no prejudice or bias, etc., held, that that he was not disqualified: *State v. Sater*, 8-420.

1122. Where a juror stated that he had read an account of the matter (a murder) in the papers, at the time it occurred, and came to the conclusion that defendant shot the deceased, and that it was a criminal thing for him to do, etc., but also stated that he had no bias against the defendant, and believed he could fairly and without prejudice determine upon the testimony the guilt or innocence of defendant, irrespective of what he had read, held, that it was not error to refuse to sustain a challenge for cause: *State v. Bruce*, 48-590; and see *State v. Lawrence*, 38-51; *State v. Soper*, 70 —.

1123. A juror cannot be said to have formed an unqualified opinion, when the opinion he has formed is based upon hearsay and not upon statements made by any one claiming to have personal knowledge, and he still thinks that he can render a true verdict: *State v. Ormiston*, 66-143.

1124. The opinion that defendant is guilty or innocent, which is good ground of challenge, is an unqualified opinion. If the opinion is qualified by the conditions that if what the juror has heard about the case is true, then defendant is guilty or not guilty, the opinion is a qualified one, and does not ren-

der the juror incompetent: *State v. George*, 62-682.

1125. Where the juror stated that he had formed and expressed an opinion upon rumor, but that he had no ill-will or prejudice against defendant, and no personal knowledge of the circumstances of the case: and that his opinion was conditional; and if what he had heard was true, he had formed an opinion, and if what he had heard was untrue, he had not formed an opinion, held, that the juror was subject to challenge for cause: *Trimble v. State*, 2 G. Gr., 404.

1126. Where a juror stated that he had no bias or prejudice against the prisoner (who was an Indian), but merely had heard reports, which he believed, that some Indians had done the deed for which the Indian was on trial; and that the act done was wrong, unless done in self-defense, held, that this was not such ground as to exclude him from sitting as a juror: *Wau-kon-chaw-neek-kaw v. United States*, Mor., 333.

1127. Where, in a prosecution for nuisance in using a building for illegal sale of intoxicating liquors, the juror testified that he was opposed to the business of saloon-keeping and to the law regulating the sale of intoxicating liquors, but that as long as the law stood, he was not prejudiced against a man for selling beer or wine, held, that he was a competent juror: *State v. Nelson*, 58-208.

1128. The juror having testified that he has formed and expressed an unqualified opinion, etc., should not be required to state whether it is for or against the prisoner in order to render him subject to challenge for cause: *State v. Shelledy*, 8-477.

1129. Implied bias: The fact that a juror is a member of an association for the prosecution of persons generally who may be arrested for horse stealing is not a ground for challenge upon the trial of a defendant charged with that crime: *State v. Wilson*, 8-407.

1130. The fact that a juror is a resident of the city does not disqualify him to sit on a jury for the trial of a person for violation of a city ordinance: *State v. Wells*, 46-662.

1131. It is not a ground of challenge to the panel that the jurors have heard the evidence in a preliminary inquiry as to the prisoner's sanity: *State v. Arnold*, 12-479.

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1182. Having served on a jury in the trial of another defendant for the offense charged in the indictment is a ground of challenge where two or more defendants have been indicted for the same offense, and have had separate trials; but there is no such objection where two defendants are separately indicted, although the offense may be of the same kind: *State v. Sheeley*, 15-404; *State v. Leicht*, 17-28.

1183. Examination of juror as to competency: It is not proper for counsel to ask a juror whether he has formed or expressed an opinion as to a certain supposed defense: *State v. Arnold*, 12-479.

1184. The proper method in examining a juror is to direct the investigation to the general question of opinion as to the guilt or innocence of the prisoner. The purpose of the inquiry is to ascertain the existence or non-existence of actual bias. Counsel may direct the inquiry so as to prove to the mind of the jury facts, circumstances, and even hypothetical cases, and thus fully present his right to challenge for cause: *Ibid.*

1185. Where the juror has been challenged for cause, it is within the discretion of the court to allow the opposite party the privilege of recalling him for cross-examination as to his qualifications: *State v. Shelledy*, 8-477, 508.

1186. Effect of disqualification: A judgment upon the verdict rendered by a disqualified jury is erroneous, but not void. It may be reversed upon appeal, but cannot be disregarded as a nullity: *Foreman v. Hunter*, 59-550.

1187. Time of objection; new trial: If the juror is examined on oath at the proper time as to whether he has formed or expressed such an opinion as will disqualify him, and answers falsely with reference thereto, that fact being shown, may be a ground for new trial, but such ground cannot be urged unless the witness has been interrogated with respect thereto at the proper time: *State v. Shelledy*, 8-477, 508.

1188. Waiver: In accepting the jury, defendant waives an objection thereto for bias or prejudice, but if either of the jurors was disqualified to act as such, he does not waive his right of objection for this cause, but may make it a ground for new trial, unless he

knew at the time the jury was sworn of the fact of disqualification: *State v. Groome*, 10-308.

1189. Error without prejudice: Where defendant does not exhaust all his peremptory challenges, any error in overruling a challenge to a juror for cause will be considered as error without prejudice: *State v. Elliott*, 45-486.

1140. Failure of the court to sustain a challenge for cause to a juror who does not sit as one of the jurors on the trial will not constitute reversible error where it appears that defendant's peremptory challenges were not all exhausted when the jury was finally sworn: *State v. Davis*, 41-811.

1141. Peremptory challenges: The fact that the state waives the first peremptory challenge does not defeat the right of defendant to exercise his peremptory challenges: *Smith v. State*, 4 G. Gr., 189.

1142. Before the enactment of the present statutory provisions as to the order of peremptory challenges, *held*, that after one peremptory challenge by the prosecution, defendant must interpose two of his peremptory challenges before the prosecution could be required to proceed; and upon failure to do so, his two challenges, or the one of them not exercised, would be deemed waived: *State v. Pierce*, 8-231.

1143. Also, *held*, that whether a jury should be filled after defendant had exercised one peremptory challenge, before he could be required to exercise another, was in the discretion of the court: *State v. Shelledy*, 8-477, 504.

1144. Administering oath to jury: No form of oath to the jury is prescribed by the statute; and in the absence of a record showing the contrary, it will be presumed that the oath administered was in due form: *State v. Ostrander*, 18-485, 452.

1145. Where the record recited that "the jury were duly impaneled and sworn to try the case (naming it), and a true verdict give therein, according to the evidence and the best of their ability," *held*, that even if that was literally the oath administered it was sufficient: *Ibid.*

1146. Where it appeared that after being impaneled the jury were sworn "the truth to speak upon the issues joined," *held*, that

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the oath was sufficient: *Wrocklege v. State*, 1-167.

1147. Under the provisions of the Code of 1851, *held*, that the oath administered to the jury requiring them "the truth to speak," without including the direction "to try the issues joined," was not sufficient: *Dixon v. State*, 4 G. Gr., 381.

1148. Under the provisions of the Revised Statutes of 1843 requiring an oath in a particular form, *held*, that where the record recited that the jury were sworn "the truth to speak" upon the issues joined between the parties, which was much less formal and solemn than the oath required by statute, such irregularity was sufficient to warrant the reversal of a conviction for murder: *Harri-man v. State*, 2 G. Gr., 270.

1149. Method of impaneling: It is too late, after the verdict, to object to the manner of impaneling the jury when no objection was made on the trial: *Ibid*.

1150. Dismissing juror: It is error, after the jury has been impaneled and the trial commenced, to dismiss a juror and substitute another in his place, even though the juror dismissed has been guilty of misconduct which would vitiate a verdict of guilty if rendered in such proceeding. In such a case of misconduct the jury should be dismissed, and the trial commenced anew: *Grable v. State*, 2 G. Gr., 559.

c. *Separate trials of defendants jointly indicted.*

1151. When defendants jointly indicted for a felony elect to be tried separately, the order in which they shall be tried rests with the district attorney, under the direction of the court: *State v. Hudson*, 50-157; *State v. Nash*, 7-347, 373.

1152. Where defendants are jointly indicted for a misdemeanor, they may be tried jointly or separately in the discretion of the court: *State v. Gigher*, 23-318.

1153. And the state, as well as defendants, in such case, may ask for a separate trial: *State v. Marvin*, 12-499.

1154. Whether tried separately or jointly, either one of the co-defendants is a competent witness for the other: *State v. Nash*, 10-81; *State v. Gigher*, 23-318.

1155. In case of a joint trial, one co-defendant is a competent witness for the other, the jury being properly cautioned, in case of a joint trial, that the evidence is not to be considered in behalf of the defendant so testifying: *State v. Stewart*, 51-312.

1156. Whether defendants be jointly or separately tried, a separate judgment is to be entered up as to each, and the clerk is entitled to a fee for the entry of each separate judgment, but where tried jointly, he is entitled to but one trial fee: *State v. Hunter*, 33-361.

1157. Acquittal of one of two defendants jointly indicted does not bar the prosecution of the other: *State v. McClintock*, 1 G. Gr. 392.

1158. One may be found guilty, and the other acquitted: *Ibid*.

1159. Where defendants are jointly indicted, and the evidence shows that, if both are guilty, they are guilty of distinct offenses committed in separate transactions, the court should require the prosecution to elect upon which transaction it will proceed: *State v. Brown*, 56-298.

1160. Two persons may be jointly indicted for the same crime without alleging that one is principal and the other accessory; or that either one was more directly the perpetrator of the act than the other: *State v. Zeibart*, 40-169.

d. *Conduct of the trial; opening and closing; introduction of evidence.*

1161. Order of trial: The order specified by statute (Code, § 4420) may be varied by the court in the exercise of lawful discretion: *State v. Flynn*, 42-164.

1162. Opening statement for prosecution: Statements by the district attorney, in opening the case to the jury, of facts which he expects to prove, and which if proved would be material and competent, may be made by him, if in good faith, believing and having good reason to believe he will be able to sustain them by evidence, although he is afterward unable to obtain evidence to sustain some of them: *State v. Meshek*, 61-316.

1163. In a particular case, a lengthy statement, which was made by prosecuting attorney, of the evidence which it was expected

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would be introduced, and was followed by an unfair argument of the case based to a considerable extent upon facts which were wholly unsubstantiated by the evidence afterward introduced, was held sufficient misconduct to require a reversal, the defendant having objected to the remarks of the prosecuting attorney at the time; and further, *held*, that the fact that attorney for defendant replied to this opening argument in the same manner, did not render the action of the prosecuting attorney error without prejudice: *State v. Williams*, 63-135.

1164. Before the enactment of the statutory provision as to an opening statement, the court might, in its discretion, allow the district attorney to make a statement of the case to the jury, and the only effect of such provision is to secure, as a matter of right, what the court might, in its own discretion, have granted or refused: *State v. Bateman*, 52-604.

1165. The fact that by oversight the prosecution introduces its evidence before the indictment is read and the opening statement made, will not constitute ground of reversal, such irregularity being waived by failure to interpose an objection to the introduction of evidence before the reading of the indictment: *State v. Norton*, 67-641.

1166. Order of calling witnesses: In criminal cases under some circumstances, and for some purposes, a witness may be called after the evidence is closed, and where no prejudice is shown from such introduction of testimony, it will not be a ground for reversal: *State v. Shean*, 32-88.

1167. The court is vested with the discretion to permit the evidence out of the order prescribed by the statute: *State v. Falconer*, 70—.

1168. The order in which evidence is allowed to be introduced is a matter so much in the discretion of the court that the supreme court will not feel justified in interfering, unless upon the clearest showing of prejudice; so *held*, where, upon rebuttal, the prosecution was allowed to introduce evidence in chief, while upon surrebuttal by defendant evidence in chief was excluded: *State v. Bruce*, 48-530.

1169. Where evidence is offered in rebuttal which should have been offered in

chief, the court may admit it as upon the original case, if in furtherance of justice it should be so admitted. The fact that it was not ostensibly so admitted will not justify a reversal in the absence of a showing of prejudice: *State v. Curran*, 51-112.

1170. As to what is to be deemed rebutting testimony, see *State v. Parish*, 22-284.

1171. Witnesses whose names are not indorsed on the indictment cannot be introduced by the prosecution (Code, § 4421): *Smith v. State*, 4 G. Gr., 189; *Ray v. State*, 1 G. Gr., 316.

1172. What sufficient indorsement: Variance between the name of a witness as indorsed on the indictment, and his true name, is not a valid objection, unless defendant is misled thereby: *State v. Ostrander*, 18-425, 459.

1173. The fact that an indorsement on the indictment gives the initials only of the witness' Christian name will not render it improper to allow such witness to testify: *State v. Pierce*, 8-231; *State v. Schlagel*, 19-169.

1174. A mistake in the initials of a witness whose name is indorsed will not, in the absence of any showing of prejudice, be sufficient ground for objecting to his testimony: *State v. Stanley*, 33-526.

1175. Where, in indorsing the name of the witness on the back of an indictment, his title, instead of his Christian name, was used, *held*, that if the witness was as unmistakably described as he would have been by the use of his Christian name, the object of the indorsement was accomplished, and no prejudice could result to defendant from allowing the witness to be called: *State v. McComb*, 18-43.

1176. The indorsement is not the only evidence to be received on the question of identity of the witness called with the one who was examined before the grand jury. The minutes of evidence may be examined in determining that question, and such minutes, being a part of the record, need not be formally introduced in evidence; and where the name of the witness indorsed was "Mrs. Hutzel," and it appeared that the witness called was Mary E. Hutzel, *held*, that it would be presumed, in favor of the action of the court in allowing such witness to testify, that it appeared from the minutes that the

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person called was the person who was examined before the grand jury: *State v. Briggs*, 68-416.

1177. In a particular case, *held*, that the difference between the name of the witness as indorsed upon the indictment, and his real name, was so slight as not to justify his exclusion: *Houston v. State*, 4 G. Gr., 487.

1178. Effect of failure to indorse name of witness: Under the provisions of the Code of 1851, differing from the provisions of the present statute, *held*, that the prosecution was not prohibited from introducing the evidence of witnesses who were not examined by the grand jury, and whose names were not indorsed on the indictment, and that the state might introduce testimony discovered subsequently to the finding of the indictment: *State v. Abrahams*, 6-117; *State v. McClintock*, 8-203.

1179. Under the present statutory provision (Code, § 4421) that the district attorney shall not, in offering evidence in support of the indictment, introduce witnesses not examined by the grand jury, and the minutes of whose testimony were not taken by the clerk of the grand jury, and presented with the indictment to the court, unless notice shall have been given to the defendant in writing, it is *held* that failure to indorse on the back of the indictment the name of a witness examined before the grand jury, and the minutes of whose evidence are returned, is not a ground for excluding his testimony; and that such defect can only be reached by motion to set aside the indictment: *State v. Fowler*, 52-103; *State v. Flynn*, 42-164.

1180. A continuance being granted after the commencement of the trial, the ground therefor being an application by the district attorney showing discovery of evidence which it was not possible to introduce by reason of the witness not having been examined before the grand jury, and no notice of its proposed introduction having been given in proper time, *held*, that this did not constitute a bar to a subsequent trial: *State v. Parker*, 66-586; *State v. Falconer*, 70—.

1181. In the examination of a witness, the minutes of whose testimony were taken by the grand jury and returned with the indictment, the prosecuting attorney is not limited to the testimony given by the witness

before the grand jury, but may examine him as to other matters not therein referred to: *State v. Bowers*, 17-46; *State v. Ostrander*, 18-435; *State v. McCoy*, 20-262.

1182. The mere brevity of the minutes of the witness' testimony taken by the grand jury will not justify the entire exclusion of the testimony of such witness: *State v. Van Vleet*, 23-27.

1183. Where the indictment is found upon minutes of testimony taken before a magistrate, and the names of the witnesses examined by such magistrate are indorsed on the back of the indictment, they may then be called to testify by the prosecution without having been examined by the grand jury: *State v. Rodman*, 62-456.

1184. The mere failure to file the minutes returned by the grand jury should not prevent the state from introducing its evidence: *State v. Postlewait*, 14-446.

1185. Failure of the state to call any of the witnesses whose names are indorsed on the indictment is no ground for presuming that the testimony of such witnesses would be in favor of defendant: *State v. Ostrander*, 18-435, 457.

1186. Other witnesses: The statutory provision limiting the prosecution to witnesses examined by the grand jury, and minutes of whose evidence are returned, etc., applies only to evidence in support of the indictment, and does not preclude the testimony of other witnesses as to the fact that a certain witness testified before the grand jury: *State v. Fowler*, 52-103.

1187. The state may call, in rebuttal, witnesses whose names are not indorsed on the indictment, and who were not examined before the grand jury: *State v. Parish*, 22-284; *State v. Gillick*, 10-98; *State v. Ruthven*, 58-121; *State v. Rivers*, 68-611.

1188. If defendant becomes a witness in his own behalf, witnesses to impeach him may be called who were not examined before the grand jury, without serving notice of the intention to call them: *State v. Teeter*, 69-717.

1189. Under the statutory provision that witnesses not examined by the grand jury may be called by the prosecution upon notice having been served of the intention to call such witnesses and the substance of their testi-

Instructions.

mony, etc., *held*, that it was sufficient that the notice be served upon defendant personally. The mode of service or authentication is not prescribed. Authentication by the person making the service is sufficient: *State v. Ostrander*, 18-435, 452.

1190. Waiver of objection: That witnesses are examined whose names are not on the indictment cannot be raised as an objection for the first time after conviction: *Ray v. State*, 1 G. Gr., 316; *State v. Houston*, 50-512.

e. Instructions.

As to INSTRUCTIONS in general, see that title.

1191. Signing: The requirement that the judge shall sign the instructions given by him is directory, and a failure to do so will not be ground for reversal, when no prejudice resulted therefrom to defendant: *State v. Stanley*, 48-221.

1192. If the instructions are properly passed upon by the court, and embodied in a bill of exceptions, the failure to sign them will not be a ground of reversal: *State v. McCombs*, 13-426.

1193. The supreme court, on appeal, will not pass upon instructions which have not been made part of the record, either by being signed as here required, or embodied in a bill of exceptions: *State v. Gebhardt*, 13-473; *State v. Watrous*, 13-489.

1194. In writing: Where it appeared that the charge of the court was given to the jury orally and afterwards reduced to writing, with the acquiescence of defendant, *held*, that such irregularity could not afterwards be taken advantage of: *State v. Sipull*, 17-575.

1195. Giving instructions asked: It is the better practice, as a rule, for the judge to put aside the instructions asked by counsel, and cover the whole ground in a methodical charge of his own: *State v. Collins*, 20-85.

1196. Instructions upon questions of fact: An instruction to the effect that, if defendant did a certain act specified, the jury should infer a fraudulent intent, is not vulnerable to the objection that it assumes facts as proved: *State v. Thompson*, 19-299.

1197. It is within the province of the court to state whether the facts proved, if believed,

constitute the offense charged: *Pollar State*, 2-567.

1198. An instruction in which the court declared "that there is some evidence tending to show that defendant was drunk where evidence of intoxication was required upon as showing want of specific intent," *held* erroneous, as indicating an opinion of the court as to the weight and quantity of evidence, unfavorable to defendant: *State v. Donovan*, 61-369.

1199. An instruction which especially directed the attention of the jury to certain facts, and thereby excluded from their attention other facts bearing upon the same question, *held* erroneous: *State v. Meshek*, 51-30.

1200. Not supported by evidence: Where it appears that there was no evidence tending to show that defendant in any respect aided and abetted the commission of the crime charged, *held*, that an instruction with reference to his criminality if it should appear that he aided, abetted, etc., was erroneous: *State v. Myer*, 69-148.

1201. Misleading: An instruction which may be misleading when applied to the particular facts of the case is erroneous: *State v. Benham*, 23-154.

1202. An instruction in a prosecution for assault which assumed that the assault was made, and called particular attention to the manner of the assault, etc., when there was great doubt from the evidence whether an assault was made, *held* erroneous, as being misleading: *State v. Bailey*, 54-414.

1203. Duty to instruct: While mere failure to instruct the jury may constitute a reversible error if it should be apparent that the failure resulted in depriving defendant of a fair trial, yet where instructions are correct as far as they go, the defendant should, if he desires further instructions, ask them or he will not be heard to complain: *State v. Helvin*, 65-289.

1204. In a trial for forgery, *held*, that failure by the court to give instructions respecting the law applicable to the offense and to a certain line of defense of which there was sufficient evidence to require it be considered by the jury, though no instructions were asked by the counsel for defendant, was sufficient to warrant a reversal, the court saying that although the court believed

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ished prior to each adjournment; it will be presumed that the court did its duty in this respect: *State v. Shelledy*, 8-477.

1233. Sworn officer: Communication with the jury by a deputy sheriff after their retirement in relation to procuring for them a paper introduced in evidence, *held*, not a ground for reversal in the absence of any showing of prejudice: *State v. Wart*, 51-587.

1234. It is not necessary that it appear affirmatively that the jury were in charge of a sworn officer. That will be presumed unless the contrary appears: *State v. Pitts*, 11-343.

1235. What the jury may take with them: Where a medical book was introduced as evidence, and a portion of it read to the jury, *held*, that it was not proper for them to take such book to the jury room, the portions which were read not being marked: *State v. Gillick*, 10-98.

1236. The jury on their retirement to consider their verdict, in an appeal from a conviction in a justice's court, were permitted to take with them the papers in the case, including the information, the transcript from the justice, transcript on change of venue, affidavits, etc.; *held*, that there was no ground for reversal in the absence of a showing that the jury, or any of them, examined the papers, or that any prejudice resulted from their action: *State v. Gibson*, 29-295.

1237. Where a juror sent for and read to his fellows a law book in support of the correctness of the instructions of the judge, *held*, that such misconduct was error without prejudice, the instructions having been as a matter of law correct: *State v. Carr*, 43-418.

g. Finding and return of verdict.

1238. Verdict for lower degree or included offense: Under the statutory provision (Code, §§ 4465, 4466) authorizing the jury to return a verdict for a lower degree of the crime charged than that for which defendant is put on trial, or for any crime necessarily included therein, whatever offense is necessarily included in the crime charged in the indictment may be punished, although the indictment contains no words specifically designating the offense so included: *Benham v. State*, 1-542.

1239. Therefore, *held*, that as every intentional maiming and disfiguring includes an assault and battery, a defendant indicted for the former might be convicted of the latter, although no assault was charged in the indictment: *Ibid*.

1240. A simple assault is necessarily included in a charge of an assault with intent to commit bodily injury: *Orton v. State*, 4 G. Gr., 140.

1241. Under an indictment for an assault with intent to commit murder, defendant may be convicted of assault and battery: *Dixon v. State*, 3-416.

1242. Or of a simple assault: *State v. Shepard*, 10-126; *State v. White*, 45-325.

1243. Assault with intent to commit manslaughter is necessarily included in a charge of an assault with intent to commit murder: *State v. White*, 45-325.

1244. Upon conviction of assault with intent to commit great bodily injury, obtained under an indictment of assault with intent to commit murder, a sentence for a simple assault may be proper: *State v. Schele*, 52-608.

1245. Under an indictment for murder in the first degree, defendant may be convicted of assault with intent to commit great bodily injury, as well as of assault with intent to murder, or with intent to maim: *State v. Parker*, 66-586.

1246. While an assault and battery will not in all cases be necessarily included in an assault with intent to murder, yet under an indictment charging the latter offense as committed by acts amounting to assault and battery, a conviction of assault and battery would be warranted: *State v. Graham*, 51-72.

1247. On an indictment for murder defendant may be found guilty of manslaughter: *Gordon v. State*, 3-410; *State v. White*, 45-325.

1248. Although the offense consist of different degrees, and defendant is not found guilty of any one of the degrees, he may still be guilty of an offense necessarily included in that for which he is indicted: *Gordon v. State*, 3-410.

1249. A charge of the crime of rape necessarily charges also the crime of assault with intent to commit rape: *State v. McLaughlin*, 44-82.

Instructions.—Conduct of jury.

That in case of reasonable doubt as to the degree, the jury should convict of the lower degree, see *infra*, § 1635.

That the jury should be instructed that in case of reasonable doubt as to the degree of the offense they should convict only of the lower degree, see *infra*, § 1634.

Instructions as to reasonable doubt, see *infra*, §§ 1618-1633.

Instructions as to alibi, see *infra*, §§ 1437-1440.

1218. Objection to evidence cannot be taken by way of instructions to the jury that such evidence should not be considered: *State v. Pratt*, 20-267.

1219. Additional instructions: Remarks of the court to the jury, after they had been out for a considerable time without being able to agree, as to the impropriety of a juror going into the jury box with a predetermination as to the result which he will favor, and to hang the jury, or to cause a disagreement if the verdict cannot be rendered as he wants it, held not erroneous: *State v. Lawrence*, 38-51.

1220. Where the jury, after having retired, sent to the court a communication asking further instructions as to a matter of fact in regard to which they were in doubt, held, that it was not incumbent upon the court to give them any further instructions upon such question: *State v. Maxwell*, 42-208.

1221. In a particular case, held, that the court was warranted in giving additional instructions after the retirement of the jury: *State v. Pitts*, 11-343.

1222. In case of libel: Although, by constitutional and statutory provisions, the jury in prosecutions for libel determine both the law and the facts, the court has the right to instruct them in these as well as other criminal cases; and the conclusive presumption is, that they followed the instructions of the court; therefore, an erroneous instruction will be regarded as prejudicial, and a ground for reversal, as in other cases: *State v. Rice*, 56-431.

1223. The expression, "under the direction of the court," used in the statute in that connection, means under the instructions of the court: *Forshee v. Abrams*, 2-571.

1224. The doctrine that the jurors are judges of the law as well as the facts, in libel,

applies only to criminal prosecutions, and not civil actions for damages: *Ibid*.

1225. Special interrogatories: The statute authorizing the submission to the jury of interrogatories for special findings on particular questions of fact is not applicable in criminal cases: *State v. Fooks*, 65-196; *State v. Ridley*, 48-370.

1226. Directing acquittal: The court may direct an acquittal when there is no testimony sustaining the charge, or when it is so slight that a verdict of guilty would be instantly set aside, but not when there is a conflict in the testimony: *State v. Smith*, 28-565.

1227. Remarks to jury: The court cannot, under the guise of determining some questions which are legitimate, make remarks in the presence and hearing of the jury which would constitute error if contained in an instruction, and thus deprive the defendant of the opportunity of having such error reviewed: *State v. Stowell*, 60-535.

f. Conduct of jury.

1228. Separation: It will not necessarily constitute error for the court to refuse to direct, on application of defendant, that the jury shall be kept together without separation, if it is not made apparent that the court has therein exceeded its discretion, or exercised it to the prejudice of defendant's rights: *State v. Gillick*, 10-98.

1229. In the absence of a showing of prejudice, held, that the fact that one of the jurors, while on the way to the jury room, separated himself from the others for the purpose of getting some tobacco, would not vitiate the verdict: *State v. Wart*, 51-587.

1230. That one of the jurors was permitted to leave the jury room for a necessary and proper purpose, accompanied by the deputy sheriff, it appearing that the juror had no conversation with any one while absent, except with such deputy, and with him only to the extent of asking permission to retire, held, not such misconduct as to make a new trial necessary: *State v. Bowman*, 45-418.

1231. As to the propriety of not allowing the jury to separate when the defendant objects thereto, see *State v. Felter*, 25-67.

1232. Admonition: It need not appear of record that the jury were properly admon-

Finding and return of verdict.—New trial.

and concealing," etc., thus specifying the crime charged in the indictment, *held*, that it was a general and not a specific verdict: *State v. Turner*, 19-144.

1267. Where defendant was charged with knowingly having in possession and uttering a forged instrument, but in the caption and indorsement of the indictment the crime was designated as forgery, and the court, while properly directing the jury as to the facts necessary to establish the crime with which defendant was properly charged, designated it as forgery, and gave the form of the verdict as though that were the crime charged, and the jury, following the form thus given, found defendant "guilty of the crime of forgery as charged in the indictment," *held*, that the verdict was simply informal, and was not vitiated by the error in designating the offense charged: *State v. Burgson*, 53-318.

1268. Reconsidering informal verdict: Where the verdict in a criminal cause is special in nature, and defective in not giving the facts necessary to enable the court to enter judgment, the jury should be directed to retire for further deliberation, but the court may, against defendant's objection, set aside the verdict and order a retrial, and defendant is not, in such case, entitled to be discharged: *State v. Arthur*, 21-322.

1269. Where the jury, in a prosecution for burglary, returned a verdict finding defendant guilty of entering a house in the nighttime, and recommended him to the mercy of the court, *held*, that such verdict did not amount to a special verdict authorizing an acquittal, but that, failing to respond to all the facts necessary to a conviction, the jury were properly directed to reconsider it: *State v. Maxwell*, 42-208.

1270. General verdict on several counts: Where there is a general verdict of guilty on an indictment containing several counts, if any one of them is good, the judgment will be supported: *State v. Shelledy*, 8-477, 511.

1271. Verdict against one of several defendants: Where two or more are indicted jointly for an offense, one may be found guilty without regard to the others: *State v. McClintock*, 8-203.

1272. Defects cured by verdict: After verdict all objections to the proceedings of

the grand jury in finding the indictment come too late: *Sharp v. State*, 2-454.

1273. The verdict does not cure irregularities in the trial or in the finding of the indictment, such, for instance, as the refusal to allow the defendant the right of challenge to the grand jurors: *State v. Osborne*, 61-330.

h. *New trial.*

1274. Motion for; when to be made: A motion for a new trial must be made before judgment: *State v. Bixby*, 39-465.

1275. Presence of defendant, even in case of prosecution for a felony, is not required at the argument and determination of a motion for a new trial: *State v. Decklotts*, 19-447.

1276. Newly-discovered evidence: The statutes do not authorize a new trial in a criminal action on the ground that testimony material to the defense has been discovered since the trial, which could not with reasonable efforts have been discovered previous thereto: *State v. Bowman*, 45-418.

1277. Newly-discovered evidence in a particular case, *held* sufficient to entitle defendant to a new trial, the right to a new trial on that ground not being discussed: *State v. Foster*, 37-404.

1278. A new trial will not be granted on account of the inability of defendant to procure certain evidence which was simply cumulative and would clearly not have warranted a different verdict: *State v. Nadal*, 69-478.

1279. Misconduct of jury: That a juror left the jury room and was temporarily absent for a proper purpose, in charge of a deputy sheriff, *held* not sufficient ground for granting a new trial: *State v. Bowman*, 45-418.

1280. The drinking of spirituous liquors during the time when a jury is out for the purpose of deliberating upon their verdict is sufficient misconduct to reverse a judgment on such verdict on appeal: *State v. Baldy*, 17-39.

See, also, as to misconduct of the jury in drinking spirituous liquors, *NEW TRIALS*, §§ 31-40.

1281. Where it is sought to set aside the verdict of a jury on the ground of state-

New trial.

ments of one of the jurors as to facts not in evidence, or the like, it is necessary to show that prejudice resulted to the party complaining. Prejudice will not be presumed: *State v. Woodson*, 41-425.

1282. Disqualification of juror (for instance, not being an elector) is not waived by failure to object to him for cause, and may be a ground for new trial; but if defendant knew at the time that the jury were sworn that any of them were not qualified to act as jurors, he would, by failure to object, waive his right to object afterward. It must appear, however, that defendant had knowledge of the fact of disqualification before it can be inferred that he waived his objection: *State v. Groome*, 10-308.

1283. But an objection to a juror on account of bias or prejudice is waived by failure to object at the proper time: *Ibid.*

1284. If the juror is examined at the proper time as to whether he has formed or expressed an unqualified opinion as to defendant's guilt or innocence, and it should afterwards appear that, on such examination, he had sworn falsely as to not having formed or expressed such opinion, that fact might be a ground for a new trial. But defendant, to take advantage thereof, must show by the record that the juror was examined on oath as to the fact: *State v. Shelledy*, 8-477, 508.

1285. Affidavits of jurors: In a criminal case, the court should receive the testimony of jurors as to any palpable misapprehension of the instructions of the court as a ground for a new trial: *Packard v. United States*, 1 G. Gr., 225.

Further as to affidavits of jurors, see NEW TRIALS, §§ 182-210.

1286. Misconduct of district attorney: By statute (Code, § 3636, as amended), any reference by the district attorney to the fact that defendant has not become a witness in his own behalf is misconduct sufficient to entitle defendant to a new trial: *State v. Graham*, 62-108.

1287. But where the evidence as to whether the district attorney made such reference in his argument or not is conflicting, the supreme court will abide by the action of the lower court in reference thereto: *State v. Maynes*, 61-119.

1288. In a particular case, *held*, that the

fact of an improper reference by the district attorney to the failure of defendant to become a witness was not sufficient to require a reversal: *State v. Woodson*, 41-425.

1289. Where defendant is called as a witness and testifies as to facts in his own defense, it is not improper for the district attorney to refer to defendant's testimony as to other material facts within his knowledge: *State v. Tatman*, 61-119.

Further as to defendant's failure to testify in his own behalf, see *infra*.

1290. In a particular case, where the conduct of the district attorney in making a statement to the jury required the granting of a new trial: *Williams*, 63-135.

1291. Misconduct of the district attorney in asking improper questions promptly excluded on objection is not sufficient in a particular case to require a new trial: *State v. Noble*, 66-541.

1292. Incompetence of defense counsel: Where defense counsel may, especially in case of a new trial, constitute a ground for a new trial, but to justify a reversal, there should be a showing of both incompetence and prejudice: *Benge*, 61-658.

1293. Remarks by the district attorney: Remarks by the district attorney upon challenges to jurors, if not prejudicial to the defendant, are not a ground for a new trial: *George*, 62-682.

1294. Fair trial: In a particular case, a new trial was granted on the ground that it appeared that the circumstances of the case showed that the defendant had a full, fair and impartial trial with no error of law was sufficient: *Trulock v. State*, 1-515.

1295. Surprise: The fact that a witness is taken by surprise by the testimony of another witness may be a ground for a new trial: *Ibid.*

1296. Defendant is not entitled to a new trial on the ground of such surprise if his counsel did not have sufficient knowledge with regard to the circumstances of the case to make a motion for continuance or a new trial: *State v. Benton*, 61-119.

1297. Verdict against the state: Where a conviction is clear

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weight of evidence, the supreme court should set it aside on appeal: *State v. Woolsey*, 30-251.

1298. The supreme court will, on appeal, interfere more readily with a verdict because contrary to the weight of evidence in a criminal than in a civil case: *State v. Tomlinson*, 11-401.

1299. But where every material allegation of the indictment is supported by the evidence, the supreme court must be satisfied of the insufficiency of the evidence, to warrant the overruling of the action of the lower court in refusing a new trial on that ground: *State v. Elliott*, 15-72.

1300. The supreme court will but cautiously interfere with verdicts, when it is claimed that they are against the evidence: *State v. Collins*, 20-85.

1301. Where the jury has rendered a verdict which the court has refused to set aside, the supreme court will not interfere if the correctness of the verdict depends upon the credit to be given the testimony of witnesses and there is nothing in such testimony rendering its truthfulness improbable: *State v. Quinn*, 47-368.

1302. Where it does not appear from the evidence of record in a criminal case that the verdict was against the preponderance of evidence, a new trial will not be granted on appeal: *State v. Stoker*, 22-52.

1303. Where the bill of exceptions does not profess to disclose the whole of the evidence, the supreme court will presume there was sufficient to warrant the verdict of the jury. It will not reverse on the ground that the verdict is against the weight of evidence, unless it is clearly and manifestly so: *State v. Lyon*, 10-340.

1304. In a particular case, *held*, that the lower court should have sustained a motion for a new trial on the ground of insufficiency of evidence: *State v. Hilton*, 22-241.

i. Arrest of judgment.

1305. The objection that it does not appear from the indictment that it was found within the statutory period of limitation after the commission of the offense is not a ground for arrest of judgment: *State v. Deitrick*, 51-467.

1306. Where a motion in arrest of judgment is sustained, the proceeding cannot be pleaded in a subsequent prosecution as constituting a previous conviction or acquittal: *State v. Clark*, 69-196.

j. Sentence.

1307. Time for sentence: Under the statutory provision that the time for pronouncing judgment must be at least three clear days after the rendition of the verdict, if the court remains in session so long, *held*, that where the record showed that the court was in session more than three days after the verdict, the statutory provision was imperative, and unless the record clearly rebutted the presumption of prejudice it could not be disregarded; and in such case the judgment was reversed and the cause remanded for judgment upon the verdict, with leave for defendant to show any cause against the same which had not been already passed upon: *State v. Watrous*, 13-489.

1308. Where the defendant appears to have been sentenced before the expiration of the three days above mentioned, it will be presumed, in the absence of any showing to the contrary, that the court deferred its judgment to as remote a period as it reasonably could: *State v. Wood*, 17-18; *State v. Marvin*, 12-499.

1309. Under the same statutory provision, which directs that judgment shall not be pronounced in less than six hours after the verdict is rendered, *held*, that where the record did not show whether six hours intervened between the plea of guilty and the final adjournment of the term, and it appeared that a continuance was made without objection, the presumption would be that the court adjourned within less than six hours, and the case was continued for judgment by consent, and that there was no error in failing to pronounce judgment at the term in which the plea of guilty was entered: *State v. Stevens*, 47-276.

1310. Where the last day of the term was fixed for pronouncing judgment, but upon that day the cause was continued for judgment until next term, when judgment was pronounced, *held*, that in the absence of a showing to the contrary, and of any objection

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at the time, it would be presumed that the continuance was for good cause, or at the request of defendant: *State v. Miller*, 53-84.

1311. It is not error to render judgment for the payment of a fine at the next term after conviction: *State v. Ray*, 50-520.

1312. Opportunity to show cause why judgment should not be rendered: The statutory provision that defendant shall be informed of the nature of the indictment and of his plea and the verdict thereon, and shall be asked whether he has any legal cause to show why judgment should not be pronounced against him, is merely declarative of the common law. Such action of the court is not required to be made matter of record, although it may properly be done, but no presumption of its omission will arise from the fact that it does not appear of record: *State v. Wood*, 17-18; *State v. Stiefle*, 13-603.

1313. Unless it otherwise appears, it will be presumed that such steps were properly taken: *State v. Wells*, 46-662.

1314. The fact that it does not appear that defendant had an opportunity to present matter in mitigation of sentence, on a plea of guilty, is no ground for a new trial, it not appearing that he was in any way deprived of such opportunity: *State v. Reininghaus*, 43-149.

1315. It appearing that defendant had all the opportunity to prepare an application for a new trial or motion in arrest of judgment and showing in mitigation of punishment which could have been necessary, *held*, that the failure to fix any definite time for judgment after a continuance upon a plea of guilty was error without prejudice: *State v. Sterens*, 47-276.

1316. It is not error for the judge to remark, in connection with the statement to the defendant of the charge against him, his plea thereto, the verdict of the jury, etc., upon the circumstances of the offense, and to state the reasons impelling him to pronounce against defendant a particular penalty imposed upon him. There is certainly no impropriety in the practice in this respect recognized in many of the courts of this state: *State v. Hale*, 65-575.

1317. Judgment on plea in bar: Where defendant interposes only the plea of former

conviction or acquittal, with guilty, as he might do in a case with, and upon verdict being returned, if he does not ask leave judgment may properly be rendered against him without further trial: *State v. Green*, 16-239.

1318. Cumulative sentence: Where judgments of imprisonment of defendant were rendered on the same offense, and no provision was made as to the term of either term as directed, *held*, that the prisoner should serve the term of imprisonment on the last rendered would commence the term of that under the first. Imprisonment cannot be consecutive: *McMillan*, 51-240.

1319. Imprisonment suffered: Where defendant has been imprisoned during appeal and the conviction afterwards reversed, and he is again convicted and sentenced, it will be presumed that the court in imposing the second term into account the imprisonment during the appeal, as required to do: (Code, § 4545): *State v. Hopk*.

1320. Sentence for included offense: Defendant, under indictment for intent to murder, was found guilty of intent to commit great bodily harm and the court, doubting its authority to sentence for the latter offense unaided, sentenced for a simple term. *held*, that there was no error prejudicial to defendant: *State v. Schele*, 52-60.

1321. Sentence to hard labor: Where the jury found defendant guilty of murder in the first degree and directed that he be punished by imprisonment in the penitentiary at hard labor for life, and the court sentenced him to imprisonment in the penitentiary for the term of years, the judgment must be pronounced at hard labor, as it corresponded with the verdict: *State v. Schele*, 52-60.

1322. Imprisonment for a term: The provisions (Code, §§ 4545, 4546) that a judgment that defendant be imprisoned at hard labor, also direct that he be imprisoned at hard labor, if the fine is satisfied, specifying the

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weight of evidence, the supreme court should set it aside on appeal: *State v. Woolsey*, 30-251.

1298. The supreme court will, on appeal, interfere more readily with a verdict because contrary to the weight of evidence in a criminal than in a civil case: *State v. Tomlinson*, 11-401.

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1308. Where the defendant appears to have been sentenced before the expiration of the three days above mentioned, it will be presumed, in the absence of any showing to the contrary, that the court deferred its judgment to as remote a period as it reasonably could: *State v. Wood*, 17-18; *State v. Marvin*, 12-499.

1309. Under the same statutory provision, which directs that judgment shall not be pronounced in less than six hours after the verdict is rendered, *held*, that where the record did not show whether six hours intervened between the plea of guilty and the final adjournment of the term, and it appeared that a continuance was made without objection, the presumption would be that the court adjourned within less than six hours, and the case was continued for judgment by consent, and that there was no error in failing to pronounce judgment at the term in which the plea of guilty was entered: *State v. Sterens*, 47-276.

1310. Where the last day of the term was fixed for pronouncing judgment, but upon that day the cause was continued for judgment until next term, when judgment was pronounced, *held*, that in the absence of a showing to the contrary, and of any objection

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at the time, it would be presumed that the continuance was for good cause, or at the request of defendant: *State v. Miller*, 53-84.

1311. It is not error to render judgment for the payment of a fine at the next term after conviction: *State v. Ray*, 50-520.

1312. Opportunity to show cause why judgment should not be rendered: The statutory provision that defendant shall be informed of the nature of the indictment and of his plea and the verdict thereon, and shall be asked whether he has any legal cause to show why judgment should not be pronounced against him, is merely declarative of the common law. Such action of the court is not required to be made matter of record, although it may properly be done, but no presumption of its omission will arise from the fact that it does not appear of record: *State v. Wood*, 17-18; *State v. Stiefle*, 13-603.

1313. Unless it otherwise appears, it will be presumed that such steps were properly taken: *State v. Wells*, 46-662.

1314. The fact that it does not appear that defendant had an opportunity to present matter in mitigation of sentence, on a plea of guilty, is no ground for a new trial, it not appearing that he was in any way deprived of such opportunity: *State v. Reininghaus*, 43-149.

1315. It appearing that defendant had all the opportunity to prepare an application for a new trial or motion in arrest of judgment and showing in mitigation of punishment which could have been necessary, *held*, that the failure to fix any definite time for judgment after a continuance upon a plea of guilty was error without prejudice: *State v. Sterens*, 47-276.

1316. It is not error for the judge to remark, in connection with the statement to the defendant of the charge against him, his plea thereto, the verdict of the jury, etc., upon the circumstances of the offense, and to state the reasons impelling him to pronounce against defendant a particular penalty imposed upon him. There is certainly no impropriety in the practice in this respect recognized in many of the courts of this state: *State v. Hale*, 65-575.

1317. Judgment on plea in bar: Where defendant interposes only the plea of former

conviction or acquittal, without pleading not guilty, as he might do in connection therewith, and upon verdict being found against him he does not ask leave to plead over, judgment may properly be rendered against him without further trial as to his guilt: *State v. Green*, 16-239.

1318. Cumulative sentence: Where two judgments of imprisonment against a defendant were rendered on the same day, but no provision was made as to the commencement of either term as directed by statute, *held*, that the prisoner should be kept in confinement until both were served out, and that the term of imprisonment on the judgment last rendered would commence on the expiration of that under the first. Two terms of imprisonment cannot be concurrent: *Mieir v. McMillan*, 51-240.

1319. Imprisonment suffered before sentence: Where defendant has been imprisoned during appeal and the conviction is afterwards reversed, and he is again convicted and sentenced, it will be presumed that the court in imposing the second sentence took into account the imprisonment served during the appeal, as required to do by statute (Code, § 4545): *State v. Hopkins*, 67-285.

1320. Sentence for included crime: Where defendant, under indictment for assault with intent to murder, was found guilty of assault with intent to commit great bodily injury, and the court, doubting its authority to sentence for the latter offense under the indictment, sentenced for a simple assault, *held*, that there was no error prejudicial to defendant: *State v. Schele*, 52-608.

1321. Sentence to hard labor: Where the jury found defendant guilty of murder in the first degree and directed that he should be punished by imprisonment in the penitentiary at hard labor for life, and in rendering judgment the court sentenced to imprisonment in the penitentiary for life, *held*, that the judgment must be presumed to mean imprisonment at hard labor, and sufficiently corresponded with the verdict: *State v. Cole*, 63-695.

1322. Imprisonment for non-payment of fine: The provisions (Code, §§ 4509, 4689) that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, specifying the extent of the

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imprisonment, which shall not exceed one day for each three and one-third dollars of fine, are directory only. The extent of imprisonment for non-payment of a fine being thus fixed, a judgment that defendant be imprisoned until the fine is paid will not be void: *Jackson v. Boyd*, 53-536.

1323. But when imprisonment is imposed under any statute the court should fix the extent of the imprisonment. To this extent the provision is mandatory: *Ex parte Tuicher*, 69-393.

1324. These statutory provisions are applicable to a fine imposed under Code, § 1540 or § 1542, providing punishment for violation of the prohibitory liquor law, as such sections are amended by 20 G. A., ch. 143, although it is therein provided defendant shall stand committed until the fine and costs assessed against him are paid: *Ibid*.

1325. Although a judgment for failure to pay the \$500 fine authorized under the prohibitory liquor law for violation of an injunction should limit the imprisonment to one hundred and fifty days, nevertheless a failure to make such order will not render a reversal of the judgment of fine and imprisonment necessary, but the judgment can be corrected on appeal: *Jordan v. Circuit Court*, 69-177.

1326. There cannot be imprisonment for non-payment of a fine unless the judgment so orders: *Lanpher v. Dewell*, 56-153.

1327. The foregoing provisions are applicable where the punishment is fine only, and not fine and imprisonment, and the extent of the imprisonment should be specified, but a failure to do so will not render the judgment void. It may be corrected on appeal: *State v. Myers*, 44-580.

1328. Such statutory provision applies only to the fine and not to the costs: *State v. Erwin*, 44-637.

1329. But it may be provided by statute that defendant be imprisoned for non-payment of costs as well as fine: *Albertson v. Kriechbaum*, 65-11.

1330. Where imprisonment for non-payment of fine, or fine and costs, is authorized, such imprisonment is not a portion of the punishment for the crime, but only a method of enforcing payment of the fine or fine and costs: *Ibid*.

1331. Therefore, *held*, that a statute making a crime punishable by fine not exceeding \$100, and providing for imprisonment until payment of fine and costs, did not take the crime out of the jurisdiction of a justice of the peace: *Ibid*.

1332. The duration of the imprisonment cannot be determined or limited by a partial payment of the fine: *Galles v. Wilcox*, 68-664.

1333. For violation of a city ordinance a defendant may be imprisoned until fine and costs are paid (Code, § 484): *State v. Wells*, 46-662.

1334. The fact of imprisonment for non-payment of a fine to the limit of the law, as above specified, does not operate as a satisfaction of the judgment: *State v. Jordan*, 39-387; *State v. Anwerda*, 40-151; *Albertson v. Kriechbaum*, 65-11.

If defendant is released under the provision as to poor convicts, upon giving a note, the judgment is satisfied: *Infra*, § 1720.

1335. Under the statutory provision that defendant may be sentenced to hard labor for non-payment of a fine (Code, § 4736), he is to be credited with \$1.50 per day upon the judgment against him, but the duration of his imprisonment cannot exceed that specified in the statutory provision, limiting such imprisonment to one day for each three and one-third dollars of fine: *Keokuk v. Dressell*, 47-597.

Further as to imprisonment, see *infra*, III, 15.

1336. Costs: Payment of a fine imposed does not satisfy the costs, and execution may issue against defendant therefor: *State v. Gray*, 35-503; *Gray v. Ferreby*, 36-146.

Further as to costs, see *infra*, III, 17.

1337. Liberation of poor convicts: A prisoner who, having been confined for the non-payment of a fine, is liberated under the provisions as to poor convicts (Code, § 4611), is entitled to have the judgment against him satisfied: *State v. Van Vleet*, 23-168.

11. Jeopardy; previous conviction or acquittal.

As to the constitutional provision in regard to being twice put in jeopardy, see CONSTITUTIONAL LAW, §§ 77-80.

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1338. Dismissal of prosecution: Defendant being put upon trial under charge of a public offense, it is not within the scope of the authority of either the prosecuting attorney or of the court to take the case from the jury of his own arbitrary will and without a controlling cause, and again hold defendant to trial on the same charge, although it be newly presented. Such proceeding amounts to an acquittal, and may be pleaded as a bar: *State v. Callendine*, 8-288.

1339. A *nolle prosequi* may be entered before the trial is entered upon, but after plea and the jury is sworn and the evidence is in it will amount to an acquittal: *Ibid.*

1340. The fact that material witnesses for the prosecution cannot be called because their names are not indorsed on the indictment will not be such a peremptory or controlling cause as to justify the court in dismissing the case: *Ibid.*

1341. New trial: The granting of a continuance, because of the inability of prosecution to introduce material evidence which was not before the grand jury, and notice of which was not given to defendant before the trial, will not bar a subsequent trial in pursuance of such continuance: *State v. Parker*, 66-586; *State v. Falconer*, 70—.

1342. Discharge of jury: The fact that in the exercise of sound discretion the jury is discharged for failure to agree does not entitle defendant to be released as having been once in jeopardy: *State v. Vaughan*, 29-286.

1343. Where, after all the evidence had been introduced, the judge, on receipt of a telegram announcing the sickness of his wife, adjourned court for a few days to go home, and on the day to which the court was adjourned, by telegram adjourned court over the term, *held*, that there was sufficient cause to warrant the adjournment in the discretion of the judge, and that defendant could not, on a subsequent trial, plead previous jeopardy: *State v. Tatman*, 59-471.

1344. Conviction of a lower degree of offense: A verdict of guilty in a lower degree of the crime than that charged in the indictment, or guilty of a crime necessarily included in that charged, operates as an acquittal of a higher degree or a higher crime, and defendant cannot, after having secured

a reversal, be again put upon a higher degree or a higher crime than he was convicted: *State v. Clemons*, 51-274.

1345. Nor will the fact of being put on trial a second time for a higher degree or higher crime, if the defendant is found guilty of only the lower degree of crime of which he was previously acquitted, render the error in improper admission of evidence on trial a second time of the higher crime, error without prejudice: *v. Tweedy*, 11-350.

1346. Second trial for higher crime: A conviction or acquittal of a lower degree of crime will not bar prosecution for a higher degree of the same crime. Thus, an acquittal for manslaughter will not bar an indictment for murder. A conviction for assault will not bar a prosecution for intent to do great bodily harm: *Foster*, 33-525.

1347. A former conviction for the crime of petit larceny will not bar a subsequent prosecution for the offense of grand larceny from the person, although the misdemeanor is triable before a justice of the peace, and the other is a felony: *Gleason*, 56-203.

1348. Where the same act constitutes two crimes: A previous prosecution for an act as constituting one crime will not bar a subsequent prosecution for a different crime committed in the same act. Thus, a prosecution for assault will not bar a subsequent prosecution for a riot arising from the same transaction: *Scott v. Mor.*, 142.

1349. A conviction for peccatus will not bar a prosecution for peccatus to remain in a saloon for allowing another person to play billiards at one date will not bar a prosecution for the same at another date: *State v. Mor.*, 196.

1350. The charge of an assault upon one person is, in a legal sense, not a bar to a prosecution for a commission of the act in regard to another person. Thus, a conviction for an assault upon one person will not sustain an indictment for an assault upon two; therefore, in a prosecution for assault and battery upon two persons, an indictment for assault and battery upon one of the persons named, defend-

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show, under a plea of a former conviction or acquittal, a judgment under an indictment for an assault upon two. Such reasoning does not apply, however, to an indictment for an assault by two. In such case either one may be acquitted either on a joint or on a separate indictment: *State v. McClintock*, 8-203.

1351. The act of using a building for the keeping of intoxicating liquors with intent to sell in violation of law, and that of using a building for the sale of the same in violation of law, are each by statute declared to be the crime of nuisance. Therefore a conviction for nuisance committed in one of these two ways will bar a prosecution for the same crime committed in the other way in the same building prior to the first indictment: *State v. Layton*, 25-193.

1352. Where a person by one muscular action and one volition passed four forged checks, *held*, that he committed one crime, and that a conviction for passing one of such checks would bar a subsequent prosecution as to the others: *State v. Eggesht*, 41-574.

1353. Where the same essential element is included in two or more crimes, as, for instance, larceny in the crimes of larceny from a dwelling-house in the night-time and robbery, a previous conviction or acquittal for one of such crimes will bar a subsequent prosecution for the other. In the prosecution for the one crime the defendant might be convicted of the included crime: *State v. Mikesell*, 70—.

1354. Acts for which conviction might have been had: Where it appeared that under a previous prosecution for selling intoxicating liquor described as stomach bitters, defendant was in fact tried for all offenses for sales of intoxicating liquors, *held*, that he could not be prosecuted a second time for the sale of dandelion bitters during the time covered by the first prosecution: *State v. Sterrenberg*, 69-544.

1355. Crime against state and United States: The crime of counterfeiting the coin of the United States may be punished under state law, congress not having attempted to exercise the exclusive power of punishing such offenses: *State v. McPherson*, 9-53.

1356. Offense against state and city: An ordinance of a city punishing an act which

is punishable under the laws of the state is not, on that account, void. The act may be punished under both without violating any constitutional principle: *Bloomfield v. Trimble*, 54-399.

But a city cannot, by ordinance, provide for the punishment of acts which are already made crimes by statute: See MUNICIPAL CORPORATIONS, § 276.

1357. Evidence as to identity of offense: Where defendant pleaded a former conviction before a justice of the peace, *held* proper to ask the justice before whom the former conviction was claimed to have been had whether the offense then charged was the same as testified to by the witnesses on the last trial, and whether the evidence was the same: *State v. Maxwell*, 51-314.

1358. Fraudulent acquittal or conviction: Where a person guilty of a criminal act procures a fraudulent conviction or acquittal by collusion, the state may elect to treat the action of the magistrate as a farce and the judgment a nullity, and it may commence a new prosecution: *State v. Green*, 16-239.

1359. Where a defendant relies upon a plea of a former conviction, and the state claims that it is not concluded thereby for the reason that it was fraudulently obtained, the burden of proof is upon the state to establish the fraud: *State v. Maxwell*, 51-314.

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1360. Execution of bond: The bond, under the statute, should be executed and acknowledged before the clerk of the district court, and the sureties should justify before him; but these are directory matters, and where the bond has been accepted it will be valid though it was executed and the sureties qualified before the clerk of the court in another county, and though it was not acknowledged at all. The execution, its acceptance, the discharge of the prisoner thereon, and his failure to appear according to its terms, are the essential matters. It is not necessary to call the sureties and have their default entered at the time the defendant fails to appear: *State v. Wells*, 36-238.

1361. Before an accused held to bail can demand a discharge upon tendering bond and surety, his bail must justify as required by

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statute; but a failure to require such justification will not render the bond void, nor discharge the sureties: *Ibid.*; *State v. Emily*, 24-24.

1362. The judge of the court has power to certify to the acknowledgment of the sureties of the bond, made in open court: *State v. Elgin*, 11-216.

1363. The voluntary execution of a bail bond does not estop the obligors from denying the jurisdiction of the magistrate who takes it in a case where the proceedings in which it is taken are without authority: *State v. Hufford*, 28-391.

1364. Acceptance of bond: Before the recognizance can have any force, it must appear that it was accepted as a valid undertaking by a court or magistrate of competent authority: *State v. Carr*, 4-289.

1365. A failure by the clerk to indorse the bond as "accepted" will not affect the right of the state to recover thereon: *State v. Emily*, 24-24.

1366. Where a prisoner has been discharged upon the filing of a bond, the acceptance by the officer will be conclusively presumed; no written approval thereon is necessary to its validity: *State v. Wright*, 37-522.

1367. A bond which is not authorized by statute, as, for instance, where it is accepted by a magistrate who has no authority to take bail, will not become a lien as a statutory obligation, but if it has secured the release of the principal it may be enforced by action: *State v. Cannon*, 34-322.

1368. Filing: The clerk should file the bond, and while, if it should appear that it was deposited with the clerk before the forfeiture was declared, an omission to mark it as filed might be remedied by subsequent filing, yet the fact that it was so deposited before forfeiture should be averred and proved, otherwise the bond should not be admitted in evidence: *State v. Klingman*, 14-404.

1369. If the bond is deposited with the clerk of the proper county as a record, the fact that it is not marked filed is immaterial: *State v. Merrihue*, 47-112, 120.

1370. The form of bond given in the statute is substantially sufficient for the bond required upon change of venue: *Ibid.*, 119, 121.

1371. The description of the crime in the bail bond need not be so particular as in an indictment. Where it was specified merely as "seduction" it was held sufficient: *State v. Marshall*, 21-143.

1372. It is not necessary that the bond refer to the offense except in general terms. A description of the crime as "larceny in the night-time," held sufficient: *State v. Merrihue*, 47-112.

1373. An averment of the petition on a bail bond alleging that it was taken in writing in such manner and form as the law provides and directs, held sufficient to show that the requirements of the law applicable to such cases were complied with: *Shelby County v. Simmonds*, 33-345.

1374. Presumptions: A bail bond given upon commitment by a magistrate is *prima facie* evidence that the magistrate made a finding that a public offense had been committed, and the execution of the bond and its acceptance are presumptive evidence that it was taken and received in place of the body of the accused: *State v. Patterson*, 23-575.

1375. Signature: It is not essential that defendant should sign the bond: *Ibid.*

1376. Who may take: The statute does not authorize the clerk of the court to take bail in vacation after arrest on a bench warrant: *State v. Carothers*, 11-273.

1377. On appeal: Failure of the court in rendering judgment to fix the bail required pending appeal, as required by Code, § 4511, will not entitle defendant to discharge on *habeas corpus*. His only remedy in such proceeding will be to have the amount of such bail fixed: *Murphy v. McMillan*, 59-515.

1378. After the bail required on appeal has been given and the appeal prosecuted, it is too late to complain of the amount of bail required: *State v. Wells*, 46-662.

1379. The bond provided for on appeal from conviction before a justice of the peace is for the appearance of defendant, and not that he will pay the amount adjudged against him on appeal: *State v. Beneke*, 9-203.

1380. For what sureties liable: Sureties on a bond are not only bound for the appearance of the accused at the time and place mentioned therein, but also that he shall abide the order and judgment of the court

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and not depart without leave. Therefore, where change of venue is granted, the sureties remain liable on the original bond, the statutory provision for the giving of a new bond being directory only: *State v. Brown*, 16-814.

1881. A failure to hold the term at which defendant is held to appear will not release his sureties from their obligation to have him at the next term, although no order is made in the case at the term mentioned in the bond: *Ibid.*; *State v. Ryan*, 23-406.

1882. That defendant held to answer for one crime is indicted for a higher crime does not release the sureties on his bond: *State v. Bryant*, 55-451.

1883. Re-arrest of defendant: Where the accused who is out on bail is re-arrested for some of the causes specified by statute, he is then completely in the custody of the state, and his sureties having no more control over him are released from responsibility: *State v. Holmes*, 23-458; *State v. Orsler*, 48-343.

1884. Surrender of defendant by sureties: A surety is not released by a surrender of the prisoner to the sheriff, unless in the manner pointed out by statute (Code, § 4503): *State v. Tieman*, 39-474.

1885. That the bail presented to the sheriff a certified copy of the bond, and in writing directed him to arrest defendant, held, not to impose any duty upon the sheriff, or be a surrender of defendant as contemplated in the statute: *State v. Kraner*, 50-582.

1886. Detention in another jurisdiction: The arrest and detention in another county of a prisoner who is under bond for appearance does not have the effect to release his sureties, in the absence of a showing by them that proper steps were taken to secure his production by the state at the proper time: *State v. Merrihew*, 47-112, 115.

1887. The fact that defendant is in the military service of the United States or another state will not excuse the sureties for his non-appearance: *State v. Scott*, 20-63.

1888. What constitutes forfeiture: Failure of a defendant, indicted for misdemeanor, to appear in person at the trial, or at the rendition of verdict, or at the sentence, will not constitute forfeiture of his bond if he makes appearance by counsel and thereby waives his personal presence: *State v. Conneham*, 57-351.

1889. Failure of defendant to appear at the time for challenging the grand jury does not constitute a default amounting to a forfeiture of his bond: *State v. Klingman*, 14-404; *Ringgold County v. Ross*, 40-176.

1890. A bond to appear to answer the indictment, and not depart without leave of court, and obey all orders of the court, is forfeited by failure of accused to surrender himself, upon being called, in satisfaction of the judgment, after he has appeared and pleaded guilty: *State v. Kraner*, 50-575.

1891. A court will not be justified in holding bail, who has become responsible for the appearance of an accused to answer a certain charge, also responsible for his appearance to answer another and different charge, even in the same court: *State v. Brown*, 16-814.

1892. A bail bond given upon being bound over by a magistrate to appear at the district court to answer to the charge of manslaughter is not rendered invalid by the fact that the accused is subsequently indicted for murder instead of manslaughter. The obligation of the bond is "to abide the judgment and order of the court and not to depart without leave of the same:" *State v. Bryant*, 55-451.

1893. Entry of forfeiture: A forfeiture of the bail bond cannot be entered until the bond is before the court: *State v. Klingman*, 14-404.

1894. The forfeiture need not be taken on the very day on which accused was required to appear, but may be taken on any subsequent day of that or a succeeding term, unless defendant has been surrendered or discharged. It is not necessary that the accused or his bail have notice of the time when forfeiture will be claimed: *State v. Brown*, 16-814.

1895. If a forfeiture of bail is not entered at the first term it will be presumed that the cause was continued by operation of law: *State v. Merrihew*, 47-112, 119.

1896. In a case where defendant was bound to appear before a justice, it was held that a default should not have been entered against him until he was formally called, and that the entry of default by the justice not showing that defendant was called, no breach of the bond was shown; but the record of the justice was held conclusive as to the ap-

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pearance or non-appearance of defendant, and not to be contradicted by extrinsic evidence: *State v. Gorley*, 2-52.

1397. At the time of rendering sentence for a misdemeanor the court may enter default of defendant for not appearing to submit to the judgment and thereupon declare forfeiture of the bail bond: *State v. Howarth*, 70—.

1398. One entry of default against defendants jointly indicted, who have both failed to appear, is sufficient although they have given separate bonds: *State v. Lighton*, 4 G. Gr., 278.

1399. A record of default cannot be varied by parol evidence: *State v. Clemons*, 9-534.

1400. The record made by the court of the forfeiture of a bail bond by failure of the person bound to appear is conclusive evidence of the forfeiture, and a mere denial of the breach of the bond raises no issue: *State v. Bryant*, 55-451.

1401. Death of principal in the bond two years after its forfeiture, held not a defense to an action thereon against the surety: *State v. Scott*, 20-63.

1402. Arrest of defendant after forfeiture: Where, after default upon the bond is entered, the defendant is arrested upon a bench warrant and held for trial, the forfeiture of the bond is not thereby discharged: *State v. Emily*, 24-24.

1403. The discretion conferred on the court with reference to relieving sureties from the effect of default upon the subsequent arrest or surrender of defendant will not be interfered with on appeal unless abuse of discretion is shown: *State v. Kraner*, 50-575; *State v. Kraner*, 50-582.

1404. It would require a very strong showing of abuse to justify the supreme court in interfering with such discretion: *State v. Hirronemus*, 50-545.

1405. If there is no surrender or arrest of defendant, the court has no authority to grant relief from the forfeiture: *State v. Scott*, 20-63.

1406. When a person held to appear was indicted and subsequently ordered arrested and was so arrested, held, that it would be presumed that such arrest was on the ground that the bail was insufficient and that the surety was therefore released: *State v. Orsler*, 48-343.

1407. The failure or refusal to arrest the defendant with the surety. It is the latter's duty he is liable on the *Kraner*, 50-582.

1408. Habeas corpus: The person released on bail voluntarily being taken in custody by the bail, and then brings action to secure release from such custody, the sole purpose of testing the validity of the statute under which arrested, will not prevent the trying the habeas corpus proceeding terminating the question at issue: *Duffus*, 66-193.

1409. The fact that a person previously procured his surety bail under a statute the validity of which is proposed to test, will estop him from rendering them liable by the validity of such statute, but will prevent his contesting the validity of the statute: *Ibid.*

1410. Suit on the bond: A bail bond given for appearance of venue should be brought in to which the venue is changed: *County v. Maxwell*, 26-398.

1411. Suit for the penalty on may be brought in the name of *Shelby County v. Simmonds*, 38—.

1412. Where a bond is given for appearance of the defendant to indictment, and afterward a change is granted, on his application, county, and he fails to appear in the county to which the change is made, action on the bond for such failure should be brought in the latter county: *County v. Wilson*, 59-354.

1413. Action on a bond for the failure of defendant before a magistrate brought in the district court: *County v. Wilson*, 16-206.

1414. Under the provisions which allowed an action of detinue to be brought upon a bail bond action of detinue would never be common law: *State v. Gorley*, 2-52. As to what county is entitled to

Evidence; circumstantial; corpus delicti; failure to produce.

ure on a bail bond, for the benefit of the school fund, see *infra*, § 1728.

1415. **Measure of damages:** Upon forfeiture of a bail bond when the punishment is a fine, the measure of damages is not the amount of the fine and costs, but the penalty named in the bond: *State v. Hirronemus*, 50-545.

13. *Evidence; burden of proof; amount of proof.*

As to the right of defendant to be confronted by the witnesses against him, see CONSTITUTIONAL LAW, §§ 65-72.

As to the admissibility of minutes of testimony on preliminary examination or before grand jury, see EVIDENCE, §§ 132-135.

As to method of proving testimony given on the preliminary examination by a witness since deceased, see EVIDENCE, §§ 137-140.

a. *Circumstantial evidence; failure to produce evidence; identity of defendant; alibi.*

1416. **Circumstantial evidence:** To justify the verdict of guilty upon circumstantial evidence it is necessary not only that the circumstances should all concur to show that defendant committed the crime, but that they are inconsistent with any other rational conclusion: *State v. Johnson*, 19-230.

1417. Whether, when a party is sought to be convicted upon circumstantial evidence alone, the evidence of the circumstances must be direct and not circumstantial, *quære*: *State v. Clemons*, 51-274.

1418. In establishing defendant's guilt by circumstantial evidence, the state is not limited to proof of circumstances tending directly to show defendant's guilt. Any competent evidence tending to prove any material fact in the case is therefore admissible: *State v. Reno*, 67-587.

1419. An instruction at length upon the weight to be given to circumstantial evidence, to the effect that strong evidence of that kind is often the most satisfactory of any from which to draw the conclusion of guilt, and explaining the reason thereof, *held* not error: *State v. Moelchen*, 53-310.

1420. Evidence with reference to the pres-

ence of defendant near where stolen goods were concealed, and of his attempt to escape arrest, *held* sufficient to warrant the verdict of guilty of the larceny: *State v. Moody*, 50-448.

1421. Where tracks of a horse's feet were found near the place where the crime of arson was committed, leading to defendant's barn, and on measurement the tracks were found to correspond in size to the feet of one of the horses found in defendant's barn the morning after the crime, but there was no other evidence tending to connect defendant with the commission of the offense, and it appeared that defendant's stable door was not locked at the time, *held*, that the circumstances were insufficient of themselves to establish his guilt: *State v. Melick*, 65-614.

1422. In a particular case, *held*, that circumstantial evidence relied upon to show defendant's guilt as accessory to the crime of murder was not sufficient to support a conviction: *State v. Clouser*, 69-318.

As to evidence of good character to rebut circumstantial evidence of guilt, see *infra*, §§ 1559, 1562.

1423. **Corpus delicti:** While the facts forming the *corpus delicti* must be clearly and distinctly proved, it is not necessary that the evidence should be direct and positive as distinct from circumstantial or presumptive evidence: *State v. Keeler*, 28-551.

1424. **Failure to produce evidence:** It is not incumbent upon the prosecution to produce all the witnesses present at the commission of the act charged as a crime against defendant, but simply that proof of the whole transaction shall be produced before defendant can be put upon his defense: *State v. Middleham*, 62-150.

1425. A suspicious circumstance, unexplained, whether defendant, in case he is innocent, can or cannot explain it, is only presumptive evidence tending to establish guilt. If the circumstance is one which defendant could explain if innocent, it would be simply stronger evidence against defendant than if it was one which he could not explain, though innocent; but the jury must in every case be the sole judge of its weight. Such presumption should not be deemed sufficient in law to overcome the presumption of innocence: *State v. Banks*, 43-595.

Evidence; identity of defendant.

1426. While it is true that the suppression or destruction of evidence is a question to be considered against the party charged with the crime, and the non-production of explanatory evidence clearly in defendant's power must weigh against him, yet this rule has no application where the evidence is equally within the reach of both parties, and is as important for the prosecution as for the defendant: *State v. Rosier*, 55-517.

1427. The doctrine, that the failure of the accused to introduce evidence explanatory of inculpatory circumstances may be regarded as a circumstance against him, is to be cautiously applied and only in cases where it is manifest that proofs are in possession of the accused not accessible to the prosecution. Therefore, *held*, that it was error to instruct the jury that the fact that defendant did not call as a witness a person claimed to have been an accomplice, when he might have done so, might be considered a circumstance against him, the testimony of the accomplice being equally accessible to the prosecution: *State v. Cousins*, 58-250.

1428. An instruction presenting the familiar rule that, if defendant fails to introduce proof which he ought to introduce explaining facts or circumstances established by the evidence which operate against him, it is a circumstance to be considered in reaching a conclusion as to his guilt, and that if evidence within the power of defendant and not accessible to the state, is withheld by the defendant, the jury are authorized to infer that if produced it would be against defendant, is not objectionable as misleading the jury with reference to the effect of a failure of defendant to testify in his own behalf: *State v. Rodman*, 62-456.

1429. Failure to call witnesses by defendant to prove his general good character raises no presumption against it: *State v. Dockstader*, 42-486.

Failure to introduce evidence in civil cases, see EVIDENCE, §§ 199, 200.

1430. Identity of defendant: Evidence of non-identity of defendant with the person committing the crime should be weighed like any other evidence offered by defendant for the purpose of showing that he did not commit the crime. It is merely evidence in rebuttal of that of the prosecution, and if

it raises a reasonable doubt of guilt defendant should be acquitted although it does not preponderate over that offered by the state: *State v. McCracken*, 66-569.

1431. Where the identity of defendant was in question in a prosecution for burglary, *held*, that evidence as to declarations made by the person committing the burglary, at the time of its commission, indicating that he was the defendant, was admissible as part of the *res gestæ*, and might be considered by the jury in connection with other circumstances bearing on the question of identity: *State v. Kepper*, 65-745.

1432. Where the fact is proven that the particular crime charged in the indictment was committed by some person, evidence which tends to identify the accused as the person who committed it is relevant to the issue, and is admissible even though it tends also to prove the commission of a distinct crime from that charged in the indictment or a different motive from that alleged. Therefore, in a prosecution for burglary, where it was evident that larceny or burglary was the object in view, *held*, that the fact that defendant was aware that the occupant of the house had in his possession a large sum of money was admissible as tending to identify defendant as the person who committed the burglary: *Ibid*.

1433. The identity of accused with the person named in the record of a marriage may be established by admissions and identity of names, in the absence of evidence that other persons of the same name performed the marriage ceremony recited in the record: *State v. Schaunhurst*, 34-547.

1434. On a trial for murder, where there is evidence that would justify the jury in believing that the crime has been committed by some one, and there are circumstances which point to defendant as the guilty person, evidence of conduct explaining the bad state of feeling on the part of defendant toward the deceased is admissible: *State v. Cole*, 63-695.

1435. Evidence of a witness as to facts which led him to believe that the prisoner was the person whom he saw present at the commission of a crime, *held* sufficient to support a verdict of guilty: *State v. Lucas*, 57-501.

1436. Certain evidence considered, and

Alibi.—Defendant as a witness.

held relevant and material as tending to implicate defendant in the crime: *State v. Hudson*, 50-157.

1437. Alibi: It is error to instruct the jury that an unsuccessful attempt to establish an *alibi* is of great weight against defendant, and implies an admission of the truth and relevancy of the facts alleged against him. It is only a fabricated or trumped-up defense of *alibi*, interposed with a knowledge of its falsity, that will constitute even a circumstance against defendant, and even that is not conclusive of his guilt: *State v. Collins*, 20-85.

1438. It is not erroneous to instruct the jury that the defense of *alibi* is one easily manufactured, and that juries are generally and properly advised by the courts to scan the proofs of an *alibi* with care and caution: *State v. Blunt*, 59-468.

1439. The defense of *alibi* does not confess the act charged, and seek to excuse it, as in the defense of insanity; and, therefore, the absence of instructions in reference to evidence of an *alibi* is no prejudice to the defendant, and, under the general instructions as to reasonable doubt on the facts in the case, the defendant would have the advantage of all the presumption which could arise in his favor by reason of such evidence: *State v. Sutton*, 70—.

1440. Instructions as to *alibi* in a particular case, held not erroneous: *State v. Butler*, 67-643.

As to burden of proof of *alibi*, see *infra*, §§ 1595-1599.

b. Defendant as a witness.

1441. Cross-examination: The rules governing the cross-examination of defendant when testifying in his own behalf are the same as those applicable to the cross-examination of other witnesses, and questions may be asked for the purpose of laying a foundation for impeaching his evidence by contradicting statements made in answer to such questions: *State v. Red*, 53-69.

1442. Impeachment: When defendant in a criminal case offers himself as a witness, he may be impeached or contradicted in the same manner as other witnesses are. His testimony is to be tested by the rules which are applicable to witnesses generally, and

any fact or circumstance which might lawfully be shown for the purpose of affecting the credibility of other witnesses may be shown for the same purpose as to his testimony. Witnesses may therefore be introduced to testify that his reputation for truth and veracity is bad, and it is not necessary that the names of such witnesses shall have been indorsed on the indictment and minutes of their evidence returned by the grand jury, or notice given of the intention to introduce such witnesses: *State v. Teeter*, 69-717.

1443. Competency: The rules relating to the pertinency of testimony given by other witnesses are applicable when the prisoner testifies in his own behalf; and the fact that the evidence against him is strong and his story improbable cannot have any bearing upon the admissibility of the proposed testimony: *State v. Kelly*, 57-644.

1444. May testify as to knowledge: Therefore, where defendant's guilt depends upon his knowledge of a fact, he should be permitted to testify upon his knowledge of the subject: *Ibid*.

1445. Credibility: It is not error to instruct the jury that they may consider defendant's interest in the result of the action as affecting his credibility when he makes himself a witness: *State v. Moelchen*, 53-310.

1446. Statutory rule: Before the enactment of the amendment to Code, § 3636, defendant in a criminal prosecution was not a competent witness in his own behalf: *State v. Laffer*, 38-422; *State v. Bixby*, 39-465; *State v. Gigher*, 23-318.

1447. Instructions: The fact that the judge gives no instruction to the jury in regard to the failure of the defendant to testify will not constitute error where he has not been requested to so charge, and the matter has not been alluded to in any way during the course of the trial: *State v. Stevens*, 67-557.

1448. Commenting upon defendant's not being a witness: Notwithstanding the statutory direction that the district attorney shall not refer in his argument to the fact that defendant does not become a witness in his own behalf, his failure to testify as to a part of his defense when he makes himself a witness as to another part may properly be made a subject of comment. The exemp-

Testimony of co-defendant; of accomplice.

tion from unfavorable comment extends only to such defendants as choose to avail themselves of the privilege of not testifying in their own behalf: *State v. Tatman*, 59-471.

1449. There is nothing which the prosecuting attorney can say about the fact that defendant has not testified in his own behalf that would justify a reference to it, and courts should hold district attorneys to a strict observance of their duties in this respect: *State v. Graham*, 62-108.

1450. It is clearly implied in the statutory provision as to defendant being a witness, that the attention of either court or jury shall not be called to the fact that the defendant has failed to testify in his own behalf, and where in arguing to the court, in the presence of the jury, a question as to an objection to evidence, that fact was referred to, *held*, that there was ground for a new trial: *State v. Ryan*, 70 —.

And further as to misconduct of district attorney in this respect as ground for new trial, see *supra*, §§ 1286-1291.

c. *Testimony of parties indicted jointly; accomplices; husband or wife.*

1451. Co-defendants: Where two or more defendants are indicted jointly but put upon trial separately, either one is a competent witness for the other: *State v. Nash*, 10-81.

1452. Where defendants are jointly indicted and jointly put on trial, one is still a competent witness for the other: *State v. Gigher*, 23-318.

1453. In such case the jury should be properly cautioned not to consider such evidence in behalf of the party testifying: *State v. Stewart*, 51-312.

1454. Where several co-defendants were on trial for the crime of unlawful assembly, *held*, that it was error to exclude the testimony of one, offered in behalf of another and not in behalf of himself, as to what was said and done by the witness' co-defendants: *Ibid*.

1455. If one of two defendants jointly indicted is called as a witness for the other, and the jury find that the one called as a

witness was not an accomplice, his testimony should be regarded as that of other witnesses: *State v. Schlagel*, 19-169.

1456. **Impeachment:** Where one of two co-defendants on trial jointly is introduced by his co-defendant as a witness, evidence of his bad moral character may be introduced to impeach his credibility in the same manner as in the case of any other witness: *State v. Hardin*, 46-623.

1457. **Testimony of accomplice:** An accomplice is a competent witness for the prosecution: *State v. Hudson*, 50-157.

1458. It is not a ground for rejecting the testimony of an accomplice that it has not been shown that he is less guilty than the defendant, or that no order of the court has been made that he should be received as a witness. (Overruling *Ray v. State*, 1 G. Gr., 316): *Ibid*.

1459. The order of the introduction of testimony being in the discretion of the prosecution under the approval of the court, it is not necessary that evidence connecting defendant with the crime shall be introduced before the testimony of the accomplice is received: *Ibid*.

1460. **Who deemed accomplice:** A detective who enters into an arrangement for the commission of a crime with the intention, from the beginning, of acting as a detective to ferret out and expose it, and who acts throughout with that motive, is not an accomplice: *State v. McKean*, 36-343.

1461. One who receives stolen goods is not an accomplice in the crime of burglary committed at the time the goods are stolen: *State v. Hayden*, 45-11.

1462. Where it appeared that a person who was guilty of breaking into and setting fire to a jail had notified another to be present, and such other person was near by and saw defendant enter the jail, but gave no assistance or advice, and did not know that the jail had been set on fire when he left, *held*, that he was not sufficiently an accomplice to render it necessary that his evidence be corroborated to warrant a conviction: *State v. Reader*, 60-527.

1463. **Corroboration of evidence of accomplice:**¹ In case of a prosecution for con-

¹ Code, § 4559. A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof.

 Testimony of accomplice; acts of co-conspirator.

cealing stolen property, the corroboration required of the evidence of an accomplice must go not merely to the fact of concealment but also to the fact that the property was stolen: *Upton v. State*, 5-465.

1464. The corroborating evidence must tend to connect defendant with the commission of the crime: *Upton v. State*, 5-465; *State v. Tulley*, 18-88; *State v. Clemens*, 38-257.

1465. Corroborating evidence is not sufficient which merely shows the commission of the offense and the circumstances thereof without connecting defendant therewith. Therefore, *held*, that the mere proof that defendant was seen drunk in company with a burglar, at or near the time and place when and where the burglary was committed, was not sufficient corroborating evidence to warrant his conviction: *State v. Willis*, 9-582.

1466. The corroboration need not be by the testimony of one credible witness; it may be circumstantial: *State v. Stanley*, 48-221.

1467. The corroboration need not be founded upon facts directly connecting defendant with the offense. It may be founded upon circumstantial evidence: *State v. Miller*, 63-60.

1468. Where the testimony of an accomplice is corroborated by other witnesses in any material point, it is sufficient to convict: *State v. Schlager*, 19-169.

1469. It is not necessary that the accomplice be corroborated in every material fact. If the jury are satisfied that he speaks the truth in some material part of his testimony, in which he is confirmed by unimpeachable evidence, this may be ground for them to believe that he also speaks the truth in other parts as to which there may be no corroboration: *State v. Allen*, 57-431; *State v. Hennessy*, 55-299.

1470. It is not necessary that the accomplice be corroborated as to the commission of the crime if he is corroborated in the material facts as to the preparation for its commission, etc.: *State v. Hennessy*, 55-299.

1471. Whether in a particular case there is any corroborating evidence is a question for the court to determine, but it is for the jury to weigh such evidence and its sufficiency: *State v. Miller*, 65-60; *State v. Deitz*, 67-220.

1472. It is the province of the jury to determine whether the corroboration is sufficient: *State v. Allen*, 57-431.

1473. In a prosecution for having counterfeit coin in possession with intent to pass, *held*, that the testimony of an accomplice as to such possession and intent was not sufficiently corroborated by evidence as to former acts of passing counterfeit money: *State v. Pepper*, 11-847.

1474. The fact that witnesses who might have been called to contradict the accomplice, if his testimony were false, were not called, should not be considered as corroborating such testimony: *State v. Hull*, 26-292.

1475. Apparently without reference to any statutory provision, *held*, that the testimony of one accomplice would not constitute a sufficient corroboration of that of another, to warrant conviction without other evidence: *Johnson v. State*, 4 G. Gr., 65.

1476. The fact that the defendant and a person who has been convicted of crime were seen conversing together four or five hours before the commission of the crime, *held* not sufficient corroboration of the testimony of such accomplice to warrant the defendant's conviction: *State v. Mikesell*, 70—.

1477. In particular cases, *held*, that the testimony of an accomplice was not sufficiently corroborated to warrant conviction thereon: *State v. Graff*, 47-384; *State v. Moran*, 84-453.

1478. The evidence in particular cases *held* sufficiently corroborative of the testimony of an accomplice to sustain a conviction: *State v. Thornton*, 26-79; *State v. Wart*, 51-587; *State v. Deitz*, 67-220.

1479. Acts and declarations of co-conspirators or accomplices: The acts and declarations of one of two or more persons charged with a conspiracy in the commission of a crime are not admissible as against the others, unless a foundation is first laid sufficient, in the opinion of the court, to establish *prima facie* the fact of conspiracy, or proper to be laid before the jury to establish such fact: *State v. Nash*, 7-347, 384.

1480. Acts and declarations of an accomplice while engaged with defendant in furthering, aiding and abetting a common

Testimony of husband or wife.—Confessions or admissions

design are receivable in evidence against him: *State v. Hudson*, 50-157.

1481. Where two defendants were jointly indicted for horse-stealing, *held*, that upon the trial of one, the state could prove that the other person conducted a witness to the horses, for the purpose of showing when and how the horses were found, without first showing the existence of a joint purpose or conspiracy: *State v. Bowers*, 17-46.

1482. Admissions of a co-conspirator made after the common enterprise is at an end are not admissible: *State v. Arnold*, 48-566.

1483. Where several defendants were jointly indicted for murder, *held*, that it was error to admit, against one of them, declarations of co-defendants made after the commission of the crime: *State v. Westfall*, 49-328; *State v. Smith*, 54-656.

1484. Upon the trial of one of several co-defendants jointly indicted for burglary, *held*, that acts and conversations of the other defendants tending to establish familiar relations and association of all the parties, and that they were in company at about the time of the commission of the crime, were admissible for the purpose of connecting defendant with the commission of the crime: *State v. Stevens*, 67-557.

1485. Testimony of husband or wife of defendant: Where a husband and wife are co-defendants, the wife may properly be called as a witness by her husband, and her evidence should be admitted under instructions restricting it in its application, so that it shall not be considered in her own behalf: *State v. Donovan*, 41-587.

1486. While the credibility of a wife testifying in behalf of her husband in a criminal prosecution is to be considered and weighed in view of her peculiar relation to defendant, it is error to charge the jury to examine her testimony with peculiar care. The same degree of care which the law requires to be given to the testimony of all witnesses should be applied to hers, and no other or different degree: *State v. Guyer*, 6-263; *State v. Rankin*, 8-355; *State v. Collins*, 20-85; *State v. Bernard*, 45-234.

1487. It is not error to charge the jury that, while the wife is a competent witness for her husband, they should examine and consider her testimony with care and caution,

and give it such credit as they think it deserves: *Nash*, 10-81.

The husband or wife of a defendant cannot testify against the other except in a prosecution for a crime committed by the other: See EVIDENCE, III.

d. Confessions or admissions of defendant

1488. When receivable in evidence, a confession should be examined when it is clearly established in the presence of the friends, or to one person only. Ordinarily, it is entitled to great and greatest weight as evidence: *Brown*, 48-382.

1489. What constitutes "confessions" does not include declarations by the defendant made in haste: *Hurst*, 34-547.

1490. The mere statement of a defendant accused of forgery that he alleged to be forged is not sufficient to constitute a confession. To have an admission must be that the defendant admitted the fraudulent intent: *State v. ...*

1491. In a prosecution for a crime, that certain admissions of the defendant were made with deceased at or near the place of the commission of the crime are receivable in evidence, but it is error to consider them as admissions and to instruct the jury on that basis: *v. Glynden*, 51-463.

1492. A confession of a defendant of the criminal act, or of the commission of the facts or circumstances from which guilt may be inferred, facts tending to show defendant guilty, are not to be treated as confessions: *Red*, 53-69.

1493. The admission of a defendant of a crime that he has lied in a matter is not a confession, and a circumstance against him shown in evidence: *State v. ...*

1494. It is error to instruct the jury to give reference to statements of a defendant as a theory that they constitute admissions, if they are not admissions.

Confessions or admissions of defendant.—Acts, etc.

ments of agency or participation in the commission of the crime, although they are such as, in connection with other facts and circumstances, warrant a conviction of guilt: *State v. Jones*, 33-9.

As to the effect of admissions and declarations not constituting confessions, see *infra*, III, 13, e.

1495. Mental condition at time of making confessions: Where defendant had introduced evidence as to his condition at the time of making certain confessions with reference to being intoxicated at that time, which evidence it was claimed indicated *delirium tremens*, *held*, that it was error to exclude the opinion of an expert as to the mental condition indicated by the proven facts: *State v. Feltes*, 51-495.

1496. While it is proper that evidence as to the condition of defendant at the time of making a confession should go to the jury, he cannot insist upon being allowed to introduce such evidence before the confession itself is testified to. The time when the jury are made acquainted with his condition is immaterial: *Ibid*.

1497. Involuntary confessions: Confessions drawn from a person by hope or fear are inadmissible as evidence against him, and the jury should be directed without qualification to disregard them. The question whether confessions were voluntarily made is to be determined by the court upon preliminary evidence: *State v. Fidment*, 35-541.

1498. Admissions voluntarily and freely made by a prisoner to the officer having him in custody, uninfluenced by hope or fear, may be shown: *State v. Soper*, 70—.

1499. A confession in order to be admissible must be free and voluntary; not extracted by any sort of threats, nor obtained by promises, however slight; nor by the exertion of any improper influence. If a confession has been obtained by undue influence, any statement afterwards made under the influence of that confession cannot be admitted: *State v. Chambers*, 39-179.

1500. In order to exclude a confession as involuntary, there must be some promise made or inducement held out, or injury threatened: *State v. Fortner*, 43-494.

1501. Facts considered and *held* not to show that the confession in question was

made under such threats as to invalidate it: *State v. Ostrander*, 18-435.

1502. Where an officer testified to conversations of defendant while in his custody, *held*, that it was not error to refuse evidence to the effect that defendant was ironed and harshly treated, it not being claimed that the treatment influenced the conversation: *State v. Sullivan*, 51-142.

1503. Corroboration necessary: Under statutory provisions a confession not made in open court will not warrant a conviction unless there is other proof that the offense charged has in fact been committed: *State v. Turner*, 19-144.

1504. Where every other ingredient of a crime was established by other evidence, except the falsity of certain representations which were shown to have been made, and it appeared that defendant did not act in accordance with such representations, *held*, that voluntary confessions out of court of such falsity were sufficient, without other evidence thereof, to warrant conviction: *State v. Lewis*, 45-20.

1505. Under the facts of a particular case, *held*, that the *corpus delicti* was not proven aside from defendant's confessions out of court, and the conviction was therefore reversed: *State v. Dubois*, 54-363.

1506. The evidence in a particular case *held* to be sufficiently corroborative of the confession of defendant to warrant a conviction: *State v. Feltes*, 51-495.

1507. In a civil action, a confession alone will not be sufficient proof of the commission of a crime: *Georgia v. Kepford*, 45-48, 52.

e. *Acts, declarations and conduct of defendant; state of feeling; other criminal acts.*

Res gestæ: As to acts, declarations, etc., forming part of the *res gestæ*, see EVIDENCE, I, 3, b.

1508. Declarations or admissions of defendant: Declarations of the prisoner made in the very act of the crime are not admissible in his behalf unless they are part of the *res gestæ*. So *held* in a prosecution for illegal sale of intoxicating liquor, with reference to the character of the liquor sold by defendant: *State v. Miller*, 58-84.

Acts, declarations and conduct of defendant.

1509. Admissions made in ordinary or random conversations are not generally considered in law as satisfactory proof: *State v. Donovan*, 61-278.

1510. Where the significance and value of certain circumstantial evidence introduced by the prosecution depended entirely upon the fact that collateral facts appearing in evidence were contemporaneous and subsequent to the crime, *held*, that declarations of the accused with reference to one of the facts, made prior to the crime, were admissible in evidence as overthrowing the circumstantial evidence: *State v. Cruise*, 19-312.

1511. An instruction to the jury that a certain conversation in evidence had with a prisoner upon the subject of the crime with which he was charged occurred as stated, and the statements of accused could not be reconciled upon any other reasonable hypothesis than that of his guilt, then upon such evidence they might convict, *held*, not erroneous where there was abundant and incontrovertible proof that the offense was committed: *State v. Rorabacher*, 19-154.

1512. In a prosecution for murder, evidence of theories propounded at one time by defendant as to how deceased may have met his death, and which were inconsistent with his explanation of the same thing, were held admissible, subject to any explanation as to the discrepancy, and subject also to the caution that too much importance should not be attached to the circumstance, as an innocent man finding himself suspected might make false representations to allay suspicion: *State v. Feltes*, 51-495.

1513. In a prosecution for incest, admissions and declarations of the parties as to the fact of the marriage claimed to be incestuous are admissible to prove it: *State v. Schaunhurst*, 34-547.

1514. Evidence as to statements made by defendant as to his previous occupation, *held* not improperly admitted in a trial for murder: *State v. Moelchen*, 53-310.

1515. While a prisoner arrested on preliminary information is not required to plead upon the preliminary examination, yet if he does so plead, even before the magistrate has advised him of his right to counsel, such pleading may be shown in evidence against

him as an admission of *Briggs*, 68-416.

1516. The statement by a defendant that he has no counsel is a solemn admission used against him if that statement is material to any issue in the case: *Briggs*, 65-196.

1517. Where admissions relied upon, it is not required to accept them as a whole for they may accept those portions which are reliable and which agree with other evidence and reject other portions that are unreliable and contradict other testimony: *McIntire*, 66-339.

1518. Testimony as to statements made by defendant with reference to the crime, by him, couched in profane language, is not admissible as against him, the fact that he refuses to answer questions concerning his wound was material, and he has been testified to directly with profane language used: *State v. Crockett*, 66-339.

1519. Conclusive presumption of guilt has no place in the establishment of the body of the case. Therefore, *held*, that while a statement by a defaulting officer at the trial, in connection with him might estop him from claiming therein that no such statement existed prior to such settlement, such statement would not apply in a case of conviction as showing that the officer was guilty: *State v. Hutchison*, 60-478.

As to the distinction between admissions and confessions and the rule as to their admission with reference to the latter: *Briggs*, 13, d.

In general as to admission of evidence: *Briggs*, I, 3.

1520. Conduct of prisoner with crime: The bodily or mental condition of the prisoner when material to the case may be shown by the usual evidence of such feelings made at the trial. The conduct and language of the prisoner when informed of the charge may therefore be shown: *Briggs*, 347, 382.

1521. Declarations of defendant made in the presence of defendant as to the purpose of showing defendant

Declarations of defendant; state of feeling.

and behavior, when charged with causing the injuries done to the deceased, whether admissible as dying declarations or not: *State v. Gillick*, 7-287, 809; *State v. Nash*, 7-347, 876; *State v. Nash*, 10-81.

1522. Declarations of the injured person, not competent as dying declarations, are not receivable where they are made in the presence of the officer having defendant under arrest, but not in the presence of defendant: *State v. Nash*, 10-81.

1523. Testimony tending to show that the prisoner, when arrested, was charged with the crime and made no answer, is admissible, but its value is to be determined by all the circumstances, of which the jury are to be the judges: *State v. Pratt*, 20-267.

1524. Statements in the hearing of defendant: Where two defendants were jointly indicted for horse-stealing, *held*, that upon the trial of one it was competent to prove what was said by his accomplice in his hearing and presence with regard to taking the horses, coupled with evidence that defendant remained silent and did not object or assent to its correctness. The weight of such evidence or the presumption arising therefrom must depend on the circumstances and must be determined by the jury: *State v. Bowers*, 17-46.

1525. Statements in regard to the crime, made in the presence of the defendant, may be introduced in evidence without establishing that such statements were understood by him. It is for the jury to determine from all the circumstances whether he understood what was said: *State v. Middleham*, 62-150.

1526. Hostile feelings: Letters merely showing a state of hostile feelings between defendant and the person injured and his family connections are not admissible in evidence unless merely for the purpose of showing the existence of such feelings, and if admitted for that purpose the jury should be limited in their consideration of them to the single purpose of ascertaining the feeling of defendant toward the injured party: *State v. Moffitt*, 31-316.

1527. Where malicious intent is necessary to be shown it is not competent to prove the relations existing between the family in which defendant lived and the person against

whom malice is claimed to have existed: *State v. McDermott*, 36-107.

1528. Evidence that defendant charged with the crime and the person murdered had had an altercation, *held* competent, as tending to show that the parties had not lived together agreeably: *State v. Moelchen*, 53-310.

1529. In the prosecution of a crime consisting of violence to an individual, it is always competent to show previous ill-feeling, bad blood or threats as tending to show a probable motive for the commission of the crime; and threats or ill-feeling by defendant toward the father of the person injured is competent evidence on a criminal charge for injury to the child of such father: *State v. Fry*, 67-475. And see *State v. Perigo*, 70 —.

Evidence of hostile feelings is admissible to implicate defendant as the person who committed the crime: See *supra*, § 1434.

1530. Threats made by defendant, after the commencement of the prosecution, against the parties engaged therein are admissible in evidence as showing the mind, spirit and purpose of defendant in his defense and in relation to the crime charged: *State v. Rorabacher*, 19-154.

1531. Conduct of defendant in averting suspicion by endeavoring to cast it upon another does not raise a strong presumption of guilt where defendant has not stated untruths respecting such third person or directly charged him with the crime: *State v. Collins*, 20-85.

1532. Compromise of civil suit is not competent evidence in a criminal prosecution for stealing property for the value of which defendant was sued in such civil action: *State v. Emerson*, 48-172.

1533. Attempts to escape: Where there is some evidence tending to show that defendant, after the commission of an offense, attempted to escape, the jury may be instructed that such attempt, if made, is a circumstance *prima facie* indicative of guilt: *State v. James*, 45-412. And see *State v. Schaffer*, 70 —.

1534. An instruction that "if it be found that the defendant, after he was arrested, escaped from custody and secreted himself from lawful pursuit, or that defendant attempted to escape, this raises a strong presumption of his guilt," *held* erroneous as stat-

Other criminal acts of defendant.

ing the rule too strongly against defendant. An attempt to escape does not raise a strong presumption of guilt, but is a *prima facie* indication of guilt: *State v. Arthur*, 23-480.

1536. While an attempt of defendant to escape from jail while awaiting trial is admissible against him, it is improper to admit evidence of an effort on the part of the persons in such jail to escape, unless it is shown that defendant participated therein: *State v. Ruby*, 61-86.

1536. The fact that a person leaves a jail through a hole made therein by some one is sufficient evidence of escape, and may be shown, as a circumstance indicating guilt, in the prosecution of the crime for which defendant was under arrest: *State v. Fitzgerald*, 63-268.

1537. There is no distinction between an actual escape and an attempt to escape, as tending to show consciousness of guilt. The latter is equally admissible with the former as against the accused: *State v. Stevens*, 67-557.

1538. Where evidence was introduced of flight by defendant after his arrest and the forfeiture of his bail, *held*, that it was not proper in rebuttal to show that threats were made of lynching him and that the fact of such threats was communicated to him, where it did not appear that the flight was soon enough after the threats and communication to afford any indication that he was scared by the threats into flight: *State v. McDevitt*, 69-549.

1539. Evidence of the good conduct of one under confinement for an offense, as tending to show him an honest man, is not admissible either to prove his good character or his innocence: *State v. Hart*, 29-268.

1540. It seems that the fact of defendant's flight, after it becomes known to him that a crime has been committed, is admissible in evidence of the commission of the act by him only in criminal cases and not in civil actions for damages: *Hopkins v. Mathias*, 66-393.

1541. Subsequent acts or declarations: The guilty intent of a party may be shown by his acts, conduct and declarations, not only before or at the time of but also after the commission of the criminal act: *State v. Lewis*, 45-20.

1542. Previous declarations: Evidence of statements made by defendant before the commission of the alleged murderous assault for which he was put on trial, as to his intention to go to the place where the assault was afterwards committed and his object in going there, *held* admissible: *State v. Driscoll*, 44-65.

1543. Other unlawful purpose: Evidence tending to show that defendant went to the place of the commission of the crime with an unlawful purpose not connected with the crime committed is not admissible: *Ibid*.

1544. Intent inferred from acts: There is no clearer rule of evidence than that malice may be inferred from the acts of a party: *State v. Linde*, 54-139.

1545. The intent with which an act is done is seldom, if ever, capable of direct and positive proof, but is to be arrived at by such just and reasonable deductions or inferences from the acts and facts proved, as the guarded judgment of a candid and cautious man would ordinarily draw therefrom. The law warrants the presumption or inference that a person intends the results or consequences which ordinarily follow from an act which he intentionally commits: *State v. Gillett*, 56-459.

1546. Where the criminality of an act depends upon the intent with which it was committed, it is not necessary that the intent be established by distinct and positive proof, but it is sufficient if it can reasonably be inferred from the facts; and it is not necessary that when such intent is sought to be established by circumstantial evidence, the proof be so far conclusive that it is inconsistent with any other rational conclusion: *State v. Maxwell*, 42-208.

As to presumption of malice, see *supra*, §§ 30-32, 133, 134.

1547. Evidence of distinct crime to show intent: While it is generally true that a person cannot be convicted of a particular crime with which he is charged by proof of another crime, yet where proof of intent to commit one crime is necessary as an element of another crime, the commission of the first may be shown to prove the intent: *State v. Golden*, 49-48.

1548. Therefore, *held*, that in a prosecution for burglary proof of larceny committed

 Other criminal acts of defendant.— Good character.

after the breaking and entering was admissible to show the intent with which the breaking and entering were done: *Ibid.*

1549. While the general rule is that evidence of a distinct, substantive offense cannot be admitted in proof of another offense, this rule is subject to the exception that whatever serves to establish the *scienter* or *quo animo*, or a motive for the commission of the crime charged, may be shown: *State v. Kline*, 54-188. And see *State v. Schaffer*, 70 —.

1550. Therefore, *held*, that it was proper, on a trial for assault with intent to commit murder by shooting, where the evidence tending to connect defendant with the crime was wholly circumstantial, to permit the prosecutrix to testify that defendant had seduced her and she was pregnant by him: *State v. Kline*, 54-188.

1551. On a trial of defendant for an assault with intent to commit rape, evidence of previous assaults of like character on prosecutrix is admissible to show the intent. But evidence of like assaults on other persons having no connection with the one charged, and occurring long previous, are not admissible: *State v. Walters*, 45-889.

1552. In a prosecution for adultery, other acts of adultery between the same parties prior to the statutory period of limitation or outside of the jurisdiction of the court are admissible in evidence as showing the disposition of the parties, and may be taken, in connection with evidence of opportunity existing within the jurisdiction and within the statutory period, as evidence of the commission of the crime: *State v. Briggs*, 68-416.

1553. In a prosecution for forgery or uttering forged paper, other acts of the same character may be shown to show guilty knowledge; but it is doubtful whether the other paper as to which evidence is introduced must not be of the same character and manufacture and precisely similar to that forged or uttered upon which the charge is based: *State v. Saunders*, 68-370.

1554. But in order that knowledge may be inferred from other transactions, it must appear that in such other transaction a crime was committed: *Ibid.*

1555. In such cases the other forged instrument, with reference to which testimony is given, must be introduced in evidence or

its absence accounted for: *Ibid.*; *State v. Breckenridge*, 67-204.

1556. Evidence of a distinct crime is admissible where it tends to connect defendant with the commission of the crime charged. Therefore, in a prosecution for burglary in breaking and entering a dwelling with intent to commit assault and battery, *held*, that evidence that defendant knew that the occupant had a large sum of money was admissible as tending to show that it was defendant who broke and entered: *State v. Kepper*, 65-745.

1557. Where two or more acts are embodied in the same transaction, each constituting an assault, and together constituting but one assault, all may properly be shown to establish the animus of defendant, although one act alone would constitute the crime: *State v. Montgomery*, 65-488.

1558. Where two persons were jointly indicted for larceny, and there was evidence that the one was keeper and the other an inmate of a house of ill-fame, *held*, that it was improper to charge the jury that they might consider the habits of the parties defendant at the time, whether they were living together, acting together, or together were engaged in a common purpose to commit the crime, there being no evidence but their mutual relationship to indicate concert of action: *State v. Graham*, 62-108.

f. Defendant's good character.

1559. For what purpose shown: General good character of accused may be shown to rebut the presumption of guilt arising from circumstantial testimony, but it does not constitute a defense: *State v. Turner*, 19-144.

1560. Previous good character is, of itself, no defense, but is a circumstance which should be considered by the jury in connection with all the other evidence and which may be sufficient to turn the scale in defendant's favor, but its value as evidence in any given case is to be determined by the jury: *State v. Donovan*, 61-278.

1561. The jury may be instructed that if they find good character established by the evidence, they should consider it and allow it such weight as they believe it fairly entitled to, as tending to show that men of

Defendant's good character.

such character would not be likely to commit the crime charged. Evidence of good character does not have a tendency to rebut the commission of the crime, except inferentially: *State v. Ormiston*, 66-143.

1562. Good character is admissible in all criminal cases, and the jury should not be limited in their consideration of such evidence to cases where the crime is sought to be established solely by circumstantial evidence: *State v. Kinley*, 43-294; *State v. Rodman*, 62-456.

1563. In passing upon the guilt or innocence of defendant, evidence of good character should be considered irrespective of whether the other evidence is conclusive or inconclusive, and it is for the jury to determine what weight such evidence of character shall have: *State v. Gustafson*, 50-194.

1564. In trials for felony, and in some instances for misdemeanors, the prisoner is always allowed to call witnesses to his good character, and in any case of doubt proof of good character will have great weight. It is a circumstance always to be submitted to the consideration of the jury, together with the other facts of the case: *State v. Nash*, 7-347, 373.

1565. It is always permissible for defendant to show his general good character and reputation as to the trait involved in the crime charged; and where defendant was on trial for perjury, *held*, that he should be allowed to show that his general reputation was good: *State v. Kinley*, 43-294.

1566. Evidence of good character should be restricted to the general trait which is in issue. Thus, in a prosecution for larceny, the general character for honesty may be shown, but in case of seduction, evidence of character for virtue only is admissible, and not as to good character generally: *State v. Curran*, 51-112.

1567. As raising reasonable doubt: The good character of accused is for the consideration of the jury in all cases and not merely in cases of doubt, and it is for them to determine its weight; and an instruction that it is a circumstance of slight weight and entitled to but little consideration when the proof is clear is erroneous. If reasonable doubt of defendant's guilt is generated by proof of good character, defendant should be

acquitted: *State v. Northrup v. Fitzgerald*, 49-260; *State v. Jones*, 52-150; & 51-343.

1568. It is error to instruct positive evidence of guilt, if character avails nothing and is regarded: *State v. Horning*, 4 Jones, 52-150.

1569. It is error to instruct previous good character is not as against facts positively proven and clearly indicating defendant, it cannot avail as a quittal: *State v. Lindley*, 51-34.

1570. Where there was no direct evidence as to defendant's guilt, *held*, that good character would not be evidence of guilt, but in the absence of evidence might be considered to show less probability of defendant committed the crime, while it in the first part could not have been: *State v. Linde*, 54-139.

1571. Evidence of good character should be considered upon the question of the degree of the offense, as well as upon the question of guilt or innocence: *State v. Jones*, 52-150.

1572. Character not in issue: Where defendant may give evidence of his character, his character is not in issue, except as he may put it in issue by evidence in support of it, and the court should not instruct the jury that as defendant has a legal right to introduce testimony of his character, the fact that he has done so was a circumstance to be considered in determining the question of his guilt: *Kabrich*, 39-277.

1573. Failure to call a witness to prove good character raises no presumption of guilt: *State v. Dockstader*, 51-112.

1574. Evidence of good character of part of defendant should be considered at the time prior to the finding of the verdict: *State v. Kinley*, 43-294.

1575. Evidence of good character of defendant while in confinement is not admissible: *State v. Hart*, 29-24.

1576. Where defendant offers evidence to testify as to his good character

Declarations of person injured; dying declarations.

tion cannot, upon cross-examination, ask as to particular facts tending to show such character. The evidence must be confined to the general character or reputation: *Gordon v. State*, 3-410.

1577. A witness as to good character of defendant may testify as to his personal observation and knowledge as to the trait of character of defendant in question, and is not limited to the general reputation of defendant in that respect in the community in which he lives: *State v. Sterrett*, 68-78.

1578. Where a witness called by defendant to prove his good character testified that it was divided, *held*, that he might be asked on cross-examination what particular acts of defendant's life he had heard spoken of, and might state various crimes of the same character which defendant had been accused of by report during the five or six years preceding: *State v. Arnold*, 12-479.

g. *Declarations of person injured; dying declarations.*

1579. Subsequent declarations of a person injured in an assault are not admissible either for or against defendant as independent evidence, but can be introduced to contradict or impeach the testimony of the person making such declarations, if called as a witness, the requisite foundation having been laid: *State v. Eneigh*, 18-122.

1580. **Dying declarations; apprehension of death:** Declarations of deceased sought to be introduced in evidence as dying declarations must be shown to have been made under the sense of impending death and in the full belief that he could not recover. It is sufficient, however, if this satisfactorily appears in any mode. It may be shown by proof of evident danger, or conduct of the person making the declaration, or other circumstances, such as the nature of the wound, the state of illness, etc.: *State v. Gillick*, 7-287, 309; *State v. Nash*, 7-347; *State v. Leeper*, 70—.

1581. It is not necessary to show that at the time the declarations were made, deceased was under the apprehension of immediate dissolution, or that he was *in articulo mortis*. It is sufficient if he believes that his death is impending and certain. The length of time that elapses between the declara-

tion and the death furnishes no rule as to the admission of evidence, nor will a declaration which was competent when made be rendered incompetent by the subsequent revival of strength in the dying person: *State v. Nash*, 7-347.

1582. To render dying declarations competent evidence against one indicted for homicide of the person making the declaration, it must appear that they were made in the full belief of deceased that he would not recover and that his death was impending. In a particular case, *held*, that it did not sufficiently appear that deceased, at the time he made the declarations offered in evidence, entertained such belief: *State v. Weaver*, 57-730.

1583. **Credibility of declarations:** The person whose declarations are admitted must be considered as standing in the same situation as if he were sworn. Such declarations are to be given the same degree of credit as his testimony would have received if he had been examined under oath, and his state of mind at the time the declarations were made, and his behavior, and his character, may be shown for the purpose of affecting the credibility of his declarations: *State v. Nash*, 7-347.

1584. The statement of deceased must be such as would be receivable if he were alive and could be examined as a witness. Therefore if the declaration shows upon its face that it is a mere opinion, it should be excluded; otherwise it should be received and its credibility left to the determination of the jury: *State v. Clemons*, 51-274.

1585. Dying declarations can only be admitted in regard to facts, and such declarations are not admissible with reference to whether the act of assailant was purposely done or not: *State v. Donnelly*, 69-705.

1586. **Admissibility:** The competency of dying declarations is to be determined by the judge in view of all the surrounding and attendant circumstances, and he should hear and weigh the evidence both for and against the competency of such declarations, before receiving them in evidence: *State v. Elliott*, 45-486.

1587. The fact that the person making dying declarations was a materialist and did not believe in a God or a future conscious existence is not competent as affecting the

Dying declarations.—Burden of proof and amount of evidence.

admissibility of such declarations, but should be received as affecting their credibility: *Ibid.*

1588. Dying declarations of another person injured: Where defendant was on trial for the murder of one person, *held*, that it was error to admit in evidence dying declarations of another person killed at the same time, to the effect that he was stabbed by defendant: *State v. Westfall*, 49-328.

1589. How proved: Where dying declarations are at the time reduced to writing by one who hears them, but the writing is not read over to nor signed by declarant, the writing is not itself admissible in evidence as a dying declaration; but it may be used by the person making it, as a memorandum from which to refresh his recollection in testifying as to the declarations: *State v. Fraunburg*, 40-555.

1590. The failure to produce such writing or account for its absence will not render parol evidence of the declarations incompetent: *State v. Sullivan*, 51-142.

1591. An affidavit made out for affiant by another party in the language of affiant and partly in substance from affiant's statements, and not read over to affiant before signing, is not admissible to prove his statements: *State v. Elliott*, 45-486.

1592. Where dying declarations are orally made and a statement thereof is also reduced to writing, if the writing and the oral statements are the same, the absence of the writing should be accounted for before evidence of the oral statements can be received. But if the declarations are repeated at different times, and one of them is reduced to writing, covering different grounds and referring to different matters from those comprised in the oral statements, then both the oral and written statements may be received: *State v. Tweedy*, 11-350.

1593. Where dying declarations are incomplete by reason of death intervening, or temporary inability or interruption suspending their utterance, which is never resumed, the declaration is not receivable; but the fact that it does not give a complete narrative of what occurred, or might legitimately be supposed to have occurred, will constitute no objection to its competency or sufficiency: *State v. Nettlebush*, 20-257.

As to evidence of previous offenses, where self-defense is pleaded, see *supra*, §§ 93-97.

h. *Burden of proof and amount of evidence; reasonable doubt.*

1594. Burden of proof and amount of evidence: The burden of proving an exception to the general rule that the burden of proof rests upon the prosecution rests upon the defendant: *State v. Sayre v. Wheeler*, 31-112.

As to pleading exceptions to the general rule, see *supra*, §§ 1018-1024.

1595. Burden of proof and amount of evidence: Where the defendant seeks to establish an exception to the general rule that the burden of proof rests upon him, the burden of proof is established except by a preponderance of evidence: *State v. Red*, 53-611.

1596. But this does not establish the principle that a person cannot be acquitted on a preponderance of evidence, where a reasonable doubt arises upon the evidence and upon the evidence established essential facts, or upon evidence consistent with the prisoner's defense. Where the defendant establishes an *alibi*, the burden of proof rests upon the prosecution to establish by a preponderance of evidence that he was not present at the time of the crime: *State v. H. Kreusen*, 57-588; *State v. Fry*, 67-475.

1597. Evidence of an *alibi* unless it preponderates: *State v. H. Kreusen*, 57-588.

1598. A bare preponderance of evidence in favor of defendant, where he establishes an *alibi*, is sufficient: *State v. Northrup*, 48-583; 54-183.

1599. It is error in such a case to say that they must be *fully* established: *State v. Hardin*, 48-403.

As to the effect of attempt to establish an *alibi*, see *supra*, §§ 1437, 1438.

1600. Burden of proof and amount of evidence: Where insanity is sought to be established as an excuse for a crime, the burden of proof must be overcome by a preponderance of evidence. It is not sufficient to produce such evidence as creates a reasonable doubt of sanity,

 Burden of proof and amount of evidence.

other hand, required to prove the insanity beyond a reasonable doubt: *State v. Felter*, 32-49; *State v. Bruce*, 48-580.

1601. A preponderance of evidence of insanity raises a reasonable doubt of guilt: *Ibid.*

1602. While the burden of proving insanity as a defense is upon defendant, he is only required to establish such defense by a preponderance of evidence. It is error to instruct the jury that if the evidence goes no further than to show such a state of mind to be possible or merely probable, it is not sufficient. The presumption of sanity simply imposes upon defendant the burden of proving insanity, and such presumption is not to be weighed against any measurable amount of evidence: *State v. Jones*, 64-349.

And further, see *supra*, §§ 22-24.

1603. As to the defense of insanity as well as that of *alibi*, the burden of proof is upon defendant: *State v. Hemrick*, 62-414.

1604. The fact that defendant undertakes to prove insanity does not relieve the prosecution of the burden of proving the criminal act and the criminal intent, and does not give defendant the opening and closing: *State v. Felter*, 32-49.

1605. Self-defense: Where there is evidence tending to show that defendant acted in self-defense, the jury should be instructed that the burden of proof is upon the state to prove that the homicide was not committed in self-defense: *State v. Cross*, 68-180.

1606. Chastity of prosecutrix in seduction: The presumption being in favor of the chastity of the prosecutrix in a prosecution for seduction, defendant relying upon the want of such chastity must prove unchastity by a preponderance of evidence. It is not sufficient merely to produce such evidence as would raise a reasonable doubt of chaste character, but the evidence must be such as to overcome the presumption of chastity by a fair preponderance: *State v. Wells*, 48-671.

1607. Burden of proof as to affirmative defenses: Any negative matter, such as the absence of self-defense, the want of sufficient provocation, etc., must be shown by the state, and defendant cannot be held to have the burden of proof cast upon him to show such matters. But whenever the matter of defense is wholly disconnected from the body

of the offense charged (for instance, where in homicide it is claimed that the death is caused by neglect of a wound), this general rule does not properly apply, but in such cases the burden of proof rests upon the accused: *State v. Morphy*, 38-270.

1608. Recent possession of stolen property: Where there was evidence of recent possession of stolen property by defendant accused of the larceny thereof, held error to instruct the jury that the burden of proof was upon defendant to satisfy the jury that this possession was innocent. Less than a preponderance of evidence on that point may be sufficient to justify a reasonable doubt of defendant's guilt: *State v. Emerson*, 48-172.

1609. In such case defendant is only required to introduce sufficient evidence as to having honestly come into possession of the goods to raise a reasonable doubt of guilt: *State v. Richart*, 57-245; *State v. Hopkins*, 65-240.

1610. Proof of identity: Evidence tending to show non-identity of defendant with the person committing the crime charged is merely evidence to rebut that offered by the state and may be sufficient to raise a reasonable doubt of guilt although not preponderating over that of the state: *State v. McCracken*, 66-569.

1611. Burden does not shift: It is error to instruct the jury that if evidence on the part of the state, alone and unexplained, would establish beyond a reasonable doubt the guilt of the defendant, then the burden of proof is shifted to the defendant to establish his defense by a preponderance of evidence: *State v. Porter*, 64-237.

1612. Amount of evidence: In criminal cases the jury do not weigh the evidence as in civil cases. Neither a preponderance of evidence nor any weight of preponderant evidence is sufficient to warrant a conviction in a criminal case unless it generates a full belief of the guilt of the party charged, to the exclusion of all reasonable doubt: *Tweedy v. State*, 5-483.

1613. Sufficiency of evidence: While the juror is not an artificial being whose judgment is to be governed by technical and artificial rules, but is a man, and should, while acting as juror, act as a man exercising his reason, his intelligence, his every-day judg-

Reasonable doubt.

ment and his common sense, yet it is erroneous to charge that he is not at liberty to disbelieve as a juror while he believes as a man: *State v. Collins*, 20-85.

1614. But error in using such language was held not sufficient to warrant a reversal where the case was otherwise fairly presented and the evidence of guilt was satisfactory: *State v. Pratt*, 20-267.

1615. It is improper to instruct the jury that what satisfies the mind outside of the jury box should do so within it. Information derived from the evidence which might be sufficient to lead a person not acting as a juror to a belief of defendant's guilt might not be sufficient to justify a verdict of guilty by such juror: *State v. Ruby*, 61-86.

1616. Reasonable doubt: It is a reasonable doubt entertained by the jury and not by any one member thereof that justifies an acquittal: *State v. Rora'acher*, 19-154.

1617. An instruction that a reasonable doubt must be one that arises in the minds of the whole jury, held erroneous, as liable to convey the impression that unless such doubt was shared by all the jurors, there should be a conviction: *State v. Stewart*, 52-284.

1618. Each juror must, under his oath, vote according to his own convictions, and the doubt with which he has to do is the doubt in his own mind: *State v. Sloan*, 55-217.

1619. Although each juror is to act upon his own judgment, and is not required to surrender his own conviction unless convinced, yet it is not necessary that such a proposition be stated in connection with the ordinary charge in regard to reasonable doubt: *State v. Hamilton*, 57-596.

1620. It is not necessary that the jury be advised that each juror is to act upon his own convictions, and that he should not concur in a verdict which is against his judgment: *State v. Fry*, 67-475.

1621. If the jury in considering the whole case have reasonable doubt upon any essential ingredient of the offense, this entitles the defendant to an acquittal because it generates a doubt of guilt: *State v. Hennessy*, 55-299.

1622. The general instruction upon reasonable doubt which is usually given need not be repeated in each instruction which re-

lates to the elements of the case: *Ibid.*; *State v. Cr*

1623. Where the court has the jury that before the conviction it must have satisfied evidence beyond a reasonable truth of each material allegation as alleged, it is not necessary the statement as to reasonable connection with every proposition instructions: *State v. Maloy*,

1624. It is not a reasonable one proposition of fact which acquittal, but a reasonable arising upon the consideration in the case: *State v. E*

1625. The doctrine of reasonable is wisely limited to the general guilty or not guilty upon all the case. It cannot safely be one fact in the case howsoever may be, as, for instance, in *Felter*, 32-49.

1626. The court is not required that the jury should acquit reasonable doubt as to a specific the crime. It is sufficient to generally that they should on the whole case they have such guilt of defendant: *State v. C* *State v. Stewart*, 52-284.

1627. An instruction to the after carefully weighing all the deliberately considering the jury had a reasonable doubt of defendant, they should return not guilty, held sufficient; that the rule as to reasonable be repeated in other instructions: *Miller*, 53-154.

1628. It is error to instruct derance of evidence in behalf is necessary to raise a reasonable guilt: *State v. Porter*, 64-237.

1629. It is error to distinguish two material facts and instruct it need only be fully and completely: *State v. Stewart*, 52-284.

1630. An hypothesis which is content to sustain a reasonable doubt out of the evidence adduced and facts of which there is no doubt: *Porter*, 34-131.

Reasonable doubt.— Appeals.

1631. For a definition of reasonable doubt, see *State v. Ostrander*, 18-435, 458.

1632. The following instruction to the jury as to reasonable doubt held proper: "before you will be justified in convicting the defendant you must be satisfied of his guilt beyond a reasonable doubt:" *State v. Lelvin*, 65-289.

1633. Instructions as to reasonable doubt held sufficient in particular cases: *State v. Sterling*, 34-443; *State v. Bodekee*, 34-520; *State v. Pierce*, 65-85; *State v. Elsham*, 70—.

1634. Doubt as to degree of crime: By statutory provision (Code, § 4429), the jury is required, in case of reasonable doubt as to the degree of the offense of which defendant is guilty, to convict him only of the lower degree, and it is error to fail to instruct the jury in accordance with this provision, even where proper instructions to the effect that they may convict of a lower degree or included crime are given: *State v. Jay*, 57-164; *State v. Neis*, 68-469; *State v. Walters*, 45-839.

1635. To warrant a conviction of grand larceny, the fact that the value of the property exceeded twenty dollars, as well as the fact of the stealing, should be proved beyond a reasonable doubt: *State v. Wood*, 46-116.

That the court should instruct as to lower degrees of the crime charged and as to included crimes, see *supra*, §§ 1209-1217.

1636. In civil cases: The rule that the guilt of defendant must be established beyond a reasonable doubt was engrafted on the common law because of a tenderness for, and in favor of, persons accused of crimes which affected their lives and liberties, at a time when the criminal law was harshly administered and cruel and harsh punishments were inflicted for slight and trivial offenses. Such a rule does not obtain in a civil action to recover damages for a criminal act: *Welch v. Jugenheimer*, 56-11.

And see further as to degree of proof in civil cases, EVIDENCE, §§ 840-855.

14. Appeals.

As to the various questions under APPEALS in general, see that title.

1637. From final judgment: An appeal in a criminal case lies only from final judg-

ment and not from an intermediate order or decision. (Overruling *State v. Brandt*, 41-598); *State v. Swearingen*, 43-336.

1638. This doctrine is applicable to appeals by the state as well as by defendant: *State v. Davis*, 47-634.

1639. A criminal case cannot be brought to the supreme court by agreement before rendition of final judgment: *Rutter v. State*, 1-99.

1640. An appeal by defendant will not lie in a criminal case from the overruling of one ground of demurrer to the indictment where another ground of demurrer is sustained and the indictment is dismissed: *State v. Hoffman*, 67-281.

1641. Not by consent after time has expired: The supreme court cannot entertain jurisdiction by consent of parties to a case after the time for taking appeal has run out: *State v. Fleming*, 13-443.

1642. A party in a criminal as well as in a civil case must prosecute his appeal within the time prescribed by law, and cannot appeal after the expiration of the time allowed for appeal: *State v. Westfall*, 37-575.

1643. Waiver of right: After payment of fine or serving out the imprisonment according to the sentence, defendant cannot appeal from the judgment: *Ibid*.

1644. Appeals by the state: Upon an appeal by the state, the supreme court cannot interfere with the judgment of the lower court. The decision of the lower court ends the proceedings as against the defendant: *State v. Kinney*, 44-444.

1645. In such case, the court having given an exposition of the law, no further order is necessary or allowable: *State v. Keeler*, 28-551.

1646. The fact that a *procedendo* issues in the usual form requiring the lower court to proceed after an appeal by the state is determined does not give the lower court any power in such cases: *State v. Kinney*, 44-444.

1647. Under the provisions of Code of 1851, a writ of error was given to defendant in criminal cases but not to the state: *State v. Johnson*, 2-549.

1648. Assignment of errors; argument: No assignment of errors is necessary on appeal in a criminal case: *State v. Pratt*, 20-267.

Appeals.

1649. In the absence of assignment of error and of argument in criminal cases, the appellate court is required to examine the record and render such judgment upon it as the law demands, but the court will not enter into a discussion of imaginary errors: *State v. Quinn*, 68-396.

1650. The court will, in a criminal case, upon an appeal by defendant, examine the record and determine whether the law has been correctly administered, even though no formal objection has been made to the proceeding and though there be no formal assignment of error or argument: *State v. Lundermilk*, 50-695; *State v. Barlow*, 50-701.

1651. Objections not raised below: The rule that objections not raised in the court below will not be considered in the supreme court does not apply in criminal cases: *State v. Potter*, 28-554.

1652. Printing of abstracts and arguments: The court may make reasonable rules relating to practice upon appeals and provide that upon a sufficient showing they may be waived or modified, and it having provided that the evidence on an appeal must be abstracted and the abstract printed, it will not consider a case not presented in accordance with these rules, unless application for the waiver of such rules has been duly made: *State v. Day*, 58-678.

1653. The provisions of the rules of the supreme court for suspending such rules in regard to printed abstracts in criminal cases on account of the poverty of defendant appealing must be complied with. An abstract in writing or caligraphic writing must be submitted to the attorney-general, and the fact of the inability of appellant to pay for printing must be shown by affidavit, and further it must be shown by the counsel, by affidavit or professional statement, that there is merit in the appeal: *State v. Earl*, 66-84.

1654. What must appear: Where the record fails to show that defendant was indicted, or was tried, or that a verdict was found against him, or that any judgment was entered, or that he has appealed, the appeal will be dismissed: *State v. Quigley*, 62-758.

1655. Where the record shows no service of notice of appeal, the court is without jurisdiction to examine any question in the case: *State v. Leslie*, 65-805.

1656. Where it does not appear from the abstract that judgment has been rendered, the appeal will be dismissed: *State v. Wheeler*, 65-619.

1657. What will be ground of reversal: Technicalities are to be disregarded: *State v. Ensley*, 10-149.

1658. It is only errors and defects which affect substantial rights that can be considered: *Hintermeister v. State*, 1-101.

1659. A purely technical objection, as, for instance, the erroneous discharge of one grand jury, and the summoning of another, by which the indictment was found, in the absence of any objection to the second except the discharge of the first, will not be ground for a reversal: *State v. Hughes*, 58-165.

1660. Where the error urged was the overruling of a motion to set aside the judgment, based upon slight irregularities in the selection of the grand jury, the court held that they did not affect the substantial rights of the party and affirmed the judgment: *State v. Carney*, 20-83.

1661. Error without prejudice: Where the evidence is all before the court, and it is apparent that an alleged error in the instructions could not have been prejudicial to defendant, the case will not be reversed: *State v. Guisenhouse*, 20-227.

1662. As malice aforethought is not an element of the crime of assault and battery, held, that in a criminal prosecution for assault with intent to murder, in which defendant was only convicted of assault and battery, the exclusion of evidence tending to show malice aforethought, even if erroneous, was without prejudice: *State v. Graham*, 51-72.

1663. A verdict of guilty will not be disturbed because of an erroneous assumption by counsel when it appears that no prejudice to the rights of the prisoner resulted therefrom: *State v. Turner*, 19-144.

1664. Where, after the overruling of a demurrer, defendant was tried as though on a plea of not guilty, but without any plea having been in fact made, held, that he was not entitled on appeal to have the conviction set aside and be allowed to enter a plea of not guilty: *State v. Greene*, 66-11.

1665. Error in prosecuting a violation of a city ordinance in the name of the state instead of the name of the city will not be

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ground of reversal, at least where the error was not objected to on the trial: *State v. King*, 87-462.

1666. Form of the record: In a criminal case, the record after the caption, stating the time and place of holding the court, should consist of the indictment properly indorsed as found by the grand jury, the arraignment of the accused, his plea, the impaneling of the traverse jury, their verdict and the judgment of the court: *Harriman v. State*, 2 G. Gr., 270.

1667. Other matters and proceedings, such as motions, objections, exceptions and the like, do not form any part of the record unless made so by order of the court, by bill of exceptions, by agreement of parties, special verdict or otherwise: *Ibid.*

1668. Bill of exceptions; certificate of judge: A certificate of the judge showing rulings made during the trial and exceptions thereto is a sufficient compliance with the statute to constitute a bill of exceptions: *State v. Fay*, 43-851.

1669. While a certificate of the judge, sufficiently setting out or identifying the testimony, may take the place of a bill of exceptions for the purpose of making the evidence a part of the record, such certificate, equally with a bill of exceptions, must be made at the time of the trial or at such time as the court may fix; otherwise the evidence may be stricken out on appeal: *State v. Newcomb*, 56-335.

1670. Transcript: Though the defendant do not appear, or fail to file a transcript, the state may file the same, and the court will examine the record, and render such judgment as the law demands: *State v. Pratt*, 20-267.

1671. Exceptions, what sufficient: A general exception to the admission of testimony *en masse*, where such testimony includes much testimony that is unobjectionable, without having asked any ruling of the court as to its admissibility, will not entitle the defendant to have the question of admissibility of portions of such evidence considered on appeal: *State v. Bengel*, 61-658.

1672. Defective record, how cured: Where the record in a criminal case on appeal was not in such form that the court was authorized to pass upon it, and the prosecuting offi-

cer insisted on such defect by motion, held, that the motion would be sustained and the submission set aside, and the case be put again on the docket for such further proceedings as the rules should direct and the rights of defendant demand: *State v. Havercamp*, 53-737.

1673. The mere fact that the indictment is mislaid or stolen after the trial and cannot be sent up with the writ of error to the supreme court on appeal will not authorize the supreme court to reverse the judgment: *Smith v. State*, 4 G. Gr., 189.

1674. When the record must contain the whole evidence: The supreme court cannot pass upon the question whether the lower court ruled correctly upon a motion for a new trial on the ground that the verdict was contrary to the evidence, unless the whole evidence upon the trial was before it: *State v. Crawford*, 11-143.

1675. In bringing before the supreme court the question whether the verdict below was in accordance with the evidence, a motion for a new trial should be made in the lower court and all the evidence taken to the supreme court on appeal: *State v. Hockenberry*, 11-269.

1676. The court cannot reverse the judgment on the ground that the verdict is against the evidence unless the record discloses that all the testimony is before it: *State v. Pitts*, 11-343; *State v. Carr*, 43-418.

1677. Granting new trial: The supreme court will interfere more readily in a criminal than in a civil case, where a new trial asked on the ground that the verdict is not supported by the evidence has been refused: *State v. Tomlinson*, 11-401.

1678. But it will cautiously interfere with verdicts in such cases: *State v. Collins*, 20-85.

1679. While the duty of the supreme court to interfere with an unjust verdict is recognized, yet when the testimony is conflicting, it must be satisfied of its insufficiency to convince the judgment, reason and conscience of the triers, before setting aside the conclusion arrived at by them: *State v. Elliott*, 15-72.

1680. The supreme court cannot, on appeal, interfere with the verdict of the jury when there is clear conflict in the testimony, this

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rule being applicable in criminal as well as civil actions: *State v. Falconer*, 70—.

1681. While the supreme court will exercise a just caution in interfering with the verdict of the jury, especially where the court below has refused to disturb it, yet a conviction clearly in conflict with the evidence will be set aside: *State v. Woolsey*, 30-251.

1682. When the evidence upon which defendant is convicted is so lacking in affirmative force as not to generate a belief of probable guilt, a new trial will be granted: *State v. Hilton*, 22-241.

1683. In particular cases, *held*, that the evidence was not sufficient to sustain a verdict of guilty: *State v. Moffitt*, 31-316; *State v. May*, 20-305; *State v. Campbell*, 69-556.

1684. Final judgment in supreme court: The supreme court may, on appeal in criminal cases, render such judgment as the district court should have rendered: *State v. Thompson*, 31-393.

1685. Reducing the sentence: Where the sentence is too severe, the court will reduce the punishment, but will not reverse the case on that account: *State v. Madden*, 35-511; *State v. Little*, 42-51.

1686. The power to reduce the sentence will be exercised only when the court below has manifestly visited too severe a penalty, one disproportionate to the degree of guilt as shown by the proof: *State v. Freeman*, 27-333.

1687. To justify the exercise of such power, it must be made to appear that the punishment is excessive: *State v. Allen*, 32-248.

1688. To authorize the supreme court on appeal to diminish the punishment, the record should show with sufficient clearness that the punishment inflicted is beyond the demands of justice: *State v. Wilmoth*, 63-380.

1689. In determining whether the punishment in a particular case is excessive, the court will decide the case upon its peculiar facts, and each offender must receive the punishment he merits without regard to the punishment inflicted on others: *State v. Upson*, 64-248.

1690. Where there is no evidence before it by which the proper amount of penalty may be determined, the supreme court will not

reduce the punishment: *Baughman*, 20-497.

1691. The supreme court will not disturb the sentence of a lower court when the record does not show circumstances attending the offense: *State v. Patton*, 21-497.

1692. The court must have data upon which to base its decision in fixing the sentence: *State v. Baughman*, 20-497.

1693. The supreme court will not disturb the punishment imposed by a lower court unless all the evidence is in favor of the defendant: *Harris*, 36-268; *State v. Baughman*, 20-497; *State v. Buck*, 59-43-131.

1694. The supreme court will not disturb the sentence merely on a technical error: *State v. Freeman*, 27-333.

1695. Facts in a prosecution which *held* not such as to require the sentence: *State v. Houston*, 60-175; *held* also in a case of accomplice with intent to commit murder: *Mower*, 68-61.

1696. So *held* also in a case of murder: *State v. Heatherton*, 60-175.

1697. So *held* also in a case of murder: *State v. Franks*, 64-39.

1698. So *held* also in a case of murder: *State v. Ritchie*, 69-123.

1699. In a particular case, the most severe punishment permitted by law for the offense charged was imposed, and it was accordingly *held*, that the sentence was not the most aggravated: *State v. Thompson*, 46-699.

1700. In a particular case, the evidence was insufficient to sustain a conviction for murder in the first degree, and the defendant claimed that defendant was guilty of manslaughter, the court *held*, that the sentence to the proper one for manslaughter: *State v. Fields*, 70—.

1701. Where defendant was indicted for two crimes, and the evidence supported both counts, *held*, that the sentence would be reduced to the proper one for the offense: *State v. Fields*, 70—.

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not been raised in the court below: *State v. Henry*, 59-391.

1702. In particular cases, *held*, that the sentence should be reduced as excessive: *State v. Madden*, 35-511; *State v. Hayden*, 45-11; *State v. Doering*, 48-650; *State v. Moody*, 50-443; *State v. Sullivan*, 51-142.

1703. Effect of reversal: Upon reversal of a judgment of conviction, the cause may be remanded for a new trial. Jeopardy is not considered as having attached if the defendant is erroneously convicted and obtains a reversal of the judgment: *State v. Knouse*, 33-365.

1704. A judgment in a criminal case being reversed on appeal for a defect in the indictment, the cause was remanded for new trial with direction that preliminary thereto it might be re-submitted to another grand jury: *State v. Morrissey*, 22-158.

1705. Rehearing: The chapter relating to proceedings in the supreme court in civil cases is intended to regulate generally the practice of that court in criminal cases as well. Therefore, *held*, that the sections relating to rehearing are applicable in criminal cases, and are applicable in behalf of the state as well as defendant: *State v. Jones*, 64-349.

1706. A procedendo from the supreme court is not necessary to the jurisdiction of the lower court on a new trial after reversal, and defendant may waive the right thereto. Jurisdiction over the subject-matter cannot be conferred by consent, but jurisdiction over the parties may be: *State v. Knouse*, 33-365. And see *Becker v. Becker*, 50-139.

1707. Costs of appeal: In case of appeal by the state, and reversal, it is improper to tax the costs to defendant: *State v. Vail*, 57-108.

1708. The statute does not provide for the payment by the county of costs of printing the abstract, etc., on appeal by defendant, although judgment against him is reversed: *Red v. Polk County*, 56-98.

And further as to costs, see *infra*, III, 17.

15. Imprisonment.

1709. Void warrant: The fact that the warrant of commitment to imprisonment is void will not entitle the prisoner to release on *habeas corpus* if the court or judge is sat-

isfied from the evidence that he should be held to answer for the crime charged or any other crime (Code, § 3485). In such case the court or judge may make an appropriate order: *Jackson v. Boyd*, 53-536.

1710. Imprisonment in the penitentiary for safe keeping: In the absence of any showing of prejudice or the improper exercise of discretion, it is not error for a judge to send a prisoner to the penitentiary for safe keeping to await his trial: *State v. Porter*, 34-131.

1711. Expenses of imprisonment: The provision (Code, § 4735) that the expenses of keeping convicts shall be paid by the county does not authorize the sheriff to receive any further fees for taking charge of prisoners, etc., than as provided by § 3788: *Grubb v. Louisa County*, 40-314.

1712. The county is not liable for the service of a jailor employed by the sheriff: *McDonald v. Woodbury County*, 48-404.

1713. While the sheriff is entitled to reasonable compensation as provided by statute, he cannot sue the county therefor until his account has been presented for settlement and allowance: *Marvin v. Fremont County*, 11-463.

1714. A person furnishing clothing to prisoners on the sheriff's request may maintain an action against the county therefor, and while only necessary clothing can be procured at the expense of the county, the discretion of the sheriff, acting in good faith, cannot be controlled by the board of supervisors. The person furnishing clothing upon the sheriff's request is only bound to know that it is for prisoners, and suitable, and, perhaps, necessary: *Feldenheimer v. Woodbury County*, 56-379.

1715. The county is liable for necessities for a prisoner, although by reason of his condition it is impossible to confine him in jail: *Miller v. Dickinson County*, 68-102.

1716. An order made by a justice issuing a warrant for arrest, that the sheriff keep the prisoner in some safe place and provide for his necessities until he is able to be brought before a magistrate for trial, is a nullity and has no effect upon the liability of the county: *Ibid*.

1717. Imprisonment at hard labor: Where the judgment of a court of general

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jurisdiction is that the defendant shall be imprisoned at hard labor as provided by Code, § 4736, it will be presumed that the facts as to age, etc., necessary to warrant such judgment were shown to the court: *State v. Winstrand*, 37-110, 118.

1718. A judgment may direct that defendant be confined to hard labor at the rate of \$1.50 per day (Code, § 4741), but it cannot direct that he be confined at that rate until the judgment is paid. The duration of the imprisonment is to be determined by § 4509: *Keokuk v. Dressell*, 47-597; *State v. Jordan*, 89-387; *In re Jordan*, 89-394; *State v. Anzerda*, 40-151.

1719. Release of poor convicts: Under the provision (Code, § 4611) for release of persons who are imprisoned for failure to pay a fine, or fine and costs, upon proof of inability to pay and giving a note for the amount, etc., actual imprisonment for thirty days is made a prerequisite to the right to be liberated: *In re Curley*, 34-184.

1720. Where a prisoner is thus liberated upon giving note, etc., he is entitled to have the judgment against him canceled: *State v. Van Vleet*, 23-168; *State v. Peck*, 37-342; *State v. Jordan*, 89-387; *In re Jordan*, 89-394.

1721. Where authority to imprison for non-payment of costs is not expressly given, this section does not warrant imprisonment for costs; and such imprisonment can be imposed only for non-payment of the fine: *State v. Errin*, 44-687.

1722. Under the provision (Code, § 4741) that such release shall not be made if, in the opinion of the sheriff, the judgment may be satisfied under the provisions for imprisonment at hard labor and credit of the amount allowed therefor on the judgment, *held*, that where it had been made to appear by the sheriff's answer in a *habeas corpus* proceeding that in his opinion the judgment could not thus be satisfied, a subsequent pleading stating a contrary opinion could not operate to prevent the discharge: *In re Jordan*, 89-394.

1723. The power to commit for non-payment of a fine not being conferred by Code, § 4611, but existing by virtue of Code, § 4509, as incident to the power to impose a fine, if the statute authorizing the fine provides that

a prisoner shall not be released under § 4611, such provision is controlling: *Hanks v. Workman*, 69-600.

1724. The provisions for the release of poor convicts apply only to persons convicted of criminal offenses. The fine authorized under the prohibitory liquor law for violation of an injunction is not a fine for a crime and the provisions for release of poor convicts does not apply thereto: *Ibid*.

As to the provisions to be made in the judgment for imprisonment for non-payment of fine and the extent thereof, also as to sentence to hard labor, and as to effect of imprisonment on the judgment for fine and costs, see *supra*, §§ 1321-1335.

16. Fines and forfeitures.

1725. Under the provision (Code, §§ 3370 and 1888) that fines and forfeitures shall go into the treasury of the county where the same are collected for the benefit of the school fund, the county in which the fine is collected is deemed to be the county in which judgment therefor is rendered and execution issued, and not the county in which the execution may be enforced against defendant's property: *Pottawattamie County v. Carroll County*, 67-456.

1726. Suit for the penalty on a bail bond may be brought by the county. It has the right to sue in such case as being the trustee of an express trust: *Shelby County v. Simmonds*, 33-345.

1727. The fact that a fine or forfeiture is to go into the county treasury for the benefit of the school fund does not make the county such party to an action therefor brought by the state as to entitle defendant to a change of venue: *State v. Merrihew*, 47-112.

1728. The county in which action on a bail bond is properly brought is the county entitled to the money collected: *Lucas County v. Wilson*, 61-141.

Further as to suit on bail bond, see *supra*, §§ 1410-1414.

17. Costs.

1729. Liability of county: Under the provision of Rev. Stats. of '43, *held*, that counties were liable for costs in a criminal case in which a *nolle prosequi* was entered, or in

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which an indictment was quashed, or judgment entered for defendant on demurrer: *Bonney v. Van Buren County*, 2 G. Gr., 230.

1730. The statutory provision (Code, § 3790) that the county shall be liable for costs in criminal cases where the prosecution fails does not render the county liable for costs in a bastardy proceeding, such proceeding being civil and not criminal: *McAndrew v. Madison County*, 67-54.

1731. For stationery used in taking down minutes of evidence on preliminary examination, a justice of the peace is entitled to be reimbursed by the county: *Evans v. Story County*, 85-126.

1732. The magistrate, or person appointed by him, cannot recover from the county fees for taking down minutes of evidence on preliminary examinations. The fees of the magistrate authorized in such cases are intended to be in full compensation for his services: *Sanford v. Lee County*, 49-148.

1733. Where a justice of the peace dismisses a criminal prosecution for failure of the prosecuting witness to appear, the costs, including witness fees, may properly be taxed to the county, unless the justice has ground for taxing them against the prosecuting witness: *Cassidy v. Palo Alto County*, 58-125; *Palo Alto County v. Moncrief*, 58-131.

1734. Where the county fails to pay the costs properly taxed against it, action may be brought therefor: *Cassidy v. Palo Alto County*, 58-125.

1735. Witness fees: The county is liable for fees of witnesses on preliminary examination: *Johnson County v. Porter*, 4 G. Gr., 70.

1736. Under the Code of '51 there was no provision giving a witness summoned for defendant in a criminal prosecution the right of claiming witness fees from the county treasurer, and in such case it was held that he must look to the party summoning him for his fees: *Donnelly v. Johnson County*, 7-419.

1737. A witness summoned to attend in several state cases is entitled to compensation for his actual attendance in all the cases, but cannot recover fees for each separate case, where he is required to attend in more than one at the same time: *Hardin v. Polk County*, 39-661.

1738. A witness is not entitled to fees for the time during which he is confined in jail on commitment by a magistrate for failure to give security to appear in the case against a defendant who is bound over: *Markwell v. Warren County*, 53-422.

1739. Under the provisions of Code, § 3818, as amended, providing that witnesses for the defense shall not be subpoenaed at the expense of the county in criminal cases except upon order of the court or judge, and only upon a satisfactory showing that they are material and necessary for the defense, the county is not liable for the fees of defendant's witnesses in a criminal case before a justice of the peace, unless they have been subpoenaed upon order of the justice as thus provided: *Kennedy v. Delaware County*, 59-123.

1740. This provision in regard to requiring the court to make an order for subpoenaing witnesses for defendant does not affect the right of a witness not subpoenaed to his fees, if he attends as a witness in the trial of the case, and his evidence is material for the defense: *Jones County v. Linn County*, 68-63.

1741. It is not necessary under this provision, in order to authorize a district judge to order the payment of witness fees to witnesses who have attended and testified for defendant without being subpoenaed, that such an order should be made upon a showing or application by the accused: *Ibid.*

1742. An order of the judge can be made when judgment is finally entered or when such order is made or action had as disposes of the case: *Ibid.*

1743. Held not error to refuse an order for all the witnesses asked for defendant upon the showing made in a particular case: *State v. Benge*, 61-658.

1744. A witness for the prosecution who comes from another state at the request of the prosecution, and testifies in a case in which defendant is adjudged not guilty, should be compensated by the county for his mileage outside of as well as within the state: *Westfall v. Madison County*, 62-427.

1745. Jury fees: The provisions of Code, § 3812, authorizing a jury fee to be taxed as part of the costs in both civil and criminal cases, is not unconstitutional: *State v. Verwayne*, 44-621.

1746. The full jury fee for one day's trial

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may be taxed, though the trial occupies but part of a day, at least where it does not appear that there was any other jury trial on the same day: *Ibid.*

1747. This provision for charging litigants with part of the expense of jury trials is not intended to limit the amount to be paid by a county from which change of venue in a criminal case is taken, for the fees of jurors in the trial of such case; and recovery may be had for the entire jury fee, and not simply for the portion authorized to be taxed as costs in the case: *Jones County v. Linn County*, 68-63.

As to taxing jury fees in civil cases, see PRACTICE, § 11.

1748. Taxing costs to prosecutor: The court has the authority to tax costs to the prosecutor, and it will be presumed that such authority is correctly exercised, in the absence of a showing to the contrary: *State v. Donnell*, 11-452.

1749. A party considering himself aggrieved by the action of the court must have the evidence on which the court acted presented to the supreme court on appeal, in order to secure a review of such action: *Ibid.*

1750. The mere failure of a private prosecutor to appear in the district court to prosecute a party put under bonds to keep the peace will not warrant judgment against the prosecutor for costs: *State v. Holliday*, 22-397.

As to appeal from the judgment of a justice of the peace taxing the costs of a prosecution to the prosecuting witness, see *infra*, §§ 1804-1808.

1751. Costs not remitted by pardon: The costs in a criminal prosecution taxed to defendant are not affected by a general pardon discharging defendant from the fine and a judgment of imprisonment: *Estep v. Lacy*, 35-419.

1752. Payment of fine: The fact that defendant in a criminal prosecution pays the fine assessed against him, and is discharged from imprisonment for its non-payment, does not release the judgment against him for costs: *State v. Gray*, 35-503; *Gray v. Ferby*, 36-146.

1753. Liability of county on change of venue: The provisions of Code, § 3841, that,

in case of change of venue which the case is taken sh county in which it is trie such trial, does not apply takes original jurisdiction mitted in an adjoining c five hundred yards of the tween them: *Floyd Coun County*, 47-186.

1754. In such case the of the case is removed is liab wherein the trial is had for expenses of the trial of t merely for the costs whic against accused in case of e County v. Linn County, 68-

18. Pardon

1755. A pardon does not charge the convict from the adjudged against him on h Lacy, 35-419.

1756. The governor may upon conditions; and when was that he might revoke it ing as he might deem suff the person pardoned could n cial investigation as to whet lated the condition: *Arthu* 264.

IV. PROCEDURE IN INF

1757. Jurisdiction: The concurrent jurisdiction with of the peace over crimes wi tion of the latter, and there put on trial in the district ment may be convicted of the offense or of a crime nec within the offense charged lower degree or included cri indictable, and could have before a justice of the peace 4 G. Gr., 140.

1758. Where there is n affirmatively on the face of before a justice of the peac of jurisdiction, defendant that the evidence shows ar been committed which can c on indictment: *State v. Sig*

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1759. A justice of the peace has jurisdiction over offenses consisting in the violation of city ordinances. The jurisdiction of the mayor in such cases is not exclusive: *Jaquith v. Royce*, 42-406.

1760. Venue: To show that the case is within the territorial jurisdiction of a justice, the prosecution need only prove that the offense was committed in the county. The township where it was committed is immaterial: *State v. Gibson*, 29-295.

1761. Where defendant is brought before a justice of the peace of the proper county upon a warrant issued by another justice for an offense triable by a justice of the peace, and makes no objection to the jurisdiction, he thereby waives any objection which he may have on that account, and cannot raise it upon appeal: *State v. Kinney*, 41-424.

1762. Information: Under the statutory provisions as to the form of an information, the facts constituting the offense should be stated with as much precision as in an indictment: *State v. Bitman*, 13-485; *State v. Allen*, 32-491.

1763. Under a statute prohibiting the selling of intoxicating liquor to any person, *held*, that an information charging such sale should state the name of the person to whom the liquor was sold, and that a mere allegation that defendant "did sell intoxicating liquors in violation of," etc., was not sufficient: *State v. Allen*, 32-491.

1764. Where an ordinance prohibited the sale of beer or wine to any person, an information for the violation of such ordinance charging the sale to "divers persons" was *held* sufficient: *State v. Smouse*, 49-634.

1765. An information charging the selling of intoxicating liquor, without specifying the kind, is sufficient: *State v. Whalen*, 54-753.

1766. It is not sufficient in an information to charge the offense by its technical name; the acts constituting the offense must be stated: *State v. Murray*, 41-580.

1767. Therefore, *held*, that in an information for an assault it was not sufficient to charge simply that defendant "did assault" the person injured: *Ibid*.

1768. An information charging larceny, *held* defective in failing to allege that it was feloniously committed, although the accusa-

tion was in the language of the statute defining the offense: *State v. Sipult*, 17-575.

1769. Where an information for violation of an ordinance was headed "State of Iowa, City of Washington, versus," etc., *held*, that the words "State of Iowa" were surplusage and did not make the prosecution one under the state law: *State v. Smouse*, 49-634.

1770. Where an information charges an offense of which the court has jurisdiction, and also one of which it has not, the allegations as to the latter will be deemed surplusage and will not vitiate the information: *Ibid*.; *State v. Silhoffer*, 48-283.

1771. An information charging the illegal sale of intoxicating liquors need not specify the quantity sold: *State v. King*, 37-462.

1772. Where the information charging the keeping of intoxicating liquors for sale was entitled "State of Iowa, Clayton County," and stated the liquors to be in defendant's saloon in Strawberry Point, *held*, that the information sufficiently showed that the liquors were in Clayton county; *State v. Thompson*, 44-899.

Further as to sufficiency of an information charging the illegal sale, or keeping for sale, of INTOXICATING LIQUORS, see that title, §§ 88-96.

1773. If the prosecutor subscribes and swears to the affidavit at the end of the information, this is a sufficient compliance with the provision requiring the information to be subscribed and sworn to: *Devine v. State*, 4-443.

1774. Amendment of information: An information is amendable, and in this respect it stands upon different grounds from an indictment: *State v. Merchant*, 88-375.

1775. Therefore, *held*, that an information defective in not being signed, although appearing to have been properly sworn to, might be amended by adding the signature of the informant while the case was pending on appeal in the district court: *Ibid*.

1776. An information may be amended, upon application, to any extent consistent with the orderly conduct of judicial business with public interest and private rights: *State v. Doe*, 50-541.

1777. Procedure: In summary proceedings the cases are to be conducted promptly

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and without unnecessary form: *Dubuque v. Rebman*, 1-444.

1778. Change of venue: Prejudice of a justice against a defendant can only be taken advantage of by motion for change of venue: *Foreman v. Hunter*, 59-550.

1779. The objections specified by statute (Code, § 4671), that may be urged against the next nearest justice to which the case would otherwise be sent, are not the same as those which are made a ground for change of venue in the first place. Prejudice of the justice is a ground for asking a change of venue, but not a ground for objection to the next nearest justice: *Albertson v. Kriebbaum*, 65-11.

1780. Where defendant, in asking a change of venue, urges objections to a justice to whom the case might be sent, and thereby procures it to be sent to another justice, he cannot afterwards object that the justice to whom it is sent has not jurisdiction, for the reason that the objection made to the nearest justice was not one authorized by statute, as a ground for not sending the case to him. By requesting the change to the justice before whom the case is taken, and appearing before him, defendant waives any objection to his jurisdiction: *State v. McEvoy*, 68-355.

1781. Where the justice to whom the case is sent on change of venue refuses to act, the officer having the defendant in charge has no authority to take him before another justice, and any action of such justice in the matter would be void: *Connell v. Stelson*, 33-147.

1782. The provisions as to change of venue from a justice of the peace do not entitle a defendant to change of venue in a trial in the police court: *Zelle v. McHenry*, 51-572.

1783. Jury trial: Where the police judge of a city is exercising the powers and jurisdiction of a justice of the peace, a defendant on trial before him may demand a jury as provided in case of trials before justices, but in a prosecution before such judge for the violation of a city ordinance, defendant is not entitled to a jury trial: *Ibid.*

1784. A justice of the peace has no authority to try a prisoner without a jury after he has demanded a jury trial: *Dupont v. Downing*, 6-172.

1785. A judgment rendered upon a verdict

by a disqualified jury is void. It may be reversed cannot be disregarded as a *v. Hunter*, 59-550.

1786. Appeals: In order to appeal, notice thereof must be given before judgment is rendered: *61-522*.

1787. If defendant gives notice of appeal there is nothing which he can do which will deprive the plaintiff of his right to such appeal, and therefore the plaintiff cannot be liable in damages for not giving notice of appeal, or committing the plaintiff to prison, whatever may be his reason: *son v. Park*, 57-69.

1788. The fact that the justice has informed defendant of his right to appeal does not make an entry of the fact that he does not render the conviction void. The defendant may have the amount of his costs in a *habeas corpus* proceeding entitled to be discharged without bond: *v. Waddell*, 61-247.

1789. Mere mistake or inadvertence is not an excuse for the failure to take an appeal at the time of judgment, and cannot be a ground for setting aside the judgment afterwards taken proper: *C. v. States*, 1 G. Gr., 39.

1790. The mere filing of a notice of appeal does not effect the appeal; it must be perfected by giving notice, and if not so perfected it may be stricken from the docket of the district court: *State v. Leyden*.

1791. There is no provision in the Code for errors of law only, in a criminal case, before a justice of the peace. The writs of error in civil cases are not available in criminal prosecutions *etc.*, *v. State*, 1-507; *State v.*

1792. Provisions as to appeals from the district court are applicable to appeals from the mayor for violation of a city ordinance: *State v. Hoag*, 46-337.

1793. The provision of the Code (§ 5094) allowing an appeal from a judgment of a justice of the peace is held unconstitutional and void. A re-trial in the district court is authorized if the defendant acquitted before the justice of the peace is re-arrested for the offense: *Horton*, 26-402.

1794. But under such provisions as are held that where defendant pleads

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state might appeal from the judgment upon such plea, and in the district court inquiry might be made into the circumstances in order to settle the amount of fine or punishment, especially where the plea and judgment were entered in the absence of prosecutor and before the day fixed for trial: *State v. Tait*, 22-140.

1795. The receipt of the fine in such case by the county treasurer was held not such an acceptance of the adjudication as to bar all right of appeal by the prosecution: *Ibid.*

1796. If no plea is entered of record by the justice of the peace, it may be entered by the district court on the trial of the appeal: *State v. McCombs*, 13-426.

1797. An appeal waives any irregularities in the proceedings before the justice: *Ibid.*

1798. A defendant who has pleaded guilty before the justice, and been sentenced upon such plea, may, on appeal, withdraw the plea as provided in Code, § 4862, with reference to proceedings upon an indictment: *State v. Kraft*, 10-830.

1799. An appeal brings up the case on its merits. There is no method by which defendant may secure a review of errors of law only: *State v. Flinn*, 51-183.

1800. Where, upon the trial before the justice, two of the counts of the information were withdrawn and defendant was convicted on a third, *held*, that it was error, on an appeal to the district court, to convict defendant on the two counts which had been withdrawn before the justice: *State v. Shilling*, 10-106.

1801. Where defendant was tried before a justice upon an information containing several counts, and was found guilty and sentenced for one offense, *held*, that on appeal he was subject to re-trial upon all the counts, and could not insist upon having been acquitted as to any of them: *State v. Mallory*, 11-239.

1802. An appeal brings the case into the district court for trial on its merits, and the court should disregard all merely technical errors or defects not prejudicing the substantial rights of the parties, such, for instance, as that upon change of venue the case was sent to the wrong justice: *State v. McEvoy*, 68-855.

1803. Defendant cannot, upon trial of an

appeal in the district court, have the cause remanded to the lower court in which it was tried, with directions for further proceedings therein: *Ottumwa v. Schaub*, 52-515.

1804. An appeal by a prosecuting witness from the action of a justice of the peace in taxing to him the costs of the prosecution in case of defendant's acquittal must be taken at the time judgment is rendered, and cannot be taken afterwards: *State v. Knapf*, 61-522.

1805. Such appeal is to be taken to the district court, and is a criminal proceeding: *Ibid.*

1806. The justice is invested with discretion as to the taxation of costs to the prosecutor, and his conclusion cannot be reversed by the district court unless he has abused such discretion. While the proceeding in the district court is called an appeal, it is in fact a writ of error, and the correctness of the judgment of the justice is to be determined by an inspection of the record. New or additional evidence should not be introduced: *State v. Kerns*, 64-806.

1807. Under the provisions of the Revision which allowed appeals by the state, *held*, that although the justice did not tax up the costs to the prosecuting witness, the district court might, on appeal, make such taxation without taking further evidence than that introduced on the trial, provided that was in itself sufficient to authorize its action: *In re Trenchard*, 16-58.

1808. Also, *held*, that where the judgment was for defendant, the prosecuting witness might appeal from an order of the justice taxing to him the costs of prosecution: *State v. Roney*, 37-30.

DAMAGES.

I. WHAT RECOVERABLE.

- a. *In general.*
- b. *Proximate and remote.*
- c. *General and special.*
- d. *Pain, suffering and mental anguish.*
- e. *Profits.*
- f. *Interest.*
- g. *Continuing damage; successive actions.*

What recoverable.—In general.—Proximate and remote.

I. WHAT RECOVERABLE—continued.

h. *Joint damages; contribution to damages.*

i. *Duty of party injured to prevent damage resulting.*

II. MEASURE OF DAMAGES.

a. *In general.*

b. *Measure of value.*

c. *For breach of contract.*

d. *In sales of land.*

e. *In sales of personal property.*

f. *In actions for tort in general.*

g. *In actions for personal injury.*

In particular cases, see ATTACHMENT, IX, f; REPLEVIN, §§ 138-141; CONVEYANCES, V, c; VENDORS, §§ 52-56, 104-113.

III. EXEMPLARY DAMAGES.

IV. NOMINAL DAMAGES.

V. LIQUIDATED DAMAGES; PENALTY.

As to survival of action for damages, see ACTIONS, IV.

Damages from cattle, see ANIMALS.

Pleading damages, see PLEADINGS, §§ 110-127, 175, 176.

I. WHAT RECOVERABLE.

a. *In general.*

1. **Cases without a remedy:** The law does not undertake to give a remedy for every injury. This is often so where the injury is slight and the damage not easily measured, and where an attempt to give a remedy would probably result in extensive litigation in matters of public concern: *Morgan v. Des Moines & St. L. R. Co.*, 64-589.

2. The rightful and *bona fide* exercise of a lawful power or authority cannot afford a basis for an action. If the power or right is exercised carelessly, negligently, wrongfully, or improperly (it may be maliciously), the party so exercising it may be liable to respond in damages for any injury, direct or consequential, resulting to another from his exercising the right or power; but such liability can only arise upon and for the manner of doing it and not for the act itself: *Slatten v. Des Moines Valley R. Co.*, 29-148.

3. Therefore, *held*, that where a landlord, who was the owner of a lot adjoining the premises leased to his tenant, made excavations on such lot, by reason of which the

occupation of the basement premises was rendered impossible by the lower temperature of the work, the landlord was liable to the tenant for damages: *Staples*, 36-532.

4. Where defendant, being in military service, fled the country, whereby plaintiff, drafted as one of a class of men compelled to render military service, that plaintiff could not recover damages for the breach of the latter thus resulting to plaintiff: *Dennis v. Larkin*, 19-434.

5. **Impossible act; penalty:** The law requires of no one impossibilities. It cannot impose upon him a penalty for an act required by law, if, in the exercise of reasonable care and diligence, he complies with the law: *Robinson v. Hamilton*, 60-134.

6. **Physician's returns:** The law requiring returns to be made by physicians and surgeons to the clerks of the courts is not to be construed as requiring a return, and that, under such circumstances, a failure to make return as required is not subject the person so failing to a penalty prescribed by law: *Ibid.*

7. **Penalty does not preclude action:** The fact that a penalty is a bar to the doing of an act recoverable by action does not deprive him of his right to an action for damages sustained by the same act: *Fuller v. Chicago & N. W. Ry.*, 31-187.

b. *Proximate and remote.*

8. **Immediate consequences:** In actions for personal damages only are allowable damages restricted to the immediate consequences of the wrongful act: *Plumb v. Chicago & N. W. Ry.*, 34-116.

9. **Special circumstances:** In actions for damages to parties to a contract increasing in value, which he suffers from a breach of the contract, it may not be taken into consideration the damages unless the fact of the breach was known to the other party at the time of the contract: *Griffith v. Chicago & N. W. Ry.*, 31-187.

10. **Proximate result:** The damages to be recovered must be the proximate result of the wrongful act.

Proximate and remote.

quence that follows the act and not a secondary result from a first consequence, either alone or in combination with other circumstances: *Dubuque Wood, etc., Ass'n v. Dubuque*, 80-176.

11. Therefore, *held*, that where a bridge, leading from a city to a river landing on which wood was piled to be sold, was so out of repair that the owner was thereby prevented from removing the wood from the landing until it was swept away by a flood, neither the city nor the county were liable for the value of the wood thus lost: *Ibid.*

12. *Held*, also, that the expense of defending an action for divorce was not a proper element of damage in an action for the speaking of slanderous words charging larceny and adultery, for the reason that an action for divorce was not the proximate consequence of such a charge. A rule of law must not be adduced from what might follow in exceptional cases, but only from what is likely to follow under ordinary circumstances: *Georgia v. Kepford*, 45-48.

13. The averment in an action for malicious prosecution that by reason of such prosecution the wife of the plaintiff became "sick, nervous, insane and utterly helpless," *held* not to show special damage for which plaintiff could recover in such an action, such damages being too remote: *Hampton v. Jones*, 58-317.

14. Where the plaintiff sought to recover for injuries received from being run over by a railway engine, the injury having been caused by the movement of the engine, *held*, that the railway company could not be held liable for illegally allowing its engines and cars to stand upon tracks in the city where it had no privilege to allow them to stand, the injury alleged not being the proximate result of such illegal act: *Armil v. Chicago, B. & Q. R. Co.*, 70—.

15. Remote: Under a claim for damages for failure to build a barge according to contract, *held*, that the person furnishing the barge was not liable for damages to a cargo shipped therein by the owner, nor for depreciation in price due to the decline in the market to which the owner was subject by reason of the failure of the builder to furnish the barge by the time agreed upon: *Davis v. Fish*, 1 G. Gr., 406.

16. Expenses incurred in soliciting sub-

scriptions and advertisements and making contracts for a newspaper of a particular size cannot be considered as elements of damage in an action for failure to furnish a printing press, according to contract, suitable for a newspaper of such size: *Allison v. Vaughan*, 40-421.

17. In an action for damages for failure to deliver personal property contracted for, the value of the article in the market, as an element of damage, may be ascertained by considering the condition of the market, the time of delivery, the demand and supply, etc.; but the probable consequences which would have resulted on the market, had the party claiming damages gone into the market, on the day of delivery, to buy the articles in default, to be delivered at once, are too remote and speculative to be considered: *Jemmison v. Gray*, 29-537.

18. Where two parties agreed to erect buildings on their respective lots, *held*, that failure of one to comply with such contract did not give rise to a cause of action in favor of the other, it not appearing that the plaintiff would have built elsewhere but for such contract: *First Nat. Bank v. Thurman*, 69-693.

19. In an action to recover damages for furnishing an abstract of title which was erroneous in stating the date of a sale thereof under execution, by reason of which error it was alleged plaintiff had been unable to redeem from such sale until the period for redemption had expired, *held*, that plaintiff could not recover without proof of reasonable effort to redeem after the discovery of the mistake: *Roberts v. Leon Loan, etc., Co.*, 69-673; *S. C.*, 68-76.

20. Where plaintiff sought to recover the value of a set of the copies of a newspaper of which he was editor, *held*, that proof of the inconveniences which an editor would suffer and the various modes by which he might be damaged by reason of the destruction of the files of a newspaper which he had edited were too remote to be considered: *Leffingwell v. Gilchrist*, 40-416.

21. Where, through the failure of vendor to extinguish a lien upon the property sold, it was seized under judicial process and taken from the possession of the vendee and thereafter destroyed by fire, *held*, that the vend-

30. Failure to repair: In damages for failure of defendant to repair the covenants of his lease of regard to repairing the damage same in order, *held*, that the damages was the difference

Proximate and remote.—General and special.

between the mill in its condition and its value if it had been kept in the condition required in the covenants, and that damages by reason of being obliged to run the mill in the night-time and at additional expense, and by reason of the loss of business occasioned by inability to perform the full amount of work, etc., were too remote to be considered: *Winne v. Kelley*, 84-839.

81. Sale of diseased animals: One who sells sheep affected with foot-rot and scab and falsely represents them to be free from such diseases is liable in damages for injuries to other sheep owned by the purchaser caused by said diseases imparted from the unsound sheep, although the vendor did not know at the time of sale that the purchaser had other sheep: *Sherrod v. Langdon*, 21-518.

82. Market reports: Where a telegraph company was under obligation to furnish correct reports of the Chicago markets to a grain dealer in a distant place, *held*, that damages resulting to such dealer from the purchase of grain in Chicago made by telegram in reliance upon an incorrect report furnished by the company, might be recovered although the company was not advised that such dealer was in the habit of making such purchases: *Turner v. Hawkeye Tel. Co.*, 41-458.

83. Frightening of horse by dog: Where plaintiff sought to recover damages for injuries sustained by reason of his horse being frightened by defendant's dog, *held*, that it was sufficient if it was shown that the dog ran after and barked at defendant's horse, although not biting him: *Schmid v. Humphrey*, 48-652.

84. That defendant was at the time engaged in doing an act prohibited by law (to wit, violating the Sunday law), *held*, in such case, not sufficient to prevent his recovering damages for the injury: *Ibid*.

85. Fire communicated: Where fire is negligently communicated to one building and from that to another, the damages are not too remote to preclude recovery by the owner of the latter building from the person liable for the origin of the fire: *Small v. Chicago, R. I. & P. R. Co.*, 55-582. And see same point in dissenting opinion: *S. C.*, 50-338, 355.

86. Cause of accident: Although the proximate cause of the injury only can be recognized, yet where it appeared that an engine of a railway company had left the track on account of a spreading of the rails, and thereupon the engineer, in the exercise of his judgment as to the best course to pursue under the circumstances, reversed the lever, and in doing so broke his arm, *held*, that the train's leaving the track, being the occasion for his doing the act resulting in the injury, was the proximate cause of the injury, and that the injury was therefore not one incident to his ordinary employment: *Knapp v. Sioux City & P. R. Co.*, 65-91.

87. Loss of incidental advantage: Under a contract between a railway company and the owner of a warehouse for the delivery of all grain of a certain description shipped over the railway, and payment of a certain sum per bushel for handling the same, with provisions for additional compensation for storage, *held*, that damages resulting from loss of storage, caused by failure of the railroad company to deliver grain as agreed, were not too remote to be recovered in an action for breach of the contract: *Richmond v. Dubuque & S. C. R. Co.*, 33-422, 501.

And see further as to loss of profits, *infra*, I, e.

c. General and special damage.

88. Conversion; pleading: In an action to recover damages for the conversion of goods, plaintiff should not be allowed to recover anything for special loss by reason of being deprived of the goods, unless such damage is alleged and proven: *Inman v. Ball*, 65-543.

89. Personal injury; mental pain; pleading: Damages for mental pain may be allowed in an action for personal injury without being specially pleaded, they being the natural and inevitable result of such injury: *Gronan v. Kukkuck*, 59-18.

90. General damages in slander: General damages are such as the law implies or presumes to have accrued from the slander. Special damages are such as really take place but are not implied by law. But whether general or special they must be the natural and proximate though not the necessary con-

Pain, suffering and mental anguish.—Profits.

sequence of the act complained of: *Georgia v. Kepford*, 45-48.

41. But desertion of a husband by his wife, and the expense of defending a divorce suit brought by her, are not natural and proximate consequences of speaking slanderous words concerning her, and cannot be considered in computing the damages resulting from such slander, in the absence of proof that such results were intended: *Ibid.*

d. *Pain, suffering and mental anguish.*

42. **Future suffering:** While an injured party is entitled to recover damages for future physical suffering, even if the injury is not of a permanent character, such allowance must be limited to such suffering as is reasonably certain from the evidence will occur, and it is error to allow the jury to give damages for such as may occur: *Fry v. Dubuque & S. W. R. Co.*, 45-416.

43. **Mental suffering**, not arising directly from bodily suffering or disability, may constitute a ground for actual damages, and the jury may, in a proper case, give exemplary damages: *Parkhurst v. Masteller*, 57-474.

44. Mental anguish arising from the nature and character of an assault is an element of compensatory damages in an action for such assault: *McKinley v. Chicago & N. W. R. Co.*, 44-314; *Lucas v. Flinn*, 35-9.

45. **Pain and suffering** constitute an element of compensatory damages: *Reddin v. Gates*, 52-210.

46. *So held* where the pain and suffering arose from actual physical injury: *Ferguson v. Davis County*, 57-601.

Such damages may be shown without being specially claimed: See *infra*, §§ 235, 236.

47. **Injury to the feelings:** Although in a proper case damages may be recovered as compensatory for injury to the feelings, nevertheless, *held*, that threats by a conductor not shown to be maliciously or wantonly made, to eject a passenger for refusing to pay an additional sum required for failure to procure a ticket, followed by the payment of such sum by the passenger, was not sufficient ground for a verdict of punitive damages against a railway company, even though it appeared that failure of the passenger to procure a ticket was due to no fault on his part

but to the fault of the *Chicago, R. I. & P. R. Co.*

48. Where plaintiff is entitled to exemplary damages it is error to say that they may make a difference for pain and suffering, as a consequence of injuries complained of: *Chicago, R. I. & P. R. Co.*

49. While physical and mental suffering caused by an injury are proper elements in determining the amount of damages, they are not to be compensated on the ordinary meaning of that word, but stand as lights around the facts to show more clearly the extent of the injury: *Collins v. Council Bluffs*, 35-

50. In an action by an individual for personal injuries to intangible interests, pain and suffering or grief are not to be recovered: *Rose v. De R. Co.*, 39-246; *Donaldson v. M. R. Co.*, 18-280.

51. But if the action is brought by an injured party before his death, and his administrator is substituted, pain and suffering may be recovered as though the injured party had brought the action to a termination: *Illinois Cent. R. Co.*, 36-462.

e. *Profits.*

52. **Speculative not allowable:** In computation of damages, all calculations must embrace speculative profits and losses, and the nature of the case will determine what is fully excluded: *Drake v. Chicago, R. Co.*, 63-302.

53. Speculation as to the future success of a business, etc., *held* not allowable in a particular case: *First Nat. Bank v. Man*, 69-693.

54. **Breach of contract:** Where a railway company contracted with a farmer to deliver to such elevator a certain rate per bushel, and the elevator refused to accept the grain shipped over its road, the railway company was not liable, as according to contract, the elevator were entitled to recover the full value of the grain would have resulted had the contract been carried out: *Richmond v. L. R. Co.*, 33-422.

55. If the profits specified

Profits.

rectly and certainly resulted to plaintiff, had defendant performed his contract, then the refusal to perform and the deprivation of these profits is a direct injury to plaintiff, damage for which is properly measured by the amount of such profits. The fact that the circumstances of the case are such that the amount of damage is not susceptible of being rendered absolutely certain is not ground for denying the plaintiff the right to recover any amount whatever: *Richmond v. Dubuque & S. C. R. Co.*, 40-264.

56. No general or uniform rule can be established as to whether loss of profits is to be taken into account in computing damages. The facts in each particular case must be considered before a determination of that question can be reached, for the reason, if no other, that for breaches of contract there can be no recovery of damages except such as arise naturally and such as the parties may reasonably be supposed to have contemplated at the time the contract was entered into: *Gibson v. Fischer*, 68-29.

57. In actions for tort defendant should respond in damages to the full extent of the wrong, and in such case compensation should be the rule; but while this is so, remote damages should not be allowed, but only such as are sustained or caused by the wrongful act: *Ibid.*

58. Therefore, in an action for damages by reason of back-water being thrown from defendant's dam upon plaintiff's dam, *held*, that the loss of earnings and profits by reason of the capacity of plaintiff's mill being lessened might be shown in evidence: *Ibid.*

59. Expected benefits not allowed: The measure of damages for breach of contract to perform services is not what the benefit which plaintiff would have derived from such service would have been, but the actual value of the services: *Gantz v. Clark*, 81-254.

60. The fact that plaintiff had a particular contract not known to defendant, under which he could realize from the property contracted to be sold to him a larger amount than the market value, cannot be considered in estimating the damage for failure to deliver according to contract: *Brown v. Allen*, 35-206.

61. Commission on sales: Where a person is employed to sell goods on commission and

the employer fails to furnish goods according to contract, perhaps the person employed may recover for loss of profits which he might have made if the goods had been furnished, at least if the quantity to be furnished was a definite amount and the demand was practically unlimited; but where the territory is limited and the goods are of a kind for which there is not a regular consumption or demand, the measure of damages for failure to furnish goods according to contract will be the loss of time caused to the plaintiff, not taking into account the profits which might have been made or the demand for the article within the territory: *Howe Machine Co. v. Bryson*, 44-159.

62. In estimating the amount of damages sustained by an agent of a sewing machine resulting from a breach of the contract by the company to furnish machines, the value of agent's time during the period of his employment under the contract, estimated without reference to the profits, with reasonable expenses added, less the sum actually earned during the time, will be the measure of damage: *Wilson Sewing Machine Co. v. Sloan*, 50-367.

63. In an action for damages for breach of a contract, under which plaintiff was to have the exclusive privilege of selling certain property for defendant within certain territory, *held*, that the damage recoverable was the proper proportion of the price of the property sold and delivered by the defendant within such territory in violation of the contract, and should not include such proportion of sales contracted in which delivery was not made through fault of the vendees: *Hall v. Stewart*, 58-681.

64. Contract to furnish materials: Where plaintiff and defendant entered into an agreement by which plaintiff was to carry on the cooper trade and defendant was to furnish the material necessary therefor, the manufactured products to be turned over to defendant at a certain price, it appearing from the contract that one inducement thereto was that plaintiff was without means of procuring such material, *held*, in an action for damages for failure of defendant to furnish material as agreed, that plaintiff might be allowed damages estimated upon the net earnings of the factory if it had been kept

Profits.—Interest.—Continuing damage.

employed, it appearing that material might have been procured and furnished by defendant: *Taft v. Tiede*, 55-370.

65. Prospective value: Failure to deliver a telegraph message, by which the purchase of property is defeated, will entitle the party injured to no greater damages than the difference between the price of the property as it might have been bought and its market value at that time. A subsequent increase in value cannot be considered: *Pennington v. Western Union Tel. Co.*, 67-631.

66. Breach of contract to supply gas: Where plaintiff had entered into a contract with defendant to supply the latter with gas, and defendant had thereafter refused to receive or pay for gas under the terms of the contract, and the parties then entered into an agreement by which plaintiff was to have the privilege of shutting off the gas until the question of the validity of the contract could be determined, and that no existing rights of either party should be affected thereby, *held*, that such agreement did not preclude the plaintiff from recovering for the profits which would have accrued from furnishing gas under the contract subsequent to the time of making such agreement: *Davenport Gas, etc., Co. v. Davenport*, 15-6.

67. Interference with water-power: In an action for damages caused by the stoppage of plaintiff's water-power mill by reason of back-water from defendant's dam, *held*, that the measure of damages was the cost of furnishing other power to supply the power lost by reason of defendant's acts, so far as was necessary to manufacture all the goods that could be sold at a profit, and not the profit on the additional goods which might have been manufactured, it not appearing that the mill could have been run to its full capacity at a profit: *Decorah Woolen Mills Co. v. Greer*, 49-490.

68. But in such a case interruption in the use of the mill and diminution of profits on that account may be alleged and shown: *Gibson v. Fischer*, 68-29.

f. Interest.

69. From time of loss: Where damages result from breach of a contract of bailment, the value of property lost becomes an indebtedness from the day of the loss, and interest

is recoverable thereon: *W. R. Co.*, 27-22.

70. This is so where the property is capable of exact compensation in case of destruction of grade and quality: *Arthur v. R. Co.*, 61-648.

71. In case of breach of contract: Notes had been given for the purchase of personal property and the possession of the vendee at the rate of interest to be allowed for breach of warranty that borne by the notes: *Beardsley*, 37-9.

72. To be estimated in damages: Interest is a common and legal element of damage, and in the absence of the contrary, it will be presumed that the jury took it into consideration in the damages resulting from the sale of real estate and quality, when the representations is set up by the counter-claim in the foreclosure of money mortgage: *W. R. Co.*, 22-49.

73. In an action for damages: Interest should not be added to the damages and assessed as a part of the damages, but may be considered as an element of damages under the rule which permits the jury in order to arrive at that which is just and lawful compensation for the damages sustained: *Richmond v. Dubois Co.*, 33-422, 502.

74. While the jury in an action for injury to property: In an action for injury to property by negligence of a railway company, the jury may include interest in their verdict, and the court to render judgment on the verdict including interest: *Garret v. W. R. Co.*, 36-121.

Further as to INTEREST, see *g. Continuing damage actions.*

75. Trespass: Where there is a continuation of a trespass, the action is limited to the time of the latest fresh action will lie for the continuation: *Close v. Samm*, 1-1.

Continuing damage; successive actions.—Joint damage; contribution.

76. **Nuisance:** Where a nuisance is of such nature that its continuance is necessarily an injury, and it is of a permanent character, so that it will continue without change from any cause but human labor, there the damage is an original damage and may be at once fully compensated: *Powers v. Council Bluffs*, 45-652.

77. The rule that every continuance of a nuisance is a fresh nuisance, for which a new action will lie, does not apply where the damage arises from negligence combining with a natural cause, however gradual the operation of that cause, if it produces a nuisance necessarily resulting in damages: *Ibid.*

78. In such case successive actions are allowable only where the defendant is continuously in fault: *Ibid.*

79. Therefore, *held*, that an action against a city for the improper construction of a ditch which by the action of natural forces, without any intervention of human agency, would in time encroach upon plaintiff's land, accrued at the time of the original construction of the ditch, although plaintiff's land was not thereby immediately damaged, and that the statute of limitations against such action then commenced to run: *Ibid.*

80. Where the damages sued for resulted from the diversion of a stream of water on plaintiff's land by defendant's railway embankment, *held*, that the right of action for the entire prospective damage accrued at once, and having been once made the ground of an action, the question was *res adjudicata* and successive actions would not lie: *Stodghill v. Chicago, B. & Q. R. Co.*, 53-841.

81. Where a party seeks to recover from a city for damages from water cast upon his lot by reason of the failure of the city to construct and maintain culverts to allow the spread of overflowed surface water, and the insufficiency of the culverts constructed, it is erroneous to allow damages on the theory that the injury is permanent; but the case should be tried on the theory that upon a determination of its duty in the premises, the city will put in and maintain the proper culverts, and that if subsequent damages result from its failure to do so, another action for damages may be maintained: *Morris v. Council Bluffs*, 67-848.

82. A purchaser of premises cannot be held

liable to an adjoining property owner for damages existing on the purchased premises before the purchase, unless the nuisance is one which could and should be abated and the purchaser is at fault in not abating it: *Bizer v. Ottumwa Hydraulic Power Co.*, 70—.

Further as to NUISANCES, see that title.

83. **Damages from failure to observe injunction:** Where, in an action to restrain defendant from interfering with the natural flow of water in a water-course, damages were asked and an injunction was granted but no damages given, *held*, that a subsequent action for damages resulting from a failure of the defendant to comply with the injunction was not barred: *Benson v. Connors*, 63-670.

h. Joint damage; contribution to damage.

84. **Sales of intoxicating liquors:** Where different parties contribute by sales of intoxicating liquors to the same person to a habit of intoxication and not merely to specific acts of intoxication, they are not to be considered as joint wrong-doers, but as individually liable for the injury occasioned by their acts respectively, and a settlement with one will not bar a right of action against another: *Jewett v. Wanshura*, 43-574.

85. Mere successive wrongs, being the independent acts of the persons doing them, will not constitute a joint liability although the wrongs may be committed against the same person: *La France v. Krayner*, 42-148.

86. In an action by a wife for damages for wrongful sales of liquor to her husband, it is error to instruct the jury that a defendant who has made such sales to plaintiff's husband, which produced or contributed to his habitual intoxication, would be liable for all damages sustained therefrom. One who contributes to the formation of habits of intoxication is liable only for the damages caused by his own act: *Richmond v. Shickler*, 57-486; *Ennis v. Shiley*, 47-552; *Engleken v. Webber*, 47-558; *Flint v. Gauer*, 66-696.

87. **Contribution by party injured:** The fact that a wife suing to recover damages resulting from the intoxication of her husband, caused by defendant, has given permission

Duty of party injured to prevent damage resulting

to the seller to supply the husband with what liquor he wants, will not defeat his recovery if it appears that such permission was given in the presence, and by the coercion of the husband: *Jewett v. Wanshura*, 43-574.

88. But she cannot recover if the intoxication is produced by her own acts: *Engleken v. Hilger*, 43-563.

89. **Party primarily liable:** While it is a general rule that no contribution can be enforced as between joint wrong-doers, yet there are exceptions in cases where the law looks upon parties as joint wrong-doers to the injured party, while as between themselves some of them may not be wrong-doers at all; as, for instance, where a railroad company is compelled to pay damages for animals injured by it which have come within its fence through an opening wilfully caused by a third person, the company having been compelled to pay the damages, may recover the damages from a third person whose wrong primarily caused the injury: *Chicago & N. W. R. Co. v. Dunn*, 59-619.

90. Thus a city which has been compelled to pay damages to a party injured by obstructions or excavations in its streets may recover from the party causing such obstruction or excavation: *Ottumwa v. Parks*, 43-119; *Sioux City v. Weare*, 59-95.

i. *Duty of party injured to prevent damage resulting.*

91. **Ordinary care and at moderate expense:** In case of breach of contract, if the injured party can protect himself from damage at a moderate expense and with ordinary effort he is bound to do so, and he can charge the delinquent party for such expense and effort only and for the damages which could not be prevented by the exercise of such diligence: *Davis v. Fish*, 1 G. Gr., 406.

92. If plaintiff, by the exercise of ordinary care and prudence, might have avoided or diminished the damage, and failed to exercise such care, he cannot recover for such damage as the exercise of ordinary care would have prevented: *Little v. McGuire*, 43-447.

93. Failure of a party to use due diligence in endeavoring to save himself from injury occasioned by the mistake of another will

defeat his recovery for such injury: *Leon Loan, etc., Co.*

94. Every person who is injured from the wrongful act of another is bound to use a reasonable effort to prevent the effect of the act: *Kiernan v. Scott*, 43-574.

95. One who has suffered injury from the failure of another to perform an act which he was bound to perform is not entitled to recover if by the exercise of reasonable care he might have prevented the injury: *Raridan v. Central Iowa R. Co.*

96. But held, that defendant is not exempted from liability for its negligence, because plaintiff's failure to prevent the failure of defendant to perform its duty constituting negligent failure and make provision for the consequences thereof: *Ibid.*

97. While, in general, a party cannot recover for an injury which is the result of the negligence of another, but where the negligence of another has been prevented by a slight effort or money, this does not constitute the immediate cause of the injury which could not have been prevented by the ordinary course of business: *Dolvin*, 68-757.

98. In an action against a party for so diverting a stream against plaintiff's land, damages, held, that the plaintiff is not using ordinary diligence to prevent the damage, where the damage has been done at a moderate expense and the negligence sufficient to claim: *Hoehl v. Muscatine*, 57-457.

99. In an action against a party for so diverting a stream against plaintiff's land, damages, held, that the plaintiff is not using ordinary diligence to prevent the damage, where the damage has been done at a moderate expense and the negligence sufficient to claim: *Hoehl v. Muscatine*, 57-457.

That contributory negligence is a bar to recovery, see NEGLIGENCE.

100. **Breach of contract:** A party cannot be allowed to charge another with negligence resulting from his own negligence. Therefore, held, that

Duty of party injured to prevent damage resulting.

ant had been guilty of a breach of contract in failing to furnish a new ferry-boat by the time specified in the lease of a ferry franchise, but it also appeared that plaintiff had been negligent in allowing the old boat to get out of repair and sink before the new boat was furnished, *held*, that the plaintiff could not recover from defendant any damages resulting from failure to deliver the new boat in time, which might have been obviated by reasonable care in keeping the old one in condition for use; *Hansen v. Kirtley*, 11-565.

101. Contract of employment: In an action for the breach by employer of a contract of employment, the employee must show the exercise of diligence in obtaining other employment: *Muller v. Fern*, 85-420.

102. Protection of property: It is the duty of all persons to protect their property if they can do so, and they can charge another person with only such damages as result or would have resulted notwithstanding such efforts, and the expense of and compensation for such efforts: *Van Felt v. Davenport*, 42-308.

103. Defects in machinery: It is the duty of a party to protect himself in so far as he can from loss or damage from breach of contract, and if he knows of defects in machinery furnished to him under contract before operations are commenced with such machinery, he cannot recover damages for delay, etc., caused by the defective operation: *Nye v. Iowa City Alcohol Works*, 51-129.

104. Construction of building: If it can be shown that one who claims damages for injury which would naturally result from the defect complained of in the construction of a building could have protected himself from damages at a moderate expense or by ordinary efforts, he can recover for such expense and efforts only and for the damage which could not be prevented by the exercise of due diligence: *Mather v. Butler County*, 28-253.

105. Furnishing machinery for sale: So *held* also in the case of a breach of a specific contract to furnish machinery for sale on commission: *Beymer v. McBride*, 87-114.

106. Ordinary, not slight, expense and diligence: That a person injured by the wrongful act of another might have pre-

vented such injury by moderate expense and ordinary effort will defeat his recovery for the injury suffered. It is erroneous to charge that he might recover unless the injury could have been prevented by slight expense and slight effort: *Simpson v. Keokuk*, 84-568.

107. The purchaser under false representations of diseased sheep cannot recover from the vendor damages which he might have avoided by the use of due care and skill; but *held* sufficient if he used reasonable care and diligence to obtain and apply such remedies as the experience and knowledge of sheep men in that community offered: *Sherrod v. Langdon*, 21-518.

108. Personal injuries; care in effecting cure: It is the duty of a person who has received personal injury to exercise reasonable care and diligence in effecting a speedy and complete cure, and for injuries and sufferings caused or enhanced by neglect to use such care, the person injured cannot recover from the party causing the injury: *Allender v. Chicago, R. I. & P. R. Co.*, 37-264.

109. A person who is injured through the negligence of another must make use of reasonable means to effect as speedy and complete a recovery as can reasonably be accomplished. He is bound to employ as a physician a person of such reputed skill as persons are accustomed to employ in such cases. But the fact that, after having employed such medical skill, his injuries are rendered more serious by reason of improper treatment will not prevent his recovery for the entire injury resulting: *Rice v. Des Moines*, 40-638.

110. All that is required in such cases is that the person injured shall have exercised such judgment and care as persons of ordinary prudence under like circumstances would exercise in the choice of a physician and the means to be used to effect a recovery. It is not required that such person shall employ the best surgical skill and the means best adapted to heal the injuries. These may not be within reach: *Collins v. Council Bluffs*, 82-824.

111. Expense of caring for injured stock: Where stock is injured by a railway company, and it does not appear that such company proposed or attempted to take charge

Duty to prevent.—Measure of.—In general.

of the injured animals, and it also appears that it was proper and necessary that they should be cared for, the owner may recover for the necessary expenses of taking care of and endeavoring to cure them after the injury has happened: *Finch v. Central R. of Iowa*, 42-804.

112. Expenses incurred in the exercise of ordinary efforts to prevent the damage, whether the efforts have been successful or not, should be allowed as an element of damage against the party who is liable for such damage: *Smith v. Chicago, C. & D. R. Co.*, 38-518.

113. Where a party in seeking to prevent loss which may accrue to him by reason of the negligence of another incurs expense, such expense is a proper matter to be considered in determining the amount of recovery for such negligence: *Raridan v. Central Iowa R. Co.*, 69-527.

114. Question for jury: In an action against a railroad for damages to crops from failure to erect a sufficient cattle-guard, it being claimed that plaintiff might, in the exercise of reasonable care, have prevented the injury or a part thereof, held, that the question as to whether, in the exercise of reasonable care, the plaintiff could have properly done what was necessary to prevent the injury, was a question for the jury: *Downing v. Chicago, R. I. & P. R. Co.*, 43-96.

115. Rule limited: Where one person does another an intentional injury, he cannot insist that the person injured shall, as a condition of recovery, prove that he could not have avoided or limited the injury: *Parkinson v. Parker*, 48-667.

116. While a party cannot recover damages which moderate expense and ordinary effort on his part would have been sufficient to prevent, yet the rule is not applicable to a case where large expense or extra effort would be necessary: *Little v. McGuire*, 38-560; *Smith v. Chicago, C. & D. R. Co.*, 38-518.

117. The law will not require the other contracting party to wholly perform the contract at a large outlay in order to reduce the damage which will otherwise result from a failure of the obligor to perform: *Varner v. St. Louis & C. R. R. Co.*, 55-677.

118. Where a land-owner agreed to con-

vey the right of way to upon the performance by the company, such that on failure to perform the owner might recover the right of way, and the cost of performing the c

119. When permanent to real property, the owner required to restore it to its even where possible and limited expense. The impose a burden of this injured party and thus escape full amount of the injury where the injury consists of a water-course upon the plaintiff abutting: *Finch* 389.

II. MEASURE OF

a. In general

120. Part payment: Where the claim of plaintiff has been the measure of his damage is such added to the amount he made the sum he was entitled to even though he files no claim: *McCracken v. Webb*

121. Pecuniary condition: The ability of defendant to pay shown for the purpose of damages, at least not where plaintiff is entitled to vindictive damages: *Chicago & N. W. R. Co.*, 26-3

122. As loss of marriage damages in action for breach of promise proper for the jury to consider as well as the social standing tending to show the condition of plaintiff would have security of the marriage, but that defendant will be able to pay awarded should have no jury in estimating the damages: *Griffith*, 32-409.

123. In an action to recover the pecuniary condition of plaintiff be shown, either by plaintiff or by defendant in mitigation: *Karney v. Paisley*, 13-89.

124. Whatever doubt there

Measure of.—In general.—Value.

as to the propriety of this rule if the question were a new one, it may now be considered the established rule in this state: *Herzman v. Oberfelder*, 54-83.

125. Aside from the exceptional cases of slander and breach of promise to marry, evidence of financial condition of defendant is not receivable, even when plaintiff is entitled to exemplary damages: *Guengerech v. Smith*, 84-848.

Plaintiff's financial condition, in actions for personal injuries, see *infra*, §§ 221-223.

Breach of promise of marriage: Measure of damages in action for, see that title.

126. In action upon a penal bond for condition broken, the amount for which the plaintiff was originally entitled to recover was the penalty. This severe rule of the common law was only mitigated by the practice of courts of chancery, which would not allow the creditor to take more than in conscience he ought. Very soon arose the practice enforced by legislation, requiring the plaintiff to assign breaches in his declaration, and the jury, on the trial, assessed such damages for the breaches assigned as the plaintiff on the trial might prove. Therefore no other sum can now be recovered on a penalty than that which shall compensate the plaintiff for his actual loss: *Gower v. Carter*, 3-244.

127. Under former statutory provisions, judgment on a penal bond was for the entire penalty named in the bond, with an assessment of damages proved to have been sustained by breaches thereof, the judgment for the penalty, in so far as it exceeded the damages, remaining as security for any further damage sustained: *Cameron v. Boyle*, 2 G. Gr., 154; *Nelson v. Gray*, 2 G. Gr., 397. (See now, Code, § 2728.)

128. Sureties on a bond are not liable thereunder, in damages for a breach thereof, further than to the extent of the penalty therein specified: *Hall v. Stewart*, 58-681.

129. **Apprehended injury:** The general rule is that where a person sustains an injury through the negligence of another, he is entitled to recover to the extent of the injury which the wrong-doer should reasonably have apprehended: *Pennington v. Western Union Tel. Co.*, 67-631.

130. Thus where an offer to sell goods at

a stipulated price was sent by telegram, and by reason of the negligence of the company was not delivered, *held*, that the measure of damages was not the difference between the price at which the property was offered and such greater price as the property would bring at the time the party losing the offer obtained knowledge of failure of transmission by reason of which it had not been made, such rule being applicable to the failure to perfect a contract by reason of non-delivery of the attempted acceptance, but not to a case of a proposition or offer not transmitted: *Ibid*.

131. Where the language of a telegram clearly imported that it related to shipping stock to market, *held*, that the telegraph company guilty of neglect in delivering the message was liable for the fall in price during the resulting delay in shipment: *Manville v. Western Union Tel. Co.*, 37-214.

b. Measure of value.

132. **In general:** Where two boats were constructed and operated together by a single crew, and one was injured, *held*, that the real damage was the difference between the value of the two boats and cargoes before and after the accident, and this might be determined from evidence of the comparative cost of transportation of the remaining cargo, and the state of the market at the place of injury, and all the circumstances upon which the value depended. Also, that the relative expense of running one or two boats might be considered in estimating the damage, and it was proper to take into account the nature of the cargo, its use and destination: *McCabe v. Knapp*, 28-808.

133. Where it appears that property, the value of which is in controversy, had a distinctly recognized market value, it might be proper to instruct the jury to allow the market value, but where it does not appear that it had a distinct market value, then it may be instructed to allow the fair value of the property: *Gere v. Council Bluffs Ins. Co.*, 67-272.

134. The measure of damages in an action by the landlord for rent, payable in grain, is its value when first demanded: *Safely v. Gilmore*, 21-588.

Measure of value.—For breach of contract.

135. Market value: An instruction explaining the term marketable value to be the amount for which the property would sell if put upon the open market and sold in the manner in which property is ordinarily sold in the community in which it is situated, *held* not erroneous: *Everett v. Union Pacific R. Co.*, 59-243.

136. Where the value of land was in question, and it was claimed that it was so situated that it would bring a greater price if laid off in town lots, *held* not proper to allow testimony as to how many lots could be laid off to the acre, the question being what it was worth in the condition in which it then was: *Ibid.*

137. In an action for failure to deliver personal property contracted for, the fact that the entire property undelivered could not have been purchased for immediate delivery in the market at the places where delivery was to have been made, at the time fixed for delivery, would not of itself establish the fact that there was not a market price for such property at such time and place: *Jemison v. Gray*, 29-537.

138. Value of life estate: In estimating the value of a life interest in land, it is improper to multiply the annual rental value of the premises by the expectancy of life. In such case the present worth is to be calculated, and no more: *Malli v. Willett*, 57-705.

139. Fencing right of way; cattle-guards: The measure of damages for breach of contract by a railway company to construct cattle-guards will be the difference in the rental value of the premises due to the failure of the company to comply with its contract: *Hull v. Chicago, B. & P. R. Co.*, 65-713; *Varner v. St. Louis & C. R. R. Co.*, 55-677.

140. In an action for damages for the destruction of crops caused by the failure of a railway company to construct a cattle-guard at the point where its track passes through the fence inclosing such crops, *held*, that the measure of damages would be the fair value of the crops less the necessary expenses of caring for and fitting said crops for market, from the time of the alleged injury, and if said crops were not entirely destroyed, the value of the portion saved should also be deducted from the market

value: *Smith v. Chicago*, 518.

141. Damages to crops

In an action against a railroad to recover damages occasioned by the backing of surface water on the plaintiff's land by reason of the bankment by a railway, *held*, that the measure of damages was the difference between the value of the premises before the backing and the value immediately after the backing, if it was not competent to show the value of crops of the plaintiff upon neighboring land: *I. R. I. & P. R. Co.*, 63-302.

142. In such case the jury is not entitled to consider, in determining the value of the crop at the time of the destruction, ever it may be presumed to have been sown by a careful person desiring to raise a crop.

143. A meadow is in the condition of permanent improvement and is a crop. Its value is partly determined by the fact that it possesses this character, and is not to be planted each year. In estimating the damage caused by a fire, *held*, that it was proper for the jury to allow the cost of the meadow to as good condition as before the fire: *Vermilya v. Chicago, B. & P. R. Co.*, 66-606.

144. Hedge: A growing hedge is worth more or less than the land on which it is; and *held*, that an instrument measuring the value of the destruction of a hedge is the value of the labor in raising and planting it from seed: *Williamson v. B.*

c. For breach of

145. Partial performance: If a party has done some work of some use and value for the employer or vendee, though not within the stipulated contract, the workman or vendor is entitled to be paid as much as the work is worth, making such reasonable allowance for the circumstances require: *Da Gr.*, 406.

146. Where a party sees to it that his services render

For breach of contract.

formance of an entire contract which he has failed to complete without proper excuse, his measure of recovery is confined to the price agreed upon by the parties under the contract, subject to a set-off of the damages sustained by the non-completion of the agreement: *Eyerlee v. Mendel*, 39-382.

147. Contract price: In an action for the value and price of work and material furnished under a special contract, the measure of damages, where there is no proof of extra work or charge increasing the expenses, is the contract price less any payments or damage suffered by the defendant in the execution of the work: *Corwin v. Wallace*, 17-374.

As to the right to recover part compensation upon partial performance of an entire contract, see **CONTRACTS**, XI, g.

148. Contract for services: Upon the failure of an employer to carry out the contract of employment for the time agreed upon, the employee is entitled to recover for the loss of time at the agreed or usual rate of wages, provided he has used diligence to secure other employment after the refusal of the employer to comply with his contract. The exercise of diligence by the employee in seeking other employment must be directly shown: *Muller v. Fern*, 35-420.

149. Reasonable value of services: Where a party is entitled to recover the reasonable value of services performed, he may show the wages actually paid for such services under the same circumstances, whether the wages so paid are under express or implied contract: *Jenks v. Knott's, etc., Mining Co.*, 58-549.

150. Difference between cost and contract price: The measure of damages for breach of a contract to deliver to an elevator all grain of a certain class, and pay for the handling thereof at the stated price per bushel, *held* to be the difference between the cost of handling the grain in the elevator and the price stipulated to be paid therefor: *Richmond v. Dubuque & S. C. R. Co.*, 26-191.

151. It would be a proper application of the above rule in a case where plaintiff, in order to handle the grain actually furnished him, kept himself in position to have handled what he did not receive, without additional expense, to say that the measure of damages

should be the price agreed to be paid for such handling, as the cost of handling would be nothing: *Ibid*.

152. Failure to perform conditions of stipulation: Where the owner of land agreed to convey the right of way thereover, on consideration of the railroad company performing certain conditions, as fencing, etc., *held*, that the owner's measure of damage for breach of the contract by the railroad company was the money value of the consideration withheld from him, and that such damage was not merely what it would cost to build the fence, etc.: *Varner v. St. Louis & C. R. R. Co.*, 55-677.

153. Where the action is for breach of contract in constructing a building in a specified manner, the measure of damage cannot be said to be what it will cost to procure the work to be done which is necessary to make the building conform to the terms of the contract. Such a rule, if applicable at all, would only apply where the building lacked certain particular items in order to complete it: *Smith v. Bristol*, 83-24.

154. Sale of good-will: Upon breach of a contract for the sale of the good-will of a business, coupled with an agreement not to resume the same business again in the same locality, the purchaser may recover damages to the extent that the seller, by resuming business, has injured the business of the purchaser: *Moorehead v. Hyde*, 38-382.

155. Mining lease: In an action for breach of contract to lease coal land for mining, *held*, that plaintiff was entitled to recover the value of the privilege or right which he held under the contract for a lease with defendant, to be determined in view of the quantity of coal, its depth below the surface, the amount of royalty to be paid, and other matters tending to show the value of the right to mine: *Chambers v. Brown*, 69-213.

In cases of lease of real property, see **LANDLORD AND TENANT**, §§ 63-67.

156. Commissions on sale of goods: Where plaintiff sued for breach of contract on the part of defendant in selling goods in the territory over which, by agreement, plaintiff was to have exclusive control of such sales, *held*, that an instruction that if such sales were shown, and it was further shown that the parties making purchases

For breach of contract.

from defendant would, but for the act of defendant in selling to them, have purchased through plaintiff, then the latter was entitled to recover the same proportion of the money received by defendant on account of such sales as he would be entitled to had he made the sales himself, *held* correct: *Hall v. Stewart*, 58-681.

157. Temporary breach of contract: In an action for breach of contract to furnish power, it appearing that such failure occurred only on one day by reason of a claim that plaintiff had not complied with the contract as to payment, and that on the same day this difficulty was adjusted, and on the next day defendant notified plaintiff that he was ready to furnish power according to contract, *held*, that plaintiff could only recover for that day's failure, and not for the value of the whole unexpired term: *Dye v. Wagner*, 49-458.

158. Indemnity: Where one party agrees with another to pay the latter's debt, the measure of damages in an action by the promisee for breach of the contract is the amount of the debt promised to be paid, although the promisee does not show that he himself has paid the same: *Stout v. Folger*, 34-71; and see *Lyon v. Aiken*, 70—.

159. Value at time of breach: The measure of damages for breach of the contract to maintain a side-track along certain lots, *held* to be the difference in value of plaintiff's lots with a side-track operated, and without it, at the time that the track was abandoned, with interest or not, as the jury should determine: *Amsden v. Dubuque & S. C. R. Co.*, 28-542.

160. Under a contract for the storage of wheat, in which plaintiff was to have five bushels of wheat for every one hundred stored, and he sought to recover the price of the wheat due him at the time of his demand, which was some years after the contract was performed, *held*, that the proper measure of damages would be the price of wheat at the time of the performance of the contract: *Miller v. Cassidy*, 25-323.

161. Where an elevator was erected under a contract with a railway company, by which grain shipped over the railway was to pass through the elevator, and at the end of the contract the elevator was to be purchased by the railway company at its appraised value, *held*, that the value of the elevator should be

estimated at what it would be if the company had fulfilled its contract to shipping the grain, and that it was actually worth in fact at the time that the company had repudiated the contract: *Richmond v. Dubuque*, 40-264.

162. Appraisal: Under a contract, *held*, that a suit for the value of the property was a proper method of appraisal required for determination of the amount to be paid therefor: *Ibid.*

163. Tort not to be included: In an action for refusal by a railway to transport plaintiff according to contract, that plaintiff could not recover for injury done him in being excluded from the company's car with undue delay: *Chicago & N. W. R. Co.*, 31-583.

164. In actions against carriers: The true rule as to the measure of damages for injuries to goods is the difference between the fair market value of the goods as delivered to the consignee and the value they would have been their fair market value at the date of delivery if they had been delivered while in the carrier's possession, in such condition as to be undamaged and delivered, but by incurring the necessary expense they may be made marketable, the expense of making them so is properly coming out of the measure of damages: *Illinois Cent. R. Co.*, 31-583.

165. In action against telegraph company: Plaintiff having had a contract for delivery of grain at a future date, was misled by an incorrect telegram transmitted to him by a telegraph company, and believing the price to be higher than which he was to receive upon delivery, he ordered the purchase of enough grain to cover his contract, although the price of grain at the time of such purchase was higher than that which he was to receive upon delivery, and before the time when he delivered the grain, the price fell below the price in the contract; *held*, that in an action against the telegraph company for damages, the measure of damages was the difference between the price which he was to receive upon delivery and the price which he was to receive upon delivery of his outstanding contract for grain: *Turner v. Hawkeye Tel. Co.*

In sales of land.—In sales of personal property.

166. Where, by reason of the negligence of a telegraph company in the delivery of a message, plaintiff was delayed for three days in the shipping of stock to market, and the message clearly imported the object for which it was sent, *held*, that the measure of damage was the difference between the market price of the stock on the day he might have put it upon the market if the defendant had been guilty of no negligence in delivering the message, and the market price at the time when he was able to put such stock upon the market: *Manville v. Western Union Tel. Co.*, 87-214.

167. Damage resulting by reason of the non-receipt of a telegram making an offer of property for sale would entitle a person who should have received the offer to no greater damage than the difference between the price of the property as offered and its market value at the day of the offer. The subsequent increase of the market value cannot affect the measure of damage: *Pennington v. Western Union Tel. Co.*, 67-681.

d. In sales of land.

168. In case of misrepresentation; exchange: The measure of damages in case of misrepresentation as to the quantity of land sold is the contract price of the amount of deficiency with interest, and it is proper to show the estimate placed upon lands exchanged at the time of entering into the contract for the purpose of showing the true basis of recovery: *Hallam v. Todhunter*, 24-166.

And see VENDORS, §§ 52-56.

169. One who sues for damages by reason of false representations as to the quality of lands purchased or exchanged, and does not put himself in a position to rescind the entire contract, can only recover the difference between the value of the land purchased at the date of the contract and the amount the land would have been worth at that time had it been such as it was represented to be: *Gates v. Reynolds*, 18-1.

170. Refusal to exchange: Under a contract to exchange lands, the plaintiff having conveyed his land under the contract, *held*, that the measure of damages for defendant's refusal to convey as agreed would be the value of the property he was to convey to

plaintiff under the contract: *Devin v. Himer*, 29-297.

171. Fraud of grantor in subsequently conveying: Where a grantor made a subsequent conveyance to a third person, of property previously granted to plaintiff, and such subsequent grantee established title to the property by reason of the defective recording of plaintiff's conveyance, *held*, that such grantor, being guilty of fraud, was liable to plaintiff in damages measured by the extent of the actual loss, embracing the enhanced value of the land at the time the prior title was defeated by reason of such fraud: *Burdick v. Seymour*, 39-452.

Further as to damages for failure to convey, see VENDORS, §§ 104-118.

e. In sales of personal property.

172. Manufactured article: Where everything has been done by a vendor which he is required by his contract to do, and the manufactured property in its completed condition is tendered, and the purchaser refuses to receive it, the vendor may recover the contract price and the title will vest in the purchaser; but where something remains to be done by the vendor which requires the co-operation of the purchaser, and the purchaser refuses to perform, the contract price cannot be recovered: *Moline Scale Co. v. Beed*, 52-307.

173. Sale on credit; place of delivery: The measure of damages for breach of contract to furnish goods on credit to be sold under an exclusive privilege, contracted for by the vendee, of selling within certain territory, is the difference in the contract price of the goods not furnished according to contract and their market value at the place where the party to whom they were to be furnished was to receive and sell them. The fact that delivery of the goods to the purchaser was to be made at the place of manufacture by delivery to a carrier would determine that as the place with reference to which such market value was to be ascertained: *Cook Mfg. Co. v. Randall*, 62-244.

174. Time: The rule of damages for failure to deliver goods at a specified time and place, where the price is not paid before the time for delivery, is the difference between the contract and the market price at the time

In sales of personal property.—In actions for tort.

and place fixed by the contract for delivery: *Davenport v. Wells*, 1-598; *Cannon v. Folsom*, 2-101; *Boies v. Vincent*, 24-387; *Jemison v. Gray*, 29-537; *Harrison v. Charlton*, 37-134.

175. Where there is a contract for sale of property, at a time fixed, at the market price, the purchaser cannot recover damages for failure of the seller to deliver. The buyer being required to tender the market price, there is no damage. It is immaterial that the quantity of property contracted for could not be had at the place designated for delivery: *Wire v. Foster*, 62-114.

176. If the contract is in writing no claim for a different measure of damages by reason of special circumstances can be sustained unless such extraordinary liability appears in the written contract: *Jemison v. Gray*, 29-537.

177. In such a case the following instruction was held to have been properly refused as not furnishing a rule for the estimation of damages, and liable to mislead the jury into assuming to fix the amount of damage without restraint: "Defendants are not to suffer loss by reason of any fault or failure of plaintiff, but they are to be made whole in an allowance of damages, and the jury are to take into consideration all the circumstances and allow the defendants such sum as, in their opinion, will protect the defendants from the direct consequences of plaintiff's failure, if any:" *Ibid*.

178. Where defendant had sold to plaintiff the lumber in a lumber yard to be delivered at a future time, with an agreement that no more lumber should be added to the stock, and defendant, without the knowledge of plaintiff, increased the stock of lumber, *held*, that plaintiff's recovery should be limited to the difference between the contract price and the market price at the time of delivery, and should not be measured by the difference between the contract price and the price at which, by some special agreement, plaintiff might have been able to procure the lumber wrongfully added to the stock of defendant: *Harrison v. Charlton*, 37-134.

179. Where the price has been paid: Where the price of a commodity contracted for has been paid prior to the time for delivery, the purchaser is not confined in his

action for damages for the difference between the market price on the day of recovery the highest market day for delivery and the time provided the plaintiff does not delay the institution of his suit: *Folsom*, 2-101; *Stapleton v. Gilman v. Andrews*, 66-116.

180. In such a case the plaintiff may recover the highest price between the day of delivery and either the day of commencement of the suit or the day of delivery: *Davenport v. Wells*, 3-242.

181. Breach of warranty. Measure of damages in an action for breach of warranty in a sale of personal property is the difference between the price paid and the value the goods would have had if it had been warranted and its actual value at the time of delivery: *Calkins v. Wells*, 31-333.

182. The rule is to ascertain the value of the article sold in its inferior condition at the time of its purchase and deduct from the contract price at the time of purchase: *Pitsinowsky v. Beaumont*, 31-333.

183. The measure of damages in an action for breach of warranty in a sale of machinery is the difference in the value of the machine actually was and what it would have been if it had been warranted: *McCormick v. Vreeland*, 31-333.

184. Where the warranty was made upon notice to the seller, after that the machine would not work, the buyer should have opportunity to return it and would take it back if it was made to work well, *held*, that the buyer and his hired hand caused by failure of the machine upon trial, was too remote to recover damages: *Ibid*.

And see SALES, §§ 226, 227.

As to measure of damages in actions for breach of covenants, see CONVEYANCES.

f. In actions for tort

185. Trespass: In an action for trespass in the wrongful taking of trees from plaintiff's land, where the defendant entered upon the

In actions for tort in general.

cently and by mistake, plaintiff should be limited to the recovery of the value of the trees as they stood and not their value after being cut and prepared for removal. In such cases plaintiff is not entitled to recover the enhancement of value consequent upon defendant's labor: *Striegel v. Moore*, 55-88.

186. The rule that a trespasser cannot be allowed compensation for enhancing the value of the property which is the subject of the trespass, *held* not applicable to a case where the owner of mineral land had mined mineral in violation of his lease to another, the measure of damages in such case being the value of the mineral raised less the rent and the reasonable cost of raising it: *Chamberlain v. Collinson*, 45-429.

187. In case of the wrongful conversion of personal property by a trespasser, he is not entitled to compensation for labor expended upon the property (such as husking and cribbing corn), notwithstanding his acts may have increased its value: *Stuart v. Phelps*, 39-14.

188. In an action against a trespasser for crops raised by him upon and removed from the premises wrongfully occupied, he may be required to pay the value of such crops without any allowance for the labor, expenses, etc., in connection therewith: *Kiernan v. Heaton*, 69-186.

189. Where a trespasser went upon lands and raised crops thereon, *held*, that he was liable in damages for the value of the crops thus raised, even after they had been severed and removed from the property: *Ibid.*

190. In such case, *held*, that the owner could recover nothing more than the value of the crops removed, and could have no allowance for injury to the property in breaking, it not appearing that it would be worth less in the market by reason of its having been broken, although it might be more liable to injury by washing, etc.: *Ibid.*

191. In an action for injury to real property, unaccompanied by malice or oppression on the part of the wrong-doer, and in the absence of a special liability created by statute, the plaintiff may recover, as damages, the sum which, expended for the purpose, would put the property in as good condition as it was in before the injury, with the

additional sums which would compensate the plaintiff for the use and enjoyment of the property, should he be deprived thereof by the injury, and the value of such property, as trees, buildings, and the like, which have been wholly destroyed and cannot be restored to the condition they were in before the injury: *Graessle v. Carpenter*, 70—.

192. In such a case it is error to instruct that the measure of damage is the difference in value between the premises as they were before the defendant entered upon them to do the action complained of and the value of the premises after such action was done: *Ibid.*

193. The general rule in respect to measure of damages in cases of trespass upon real property when personal property is removed therefrom is the market value of such personal property at the time of removal: *Brown v. Allen*, 35-306.

194. Damage to property from overflow: In an action for damages resulting from the overflow of property, the true measure of damage is the injury which the property sustains from successive overflows when they occur, unless it appears that with reasonable care and caution such injury could have been guarded against: *Van Pelt v. Davenport*, 42-308.

195. Suit being brought to recover damages for the wrongful flowing back of water upon plaintiffs' premises and for damages to their water-power, *held*, that they might recover for either, and an instruction which confined the recovery to damage to the water-power was erroneous as liable to mislead the jury: *Close v. Samm*, 27-503.

196. Injury to riparian rights: In an action for damages caused to an abutting owner by the filling of a channel on which the property abutted, *held*, that the measure of damages was the difference between the value of the property prior to such filling, and its value as depreciated thereby, and not the value of the use of the property before and after the filling: *Finley v. Hershey*, 41-389.

197. Male animal running at large: The damage to the owner of a thoroughbred cow, which is got with calf by an unpedigreed bull unlawfully at large, is the difference in value of the cow for breeding purposes be-

In actions for tort.—In actions for personal injury.

fore meeting the bull and afterward: *Craeford v. Williams*, 48-247.

198. Conversion: The value of the property at the time of conversion, with interest, is the measure of damages where there is no claim for special damages: *Cutter v. Fanning*, 2-580.

199. A party suing for a conversion cannot recover the full value of the property where it is shown that he has sold the property, after the conversion, to a person who would be liable for the conversion thereof, and received payment: *Pierce v. Evans*, 36-495.

200. If property is wrongfully taken from the owner and is thereafter destroyed by fire, the wrong-doer is liable for its value, not by reason of the fact of loss, but by reason of the tort preceding the loss: *Harper v. Dotson*, 43-232.

201. Notes or choses in action: The *prima facie* measure of damages for conversion of notes or choses in action placed in one's hands for collection is the amount of their face value at the time of demand made: *Latham v. Brown*, 16-118.

202. Where a chose in action has been improperly converted, the amount of the face value is *prima facie* the measure of damage: *Sadler v. Bean*, 37-439.

203. While the measure of damages for the wrongful conversion of negotiable paper is *prima facie* the sum recoverable thereon, yet where the market value may be shown by showing the insolvency of the maker or obligor, the measure of damages will not exceed the real or market value: *Callanan v. Brown*, 31-333.

204. Municipal bonds: While in an action for the conversion of a note or bill or other security, executed by an individual, the true measure of damages is the face of or the amount due upon such security, with interest from the conversion up to the trial, unless it is shown that the maker was insolvent, or the security illegal, or that it had been in whole or in part paid, and the market value of the note or security cannot be inquired into, yet, as municipal bonds are issued for the purpose of sale, they have a market value, and such value will be the measure of damages in case of conversion, unless some special circumstances are shown which give to the particular instrument in

question a special value, and such circumstances were shown in person dealing with reference to: *Burden*, 35-138.

205. Detention: In a wrongful detention of a warehouse interest, *held*, that the property is recoverable was legal warrant during the time of detention: *McCoy v. Cornell*.

206. Assault and battery: For damages for assault and battery, a plaintiff may recover for mental injury to business and social standing from violence, as a direct consequence: *Lucas v. Flaherty*.

g. In actions for personal injury.

207. Medical attendance: Damages are claimed on account of injury resulting from defendant's negligence, and one element of the damages is the expense of medical attendance. It appears that a physician whose services are lawfully rendered will presume an obligation to provide reasonable value of his services. Reasonable value may be established by the testimony of a physician, although the defendant's services have not been paid for: *Council Bluffs*, 52-698.

208. Attendance of relatives: It is *held* also proper to allow plaintiff who attended plaintiff while the injury complained of, what such attendance was worth, irrespective of whether plaintiff had a legal obligation to pay for it: *Ibid.*

209. Evidence of value of services: Expenses of care and attendance may be included as elements of damages in an action for personal injury, where there is no evidence as to the value of the services: *Muldorney v. Illinois Central*.

210. Damages must be proved: To allow the jury to consider the time, or for expense of traveling, in an action for personal injury, there is no allegation of loss, or evidence of any expense incurred for such purpose: *Gardner v. Burlington R. Co.*, 68-588.

In actions for personal injury.

211. There being no evidence upon which any estimate of the expense of medicine and medical treatment might be based, it is error to instruct the jury that they may allow damages for such expense, in an action for personal damages: *Eckerd v. Chicago & N. W. R. Co.*, 70—.

212. It is error to instruct the jury that plaintiff may recover reasonable expense incurred in nursing, when there is no evidence that any such expense was incurred: *Nichols v. Dubuque & D. R. Co.*, 68-782.

213. A party cannot recover damages by reason of the loss of time on account of assault and battery where there is no evidence that he lost any time in consequence of such injury: *White v. Spangler*, 68-222.

Profert of the person, see EVIDENCE, II, 5.

214. Expectation of life; life tables: The Carlisle life tables being standard tables on the subject of the expectation of life, are competent evidence: *Donaldson v. Mississippi & M. R. Co.*, 18-280.

215. In case of the death of a minor such tables are admissible to show his expectation of life beyond the period of attaining majority: *Walters v. Chicago, R. I. & P. R. Co.*, 41-71.

216. In an action against a railway company for negligence occasioning the death of plaintiff's intestate, the ordinary life tables are admissible in evidence in determining the amount of damage, notwithstanding the expectation of life in a dangerous employment, such as that of railroading, may not be so great as in ordinary cases: *Coates v. Burlington, C. R. & N. R. Co.*, 62-486.

217. Where there was some evidence that the death of plaintiff's intestate subsequent to the injury was the result of the injury, *held*, that it was not error to admit the life tables in evidence: *Simonson v. Chicago, R. I. & P. R. Co.*, 49-87.

218. In a case of personal injury of a permanent nature so as to disable one for life from doing labor, the length of time the injured party would probably live is proper data to be considered by the jury in determining the amount of pecuniary damage sustained, and the Carlisle tables are admissible to show the expectancy of life: *McDonald v. Chicago & N. W. R. Co.*, 26-124.

219. "Expectancy in life" is different from "expectancy of life." The former phrase means one's probable employment, conditions, etc., during his life: *Rice v. Des Moines*, 40-638.

220. The fact that, in an action to recover damages to the estate of a person whose death is caused by the alleged negligence of a railway company, life tables are not introduced in evidence, will not render the allowance of damages by the jury for such death improper, it not being claimed that the amount of damages allowed is excessive: *Beems v. Chicago, R. I. & P. R. Co.*, 67-435.

Life tables not receivable in action by wife to recover damages for causing intoxication of husband, see INTOXICATING LIQUORS, § 195.

221. Value of plaintiff's services; defendant's financial condition: In an action for damages for personal injury, it is competent to show the nature of plaintiff's business and the value of his services in conducting it, as a ground of estimating damages; but unless plaintiff is entitled to exemplary or vindictive damages for a malicious injury, the ability of the defendant to pay cannot be shown to increase the damage: *Hunt v. Chicago & N. W. R. Co.*, 26-863.

222. But the nature of plaintiff's employment and his dependence thereon for support, as well as the value of his services, and therefore his financial condition as making him dependent upon his services for support, may properly be shown in evidence: *Moore v. Central R. of Iowa*, 47-688.

223. Condition in life of person injured: The value of the life of a person killed by negligence is not, in the light of pecuniary considerations, affected by his method of life in relation to his indifference to comforts usually prized by others: *Walter v. Chicago, D. & M. R. Co.*, 39-83.

224. Occupation, earnings, etc., of person injured: Where the jury is guarded by instructions against an allowance of improper damages, in an action for the death of a person, and the recovery is limited to such damage as the estate suffered in a pecuniary way, it seems proper to allow evidence to be introduced as to the occupation, annual earnings, age, health, habits, family and estate of the deceased: *Donaldson v. Mississippi & M. R. Co.*, 18-280.

In actions for personal injury.

225. In an action for damages resulting from personal injury sustained in the service of a railway company, *held*, that it was proper for plaintiff to testify as to what wages he was receiving at the time of the accident, and as to whether he was incapacitated, as the result of the injury, from doing the kind of work he had been accustomed to do: *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50-656.

226. In connection with proof of the earnings of the person injured it is proper to show the condition of his health, his aptitude and qualifications for business and his habits of industry, his habits with reference to the use of intoxicating liquors, and in regard to anything else which affected his prospective earnings and savings. But proof of the average personal expenses of men in his condition in life at the place where he lived is not admissible. That the person injured was dependent upon his earnings is a circumstance to be considered as bearing upon the probable continuance of his industry. Also, as bearing upon the question of his necessities, *held*, that the fact that his step-father had driven him from home and was not good to him, was admissible: *Simonson v. Chicago, R. I. & P. R. Co.*, 49-87.

227. In an action by an administrator for damages to the estate from the death of intestate from personal injuries it may be proper to show that deceased was a married man, but evidence of the number of his children is not admissible: *Beems v. Chicago, R. I. & P. R. Co.*, 58-150.

228. The estate of the person killed by negligence is entitled to recover what, according to the evidence, would have been the probable pecuniary benefit to the estate, had his life continued. Circumstances proper to be considered in such cases stated: *Kelley v. Central R. of Iowa*, 5 McCrary, 653.

229. In an action for damages, resulting from personal injuries, interfering with the prosecution of plaintiff's business, he may prove what he could earn per year by his personal exertions prior to the injury, and that from the time of the injury to the time of the trial he has been incapacitated from business, it also appearing that the injury is of a permanent character: *Rice v. Des Moines*, 40-638.

230. Loss of time of married woman, in an action for damages, cannot recover for loss of earnings. Evidence shows that she was engaged in the operation of a business separately from her husband: *Tuttle v. Chicago, R. I. & P. R. Co.*, 58-431.

231. Pecuniary condition of plaintiff, in an action against a city for damages resulting from injury to a physician from injury to his eyes, on account of defects in a street, which rendered him unable to practice his profession, it is not incumbent upon the plaintiff to testify that he had no other source of support except his earnings: *Stafford v. Oskaloosa*, 58-431.

232. Chance of promotion, in an action for damages, evidence as to the earnings of the decedent being received in a past action for the purpose of showing what he could have recovered by the estate if he had not died, and it appearing that he was employed as a fireman, and that it was not proper to permit the evidence to the effect that firemen on defendant's engines, when they had sufficient experience, and had acquired a skill, were sometimes promoted to the position of engineers, and when so employed they received an increased compensation for services, it being shown that the decedent was at the time of his death a fireman, and not a steam engineer, nor possessed of the qualifications for that employment: *Brown v. Chicago, R. I. & P. R. Co.*, 64-652.

233. Speculative profits, in an action for damages, the jury should consider the decedent's situation, life, habits, etc., and give full pecuniary compensation for the loss resulting to his estate. While much is left to their discretion, they are not authorized to found upon mere speculation as to the probable fortune of deceased: *Ross v. Valley R. Co.*, 39-246.

234. Physical suffering, in an action for damages, a plaintiff is entitled to recover damages for physical suffering, even if the injury is of a permanent character, and the chance for future suffering may be small, such as it is reasonably expected to be, and the evidence will occur, and it is the duty of the jury to give damages for

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cur: *Fry v. Dubuque & S. W. R. Co.*, 45-416.

235. As mental pain is a natural and inevitable result of personal injury, damages therefor may be proven without being specially claimed: *Gronan v. Kukkuck*, 59-18.

236. Mental suffering arising from actual physical injury inflicted may properly be considered in estimating compensatory damages: *Ferguson v. Davis County*, 57-601.

Further as to damages for pain and suffering, see *supra*, I, d.

237. In an action by an administrator for injury to the estate of his intestate by reason of his death, there is no basis for damages for pain and suffering or for the grief of his relatives. Compensation for the pecuniary loss to his estate is alone to be allowed: *Rose v. Des Moines Valley R. Co.*, 39-246; *Donaldson v. Mississippi & M. R. Co.*, 18-280.

238. Where an action for personal injuries is brought by the party injured, in which compensation for pain and suffering is claimed, and afterward, upon his death, his administrator is substituted as plaintiff, such administrator can recover the same damages for pain and suffering which might have been recovered if the action had been carried on by the original plaintiff, but the rule would be different if the action had been commenced after the death of the person injured, for the benefit of his estate: *Muldoney v. Illinois Cent. R. Co.*, 36-462.

239. Permanent injuries: It is proper to instruct the jury that if they find the injury to be of a permanent character they should consider that fact as an element enhancing the damages: *Collins v. Council Bluffs*, 32-324.

240. Prospective damages: It is proper to instruct the jury that if they find plaintiff entitled to damages for injuries from which he has not recovered, they should consider the length of time it will require him to recover as appears from the evidence: *Gronan v. Kukkuck*, 59-18.

241. Future suffering: In an action for damages resulting from personal injuries, the plaintiff should be allowed compensation for such consequences as it is reasonably certain will result to him in the future from the injury: *Stafford v. Oskaloosa*, 64-251.

242. Discretion of jury: An instruction saying that elements of damage to plaintiff's power to earn money, and for pain and anguish suffered by reason of injury, are from necessity left to the sound discretion of the jury, held not erroneous, there being nothing in the charge to take from the consideration of the jury evidence given in regard to the character of the injury, the pain suffered and the disability probably incurred: *Morris v. Chicago, B. & Q. R. Co.*, 45-29.

243. Where the court instructed the jury in an action for damages for negligence occasioning the death of the plaintiff's intestate, that the damages would be such a sum, not to exceed the amount claimed, as it appeared from the testimony would compensate for the loss sustained by the injuries, taking into consideration all the testimony having a bearing thereon, held, that the instruction should have been more explicit as to the measure of damages to which plaintiff was entitled: *Coates v. Burlington, C. R. & N. R. Co.*, 62-486.

244. Injuries to estate of minor by reason of his death: Under our statute (Code, § 2526) allowing an action for a wrongful act, causing death, to be brought by the administrator for the benefit of the estate, the administrator of a minor can recover damages for injury to the estate only from the time the decedent would have become of age. Action for damages for the time to lapse between the time of death and the time of coming of age must be brought by the father: *Walters v. Chicago, R. I. & P. R. Co.*, 36-458.

245. Damages to the estate only are to be recovered in such action and not those resulting to the next of kin: *Sherman v. Western Stage Co.*, 24-515.

246. In such a case the damages to the estate, when there is no property except the probable fruits of personal earnings of the minor if he had lived, are limited to those which would arise at and after his attaining majority. For such earnings as would accrue prior to his attaining majority, the father, or in case of abandonment by the father, the mother, could maintain an action: *Lawrence v. Birney*, 40-377.

247. But in such actions the administrator is not to be limited to the recovery of nominal damages: *Walters v. Chicago, R. I. & P. R. Co.*, 41-71.

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248. Expectation of life: In such a case, life tables are admissible to show the expectancy of life of the minor beyond majority. The fact that nothing can be recovered for the period up to majority does not affect the rule for determining the probability of life after that period: *Ibid.*

249. Father's pursuits: It is not error in such an action to allow the jury to take into consideration the pursuits in which the father is engaged, as indicating the general nature of the pursuits which deceased would have probably followed had he lived and his life and strength been preserved, and for the purpose of determining what the business and earnings of deceased would probably have been: *Ibid.*

250. Present worth of future earnings: In determining the damages to be recovered in an action by a parent for the death of a minor child, the jury should be instructed to take into consideration, not only the amount of probable earnings but the fact that such earnings would have been in the future, and should render a present verdict for such amount as would be equivalent to a sum to be earned at the time the services would have been rendered: *Benton v. Chicago, R. I. & P. R. Co.*, 55-496.

251. Excessive damages: So many elements properly enter into the computation of damages in a case of personal injury, and so much is necessarily left to a wise and well guarded discretion, that it is difficult to weigh nicely and determine with mathematical exactness the amount which should be paid for bodily suffering, mental anxiety and the like: and to warrant the setting aside of a verdict for such damages as being excessive, the excess should be so flagrant as to strike the mind at once as being the result of bias, prejudice, or passion: *Russ v. Steamboat War Eagle*, 14-363; *Collins v. Council Bluffs*, 32-324; *Locke v. Sioux City & P. R. Co.*, 46-109.

252. The allowance of fifteen thousand dollars to a woman receiving permanent injuries in her ankle from an accident caused by accumulation of snow upon a sidewalk, held excessive, it appearing that her earnings could not exceed from three hundred to five hundred dollars per year, and plaintiff was allowed the option of accepting a reduc-

tion to ten thousand dollars. *Collins v. Council Bluffs*

253. Where plaintiff was suffering intense pain being put to great expense and being crippled for life by reason through the negligence of a dangerous place, held, seven thousand dollars. *Rowell v. Williams*, 29-2

254. A verdict of nil for personal injuries to plaintiff depriving him of the ability to work, which his sufferings had been most intense, held, narrant the court in setting it aside. *Deppe v. Chicago, R. I. & P. R. Co.*

255. A verdict of ten thousand dollars in favor of the administrator of the estate of a man whose death was caused by the negligence of a street car company, and who was twenty-four years of age, and whose expectancy of life at the time of his death was a man of temperate habits, whose net earnings at the time of his death were \$263, held, to indicate passion or prejudice, and the verdict was set aside. *plaintiff was directed to render a verdict of five thousand dollars or more, as the jury saw fit.* *Rose v. Des Moines & N. W. R. Co.*, 39-246.

256. A verdict of \$4,500 for damages to a man from fifty-seven to sixty years of age, in the enjoyment of good health, of industrious habits, and of good property, held, not excessive. *Chicago, D. & M. R. Co.*

257. Where it appeared that the plaintiff's ankle had been injured and he was permanently lame, held, \$7,500 was not so excessive as to constitute error or prejudice. *Rice v. Chicago, D. & M. R. Co.*

258. Where a railway company's negligence caused the death of a man in good health, thirty-two years of age, and worth \$10,000, held, that a verdict of five thousand dollars against the company for damages was not excessive. *Central R. of Iowa*, 40-564.

259. Where it appeared that the plaintiff sustained a serious permanent injury by being struck by a street car, and projecting her to great suffer-

In actions for personal injury.—Exemplary.

her for some of life's duties, *held*, that a verdict for \$5,500 was not excessive: *Allen v. Chicago, R. I. & P. R. Co.*, 43-276.

260. Where an injury to a man thirty years of age, in an employment yielding him \$540 per year, and in a business in which there was a regular system of promotion, permanently disabled him in that employment, and probably tended to shorten his life, *held*, that a verdict of \$11,000 was not excessive: *Belair v. Chicago & N. W. R. Co.*, 43-662.

261. Where decedent's net income was about \$450 per year, his habits good, and his expectancy thirty-six years, *held*, that a verdict for \$7,000 for injuries from negligence of defendant causing death was not excessive: *Locke v. Sioux City & P. R. Co.*, 46-109.

262. A verdict for \$1,425 in favor of a brakeman in the employ of a railroad company, for injuries to his hand, and a partial loss of the use thereof, *held* not excessive: *Kline v. Kansas City, St. J. & C. R. R. Co.*, 50-656.

263. Where, as the result of an injury, the plaintiff, a farmer fifty-two years of age, had his leg broken near the hip, resulting in a false joint, causing a permanent injury, disabling him from labor, *held*, that a verdict for \$8,000 damages was not so excessive as to justify an interference on appeal: *Funston v. Chicago, R. I. & P. R. Co.*, 61-452.

264. Where the plaintiff suffered a compound fracture of the arm and a partial dislocation of the elbow, resulting in permanent injuries, *held*, that a verdict for \$4,000 damages was not excessive: *Van Winter v. Henry County*, 61-684.

265. Where a woman in good health and in the prime of life received severe injuries such as to disable her for life and cause hernia, which is incurable, *held*, that a verdict for \$3,500 for such injuries was not excessive: *Calder v. Smalley*, 66-219.

266. Where the injuries received from being put off a train at a dangerous place were very great, the thigh being fractured in two places, endangering life, and permanent injury resulting, *held*, that \$7,000 was not excessive damages, although plaintiff was a poor man with small earnings: *Marion v. Chicago, R. I. & P. R. Co.*, 64-568.

267. A verdict for twenty-five thousand dollars on account of personal injuries recovered against a county for negligence in the erection and maintenance of a county bridge by reason of which such person received injuries from which he afterwards died, *held* excessive, and *held* that the plaintiff should have the option of accepting fifteen thousand dollars or submitting to a new trial: *Cooper v. Mills County*, 69-350.

III. EXEMPLARY DAMAGES.

268. Punitive rather than compensatory: Exemplary damages are awarded by way of punishment to the wrong-doer, and not to compensate the person injured or as a matter of right: *Sheik v. Hobson*, 64-146.

269. An instruction to the jury that "exemplary damages are given whenever elements of oppression or fraud or malice enter into the commission of an offense; and in such cases the jury are not limited to actual compensation, nor are they required to scrutinize very closely the amount of their verdict, but blending together the rights of the injured party and the interests of the community, they may give such a verdict as will compensate for the injury and at the same time inflict some punishment upon defendant for his wrongful act, protect society and manifest the detestation in which the act is held by them," *held* not erroneous except as to the last clause, but that the error in this clause was sufficient to warrant a reversal: *Hendrickson v. Kingsbury*, 21-379.

270. Exemplary damages will not be limited to compensation for injury to the feelings, etc., of the plaintiff, resulting from the wrongful act of defendant: *Parkhurst v. Masteller*, 57-474.

271. Not a punishment: The damages allowed in a civil case by way of punishment have no necessary relation to the penalty incurred for the wrong done to the public, but are called punitive damages by way of distinction from pecuniary damages, and to characterize them as a punishment for the wrong done to the individual. The awarding of punitive damages, therefore, does not conflict with the constitutional inhibition against inflicting two punishments for the same offense: *Hendrickson v. Kingsbury*, 21-379.

Exemplary.

272. One may be liable for punitive damages for malicious injury although the offense is one punishable under the criminal statutes: *Garland v. Wholeham*, 26-185; *Guengerich v. Smith*, 36-587; *Ward v. Ward*, 41-686; *Reddin v. Gates*, 52-210.

273. It is not error to instruct the jury that among the objects to be attained by the allowance of exemplary or punitive damages is the punishment of the wrong-doer, and as an example whereby others may be deterred from the commission of like wrongs: *Ward v. Ward*, 41-686; *Root v. Sturdivant*, 70—.

274. Such damages need not be limited to such an amount as will operate alone upon the offender in restraint of future conduct: *Ward v. Ward*, 41-686.

275. The fact that defendant has been punished by fine in a criminal prosecution for the same act cannot be taken into consideration in assessing the damages: *Reddin v. Gates*, 52-210.

276. Not allowable without actual damage appears: Where a party does not show himself entitled to actual damages, he cannot be entitled to recover exemplary damages: *Myers v. Wright*, 44-38.

277. Discretionary: In all actions in which exemplary damages are allowed, the allowance thereof rests in the sound discretion of the jury: *Goodenough v. McGrew*, 44-670; *Root v. Sturdivant*, 70—.

278. They should not be instructed that any fact should go in aggravation of exemplary damages: *Goodenough v. McGrew*, 44-670.

279. The discretion of the jury is not unlimited, and where, in an action to recover damages for maliciously causing the levy of an execution on the goods of plaintiff, the actual damages shown did not exceed \$50, while the jury returned a verdict of \$700, *held*, that the amount of punitive damages was excessive and the judgment was set aside: *Saunders v. Mullen*, 66-728.

280. Against personal representative: Although by statute a right of action for a tort survives against the personal representative of a deceased wrong-doer, yet exemplary damages cannot be awarded in an action against such personal representative: *Sheik v. Hobson*, 64-146.

281. Financial condition
Aside from the exceptions and breaches of promise of financial condition of defendant recoverable even where plaintiff's financial condition is poor, exemplary damages: *G* 34-348.

Further as to defendant's financial condition, see *supra*, §§ 121-122.

282. When proper: In actions for fraud, malice, gross negligence, or intentional tort, plaintiff's financial condition is not a bar to recovery of exemplary damages: *Williamson v. We* 171.

283. Allowable for
Exemplary damages may be awarded to the proprietor of a stagecoach who was grossly negligent in the known drunken driver, if the driver's conduct to the plaintiff has resulted in injury with intent with design to do the same: *Frink v. Coe*, 4 G. 171.

284. In an action for the treatment of a disease, damages are not limited to actual damages, but may allow such further damages as the jury think proper under the circumstances: *Miller*, 13-128.

285. Malice essential: Exemplary damages cannot be recovered unless malice is averred and proven: *John I. & P. R. Co.*, 51-25; *John* 739.

286. The recovery of exemplary damages should be made dependent upon the proof of the wrong-doer. It is not sufficient that the wrongdoer's act was done: *Curl v. Chicago*, 51-63-417.

287. Evidence of malice: In an action for injury in inflicting damages, if the plaintiff's complaint, it should be shown that the defendant was wilful and malicious, and that the purpose to harass or injure was the purpose, not sufficient that the defendant believed his act wrongful: *65-543*.

288. Therefore, where a chattel mortgagee claimed were not covered by a mortgagee, who was not taken, and did not offered to return them

Nominal.—Liquidated; penalty.

identified, *held*, that exemplary damages as against him were without warrant: *Ibid*.

289. Malice is implied from the doing of an unlawful and injurious act with a wrong motive, and the allegation that a wrongful act is wilfully done means more than that it was merely purposely or intentionally done: *White v. Spangler*, 68-222.

290. Where an officer deposited public money in his individual name, and his creditor, knowing the nature of the fund, caused it to be used and applied to his debt, *held*, that he did not thereby render himself liable for exemplary damages: *Long v. Emsley*, 57-11.

291. As bearing upon the question of malice, all the circumstances surrounding the transaction as a whole may be introduced. The intent to assault may be inferred from the excessiveness of the battery which immediately followed: *Reddin v. Gates*, 52-210.

292. Advice of counsel will go to rebut the idea of malice, but defendant must prove that he submitted the case to an attorney, and was advised by said attorney that he had a good cause of action. If this fact is proved it will defeat exemplary but not actual damages: *Raver v. Webster*, 3-502.

293. Trespass: Whether plaintiff, in an action of trespass upon real property, can recover exemplary damages, *quære*: *Armstrong v. Iowa Falls & S. C. R. Co.*, 34-502.

294. Malice, such as to warrant punitive damages, is not to be inferred from the mere fact of an unintentional trespass upon uninclosed and unimproved land: *Kiernan v. Heaton*, 60-136.

295. The mere fact that a trespass is unlawful does not give rise to a presumption of malice warranting the assessment of exemplary damages: *Brown v. Allen*, 35-206.

IV. NOMINAL DAMAGES.

296. When allowed: When a right is invaded or a wrong done and no particular damage is proved, the law implies or infers nominal damages: *Foster v. Elliott*, 33-216.

297. Failure of the jury to award nominal damages to a party entitled thereto will not be a ground for a new trial where substantial justice has been done: *Watson v. Van Meter*, 43-76.

298. Nor will such failure to award nominal damages, if plaintiff is entitled to no more, be sufficient ground for reversing a judgment: *Portman v. Klemish*, 54-198; *Rowley v. Jewett*, 56-492; *Phoenix Ins. Co. v. Findley*, 59-591; *Wire v. Foster*, 62-114; *Watson v. Moeller*, 63-161; *Norman v. Winch*, 65-263; *Case Threshing Machine Co. v. Haven*, 65-359.

299. Although failure to allow nominal damages is not a ground on which a judgment can be reversed, yet where a verdict for actual damages is set aside upon motion in arrest of judgment, when nominal damages might properly have been recovered, such action of the court will be held erroneous upon appeal: *Carl v. Granger Coal Co.*, 69-519.

300. Instructions: Where an instruction was to the effect that the plaintiff might recover the actual damage sustained, and nominal damage if the wrongful acts had been proved, *held*, that the instruction was not misleading as limiting all the damage to nominal damage: *Bradley v. Redmond*, 42-452.

V. LIQUIDATED DAMAGES; PENALTY.

301. How distinguished: The sum named in a bond will be treated as a penalty or as liquidated damages, dependent upon the nature of the agreement, the surrounding circumstances, the intention of the parties, and the reason and justice of the case: *Beard v. Delaney*, 35-16.

302. Though the parties may call the sum fixed a penalty, or give it no name, or style it liquidated damages, the court will construe the stipulation as the one or the other, depending upon the nature of the agreement, the intention of the parties, and other facts and circumstances: *Foley v. McKeegan*, 4-1; *McIntire v. Cagley*, 37-676; *Wolf v. Des Moines & Ft. D. R. Co.*, 64-380.

303. Whether the sum mentioned shall be considered as the one or the other is a matter of construction, in which the court may be aided by matter extraneous to the writing: *Foley v. McKeegan*, 4-1.

304. But if it is doubtful whether the parties intended that the sum specified should be a penalty or liquidated damages, courts incline to treat the contract as creating a penalty to cover the damages actually sus-

Liquidated; penalty.

tained by breach of the stipulation, and not as liquidated damages: *Ibid.*

305. Where a contract contains covenants for the performance of several things, and one sum is stated as the amount to be paid upon a breach of the contract, and the things to be performed are of unequal value, the sum designated must be considered as a penalty: *Ibid.*; *Lord v. Gaddis*, 9-265.

306. *Held*, that a stipulation in a note that the maker should pay an attorney's fee of ten per cent., was in the nature of liquidated damages and not a penalty: *McIntire v. Cagley*, 37-676.

307. Where from the nature of a contract the extent of damages which would result from a breach thereof is difficult or impossible of ascertainment, the fact that the parties have deliberately named a sum which should be treated as liquidated damages on the happening of the breach, is of the highest importance in determining the question. The fact that the nature of the contract is such that breach thereof would cause damages and injury which would be matters of mere conjecture is also to be taken into account: *Wolf v. Des Moines & Ft. D. R. Co.*, 64-380.

308. Therefore, where, in a contract for the construction of a railroad, it was stipulated that the company might, upon the termination of the contract on account of failure of the contractor to comply with its provisions, retain ten per cent. of the contract price, as liquidated damages, *held*, that the sum thus provided for should be treated as liquidated damages and not as in the nature of a penalty: *Ibid.*

309. Where a contract in the form of a promissory note, payable in one hundred bushels of corn, concluded with the provision: "Ohio corn is estimated at twenty dollars," *held*, that the damages for non-performance were intended to be stipulated at twenty dollars, which sum, and not the value of the corn at the time fixed for delivery, was the measure of damages: *Hise v. Foster*, 17-23.

310. The law, of itself, attaches to the breach of every contract the right to recover proper damages; and the fact that the parties have expressly provided for the payment of

some of the damages can be a waiver of the right to recover damages which the law permits: 40-166.

311. Where, on the sale of a business, the seller stipulating a certain sum of damages in case of his resuming the same town, *held*, that the sum must be treated as liquidated damages, not as penalty, the action would be sustained being a matter of conjecture: *Sto*, 62-524.

312. Also, *held*, in such a case, the remedy for breach of the bond was by an action on the bond, the purchaser of the good-will being entitled to an injunction to prevent conditions: *Ibid.*

313. Where a penalty is stipulated in a contract, the action to proceed upon the contract is not limited by the amount of the penalty: *Foley v. McKeegan*, 4-1.

314. In case of a contract of money simply, a stipulation of a sum in default of performance will be regarded as a penalty, and not as a covenant for liquidated damages: makes no difference that the sum may be made to a party other than whom the contract is made: 37-351.

315. Where parties contract for the delivery of a certain number of bushels of corn, and the sum to be paid for as the corn was upon an estimate of the value of the corn, ten per cent. of the contract price retained as security for the performance of the contract, *held*, that the sum reserved was a penalty, and not liquidated damages: *Jemmis*, 537.

316. Usury: No damages can be recovered for non-payment of money contracted between the parties, notwithstanding the provisions of the law fixing the rate of interest: *Gower v. Carter*, 3-24.

As to penalty in bonds: 128.

What constitutes.

DEDICATION.

1. Highways existing by: A highway may exist in this state arising from dedication and prescription, notwithstanding the provisions of the statute for the establishment of highways: *Mosier v. Vincent*, 34-478; *Baldwin v. Herbst*, 54-168.

2. In parol: There may be a dedication to public use without deed or other written evidence, but in such case the intent to dedicate should be clear, and the acts and circumstances relied on to establish such intention unequivocal and convincing: *Morrison v. Marquardt*, 24-85.

3. The mere oral declarations or acts of an owner of property will warrant the presumption of a dedication, though followed by public enjoyment for ever so short a time, the time of enjoyment being immaterial: *Fisher v. Beard*, 32-346.

4. Parol evidence showing the existence of a highway by proof of dedication or by acts *in pais* showing a right in the public arising from prescription is not secondary but primary evidence: *Mosier v. Vincent*, 34-478.

5. Dedication *in pais*; evidence: Dedication *in pais* is sufficient to establish a highway, in the absence of grant or dedication by matter of record: *Getchell v. Benedict*, 57-121.

6. Taxation of land which is adversely used as a highway will not destroy the easement which the public holds by virtue of such adverse use, but if the owner is in possession holding adversely to the public, the levy of taxes would be inconsistent with the claim that it is a public highway: *Ibid*.

7. The fact that a person holds title to property as described in a plat in which a certain highway claimed by prescription is not recognized does not estop him from asserting, as one of the public, his rights in such highway: *Ibid*.

8. Where there were facts sufficient to show a dedication *in pais* before the filing of the plat of a city, *held*, that the owner could not by the filing of such plat limit the dedication already made: *Ibid*.

9. Declarations of a party holding an estate upon condition which may become void upon the failure of the grantee to comply with the terms of the grant may be shown to establish an *animus dedicandi* in connection with

acts of the party after the title has reverted to him: *Ibid*.

10. A highway may derive its existence from the dedication of the land over which it passes to the public use by the owner of the soil, and the acceptance thereof by the public for such use. No particular formality is required. Any act of the owner clearly indicating an intention to dedicate is sufficient: *Wilson v. Sexon*, 27-15.

11. No particular form is necessary for the dedication of land for a highway. Dedication is a conclusion of fact to be drawn by the jury from the circumstances of each case, and the question as against the owner of the soil is, whether the *animus dedicandi* sufficiently appears from all the facts: *Manderschid v. Dubuque*, 29-73.

12. Use by the public for any period of time is not the only circumstance that will raise a presumption of dedication. Other facts may be shown from which an intention to dedicate may be inferred: *Ibid*.

13. Unless there is something to indicate otherwise, it will be presumed that a street, opened and constructed by the owner of land in a city, was established with a view of dedicating it to public use: *Ibid*.

14. The fact that a party owns land on both sides of a highway used by the public, and permits such use, does not prove a dedication by him: *Davis v. Clinton*, 58-389.

15. Where commissioners, appointed to make partition of real estate, treated a portion of the property as part of the public street, and made partition of the remainder, *held*, that the acceptance of the partition by the parties estopped them from denying that the portion not divided was a portion of the street: *McGregor v. Reynolds*, 19-228.

16. The fact that a road is established and traveled by the public as a public highway, and recognized by the county authorities and supervisors as an established road, and that bridges are built thereon by them, is sufficient, until rebutted, to show the existence and public character of the road in an action against the county for injuries received thereon: *Brown v. Jefferson County*, 16-339.

17. Where it appeared that a highway was opened by the owner of the land for a public highway and that the public used it, and that repairs were made thereon by the road

DEDICATION.

Acceptance.

supervisor, *held*, that it must be regarded as a highway established by dedication: *Gerberling v. Wunnenberg*, 51-125.

18. Where the owner of land through which a way had been traveled for a long period of years entered into an agreement with his neighbors that if they would build a portion of the fence necessary to inclose his land along such highway, he would permit it to be used as a highway as long as it should be wanted, *held*, that such agreement showed the *animus dedicandi*, and that the right of way was thereby established: *Hugh v. Haigh*, 69-382.

19. Where, by request of the land-owner, the supervisor in opening an established highway deflected therefrom upon the land of such owner, and the road as thus opened was used and worked by the public, *held*, that the action of the owner amounted to a dedication as to that portion outside of the established highway: *Ryan v. Kennedy*, 62-37.

20. Where a highway is regularly laid out, a use slightly different from the line as established cannot be claimed by dedication. The fact that the road is established in the ordinary manner is conclusive that there is no dedication: *State v. Welpton*, 84-144.

21. The fact that a highway is dedicated to the public in lieu of another highway over the same owner's land which dedicator believes to be a valid and legal highway, when it is not, will not authorize the rescission of the dedication after improvement and use by the public of the new highway. The abandonment of the *de facto* road and the surrender of the inchoate but valuable right of the public therein render the new road one *de jure*, not to be questioned by the dedicator in an action of trespass. Whether he could have relief in equity upon putting the public in *statu quo. quere: Marratt v. Deihl*, 37-250.

22. Long use and long acquiescence in such use by the owner of the land are in themselves evidence of dedication. How much weight they are entitled to depends upon the situation of the land, the nature of the right claimed and exercised by the public, knowledge of the owner, etc.: *Onstott v. Murray*, 22-457.

23. The essential elements of a dedication are *animus dedicandi* and use by the public. Unless both are shown, a highway by dedica-

tion is not established:
ham, 65-248.

24. Acceptance by public.—Highway by dedication if accepted by the owner or authority; acceptance of the highway as dedicated to public: *Manderschid v. State*, 67 Cal. App. 2d 809, 143 P.2d 539, 540; *State v. Tucker*, 36-485; Si-

25. Acceptance of the is quite as essential to the highway as dedication. If the public is not bound to accept the grant, but if it accepts using and improving it, it continues to be inclosed. After a period of prescription, a right of portion does not vest in the public. *Burlington*, 68-296.

26. Especially is proof necessary in an action for neglect of the highway in repair: *Mabique*, 29-73.

27. Acceptance may be shown by public use, repairs, etc., presumptions as to acceptance use in an action against a railroad for negligence as in the land-owner for obstructing highway. *Ibid.*

28. In an action for injury by negligence of a municipality for keeping a highway in a state of disrepair, the absence of repairs made by the municipality subsequent to the injury is conclusive evidence to show that the city had not exercised due care in the highway as dedicated:

29. Acceptance may be by public use or by taking the highway by public authority. In a particular case, there was not sufficient use or taking of the highway by public authority to constitute acceptance: *State v. Tucker*.

30. Where the streets, plat from which lots were hilly, rough land, and were used by the public for that than thirty years, held, the and use after the expiration sufficient to constitute an dedication: *Shea v. Ottum*

31. Prescription; use
way cannot be supported

Prescription distinguished.

using the word in its technical sense. Prescription can only be for things which may be created by grant, and as there can be no grant to the public, therefore the public can hold no right by prescription. However, long and uninterrupted occupation by the public as a highway is evidence of its dedication to the public use, and upon evidence of this character a highway may be supported: *State v. Kansas City, St. J. & C. B. R. Co.*, 45-189.

32. The distinction between dedication and prescription is this: The former is established by proof of an act of dedication and of the *animus dedicandi*, without reference to the period of use, while in the latter long user is an essential ingredient: *Ibid.*

33. The use and occupancy of the premises as a highway for a sufficient length of time under a claim of right gives to the public the right to continue such use: *Overman v. May*, 35-89.

34. To establish a highway by prescription there must be an actual public use, general, uninterrupted, and continued for the period of the statute of limitations under a claim of right: *State v. Tucker*, 36-485; *State v. Green*, 41-693.

35. In a particular case, *held*, that the use was not sufficiently public or general, or under claim of right, to establish a highway by prescription: *State v. Tucker*, 36-485.

36. The use must be of such character and affected with such circumstances as to evidence a claim of the public of a right to do so, such as exercising jurisdiction over the road, working it, or spending money in its repair: *State v. Green*, 41-693.

37. In a particular case, *held*, that the existence of gates and bars upon a road was sufficient to show that public use thereof was not under a claim of right and that there was no intention to dedicate the road as a public highway: *Ibid.*

38. Erection of fences or bars by the owner of the fee across the road will not, without maintaining them a sufficient time, absolutely rebut the presumption of dedication or prescription, but it would tend in that way: *Baldwin v. Herbst*, 54-168.

39. Where the sole question is whether the highway has been established by uninterrupted and constant use for the period of

limitation, the question of necessity becomes altogether unimportant except in so far as it may reflect light upon and explain the nature of the use: *Hougham v. Harvey*, 40-684.

40. Much stronger evidence of a prescriptive right by the public is required where the road is a mere local or neighborhood road than if it were a thoroughfare or part of an acknowledged highway between towns or leading to a town and as such constantly traveled: *Ibid.*

41. In a particular case, where the road extended through unimproved and vacant land between a creek and inclosed prairie, and the travel was confined to no part of the line, but constantly changed and varied, and it appeared that it was never improved and was at various times interfered with without objection, *held*, that sufficient use to establish a prescription was not shown: *Ibid.*

42. Where the public has traveled and used a road different from the established highway for the period of prescription, it acquires a right by prescription in the road thus traveled: *Kelsey v. Furman*, 36-614.

43. In an action to enjoin a supervisor from removing a fence under a claim that it was in the public highway, *held*, that the fact that a fence in the same location was built at the time the highway was laid out, twenty years previous, and was then on the line of the highway, was sufficient evidence to support plaintiff's claim, although by subsequent location of the highway from field-notes, the fence appeared to be within the highway: *Cattell v. Wilhelm*, 39-288.

44. Presumption as to width: There is no presumption that a highway originating by prescription is of the width required for a highway laid out by the state. The width of such highway is a question of fact for the jury to determine from the facts and circumstances. The court cannot, as a matter of law, say that the road acquired by prescription or use is of any particular width beyond such portion as is actually used by the public: *Davis v. Clinton*, 58-389.

45. And where, in the dedication of a highway, it was stipulated that it should be established as it had been used, the width would be that of the way as it should be found to be: *Hugh v. Haigh*, 60-382.

Use as evidence of adverse possession; knowledge.

46. Use as evidence of adverse possession: Although adverse possession cannot be established by use alone (Code, § 2081), it may be established by showing dedication, and use immediately following such dedication: *Gerberling v. Wunnenberg*, 51-125.

47. Under the statutory provision just referred to, it is not sufficient, in order to prove a highway by prescription, to establish use alone. The fact of adverse possession must be shown by evidence distinct from and independent of the use, and it must be shown that the person against whom the claim is made had express notice thereof: *Zigefoose v. Zigefoose*, 69-391; *State v. Mitchell*, 58-567.

48. The statutory provision that use shall not be admitted as evidence of adverse possession does not apply to highways existing by prescription before the statute took effect; *Baldwin v. Herbst*, 54-168.

49. An instruction as to the amount of use necessary to establish prescription and dedication, to the effect that no particular amount of travel would be necessary, and that the use would be sufficient if the highway was traveled as much or about as much as it would have been had it been laid out according to statute, and traveled as much as the circumstances of the surrounding population and their business required, held correct: *Ibid.*

50. Knowledge, acquiescence or consent of the land-owner: Dedication of a highway to the public may be established by use for more than ten years by the public and the mere acquiescence therein by the owner: *Gear v. Chicago, C. & D. R. Co.*, 39-23.

51. Long use by the public and work done upon the highway from the time of such use with the knowledge and consent of the land-owner is sufficient evidence of the dedication: *Hougham v. Harvey*, 93-208.

52. In order that use of the highway for the period of prescription shall give rise to the presumption of dedication, it must be shown that such use was with knowledge of the owner: *Daniels v. Chicago & N. W. R. Co.*, 35-129; *State v. Green*, 41-698.

53. But knowledge of an agent who has no such authority as would make a grant of the easement by him in the name of the owner valid will not constitute sufficient notice: *Daniels v. Chicago & N. W. R. Co.*, 35-129.

54. The fact that the owner for a long time permits the public under a claim of right to use the land authorizes the inference that such use was commenced and continued with his consent; but the knowledge of the use must be proved, or there must be sufficient ground on which the law can raise a presumption that the owner had known of the use to which his land was devoted: *State v. Kansas City, St. J. & C. B. R. Co.*, 45-189.

55. Long-continued notoriety of the fact of use is usually sufficient to raise a presumption of law that persons affected thereby or interested therein had full notice of the matter. But in the case of wild and uninclosed land, and especially where the owner is a non-resident or resides at a distance, notorious use as a highway will not be presumed to have been known to him. User alone, therefore, of uninclosed or wild prairie or timber land will not support a prescription: *Ibid.*

56. If the public, with the knowledge of the owner, has claimed and continuously exercised the right to use the land for a public highway for a period equal to that fixed by the statute for bringing action of ejectment, its right to the highway is complete, in the absence of proof that the road was so used by leave, favor or mistake. But the land-owner is not concluded, who, without knowledge that a claim of right is being asserted on the part of the public, allows his neighbors to pass over his land for their mere accommodation, to obtain fuel and for like purposes. In determining whether there is an implied or presumed acquiescence on the part of the owner, very much depends upon the location of the road, the amount of travel, the nature of use by the public, the rights asserted by it, the knowledge of the owner, and like circumstances: *Onstott v. Murray*, 32-457.

57. Use by mistake: Where the public use a way supposed to be on a certain line laid out, but which by mistake is not on such line, the claim of right is confined to the line as laid out, and a use beyond such line is not adverse: *State v. Welpton*, 34-144; *State v. Gould*, 40-372; *State v. Schilt*, 47-611.

58. Non-user: Where a highway is established by proper and legal authority, mere non-user thereof will not operate to defeat

For streets, public grounds, etc., in city.

it, especially where there is no use of the premises adverse to that in the public: *Darries v. Huebner*, 45-574.

59. But where a portion of a highway legally established, but never actually opened, was inclosed and cultivated and adversely occupied by adjoining land-owners for more than ten years, *held*, that the right of the public in such portion of the highway was thereby extinguished: *Ibid*.

60. Where a highway was established across certain lands by the written consent of the owner, and seven years afterwards he sold the land to plaintiff, and it appeared that during this time the land was inclosed and used as a part of the farm, and so continued to be used by plaintiff for seven years longer, the travel going a little aside from the land for the purpose of crossing a stream at a ford, the stream not being fordable at the point where the established road crossed it, *held*, that the right of the public in the highway as established was not lost, there being nothing to indicate a holding by the original owner, at any time after such grant, adverse to the public: *Wenzel v. Kempmeier*, 53-255.

61. Dedication for street, public grounds, etc., in city: Where the general government as owner laid off land into lots, streets, squares, etc., for a city and sold lots according to such plan, *held*, that the sale and conveyance implied that a grant or covenant to the purchasers of the lots that the streets and public squares should forever be open to the public, free from all claims of proprietors inconsistent with such use, but that the dedication did not operate as a grant to the city of the fee in the streets, and that such fee title passed to the adjoining property owners, subject to the easement of the public, with the power in the city to regulate the public use of such streets and squares, as the representative of the public, for the purpose of vindicating the public right: *Dubuque v. Maloney*, 9-450.

62. Where, by act of congress, certain land in front of a street leading to a navigable river was reserved from sale for public use, with the declaration that it should remain forever free for highways and other purposes, *held*, that such dedication was in the nature of a contract which could not be

afterwards abrogated or repealed, and that the municipal corporation, succeeding to the title of the land thus reserved, held it for the same purposes and could not divert it for other purposes: *Cook v. Burlington*, 30-94.

63. Where the owner of land laid out an addition to a city and by the plat donated and granted the "streets, alleys and public grounds, etc., for public purposes," and designated a tract of ground next to the river as "Reserved Landing," *held*, that the city did not by such donation acquire the right to the property so reserved: *Grant v. Davenport*, 18-179.

64. Where the plat of a town contained a square designated "public square," and lots were sold on the faith of such plat, and afterwards another plat was duly made and recorded changing the designation of the square, with the representation to prior lot purchasers that it was for the public use and control, and the city took possession of the square as public property, *held*, that the corporation had the title to such square for the use of the public and in trust for it: *Pella v. Scholte*, 21-463.

65. Where a square was marked upon a plat as "market square," and thereafter treated by the city as public, and was for that reason omitted from taxation, which facts were known to the dedicator and those claiming under him, *held*, that the circumstances showed an intention to dedicate such square to the public: *Scott v. Des Moines*, 64-488.

66. Also *held*, in such case, that the designation of the square as "market square" did not show an intention to impose on the dedication a condition that it be used only for market purposes and that a market building be erected thereon: *Ibid*.

67. A dedication of a portion of land covered by a city plat for public purposes, as by marking it "public square," which dedication is accepted by the city, imposes upon the city an obligation to hold the property in trust for the uses and purposes expressed, and the city cannot divert it to another and different use, as by selling it to private owners: *Warren v. Mayor of Lyons City*, 22-851.

68. Where a plat contained a square marked "church square," *held*, that such designation did not constitute a dedication

 Platting of streets.—When party deemed in default.

to any particular church association although but one such association existed at the time in the town: *Christian Church v. Scholte*, 2-27.

69. Under the evidence in particular cases, *held*, that subdivisions of plats marked as "square," or "public square," were dedicated to the public: *Livermore v. Maquoketa*, 35-358; *Bayliss v. Supervisors*, 5 Dillon, 549.

70. Where lots are sold with reference to a town plat, upon which certain land is dedicated to public use, the purchasers acquire, as appurtenant to their purchases, a vested right to the use of the land dedicated to public use, of which they cannot be divested by the owner who made the dedication, or by the town in its corporate capacity: *Leffler v. Burlington*, 18-361.

71. Where lots were sold in accordance with a plat upon which a certain square was marked "public square," and afterwards "garden square," and with the representation that the square was for the public, and was to remain forever an open and unoccupied space, and the value of lots sold was increased thereby, *held*, that a purchaser could enjoin the grantees of such square from platting lots and erecting buildings thereon: *Fisher v. Beard*, 40-625.

72. Platting of streets: Where a plat shows the dedication of two streets at right angles to each other, the square formed by their intersection will be presumed to be included in the dedication: *Yost v. Leonard*, 34-9.

73. To make out a dedication of a street appearing on a plat, it is necessary to show, not only that the plat was laid out, but also that the party laying it out had title thereto: *Porter v. Stone*, 51-373.

74. Dedication in a town plat *held* sufficient, in a particular case, to convey the fee in a street indicated thereon: *Stange v. Hill & West Dubuque St. R. Co.*, 54-669.

75. Evidence in a particular case, *held* not sufficient to establish a dedication of a street which was shown by the last of three plats filed, but not by the first two under which the rights of the parties attached: *Manchester v. Hoag*, 66-649.

76. When lots are sold on a plat bounded by a street or highway, that fact raises a strong presumption of the intent to pass the

soil to the center of the street or highway, and it will so pass unless the highway be expressly excluded: *Dubuque v. Maloney*, 9-450.

77. But this rule is not applicable to land reserved for public use on the opposite side of the highway from the lots thus sold, and the lot purchaser acquires no title to the land thus reserved: *Cook v. Burlington*, 30-94.

78. Where the owner of land on both sides of a section line platted the portion on one side, locating a street on such line, *held*, that the dedication covered the entire width of the street: *McDunn v. Des Moines*, 34-467.

79. The existence of a plat, even though defective, and the sale of lots, bounded according to its descriptions, by the persons platting the land, establish the *animus dedicandi* as to the streets laid out on such plat, which, when shown, is sufficient to establish a way or street, even though there be no record of such plat made in the form prescribed by law: *Shea v. Ottumwa*, 67-39.

DEED.

See CONVEYANCE.

DEED OF TRUST.

See TRUSTS.

DEFAULT.

I. WHEN PARTY DEEMED IN DEFAULT.

II. SETTING ASIDE DEFAULT.

III. EFFECT OF DEFAULT; JUDGMENT.

I. WHEN PARTY DEEMED IN DEFAULT.

1. What constitutes: When a party seeks to prevent his adversary from a hearing upon the merits, he ought to show that such adversary has failed to comply with some statute or some special or general rule of court: *Wright v. Howell*, 24-150.

2. Failure to file pleading: A pleading is in time to prevent default if filed previous to the actual entering of the default, in the absence of express rules to the contrary: *Davis v. Brady, Mor.*, 101.

3. Where an answer was filed some eighteen days after the time allowed for filing of answer by agreement of parties, but some

When party deemed in.

months before the next term of court, and in answer to an amended petition setting up a new cause of action, and in pursuance of an order of court made in vacation upon application extending the time, but without notice to the adverse party, *held*, that there was no abuse of discretion on the part of the court in refusing to grant default on motion: *Redfield v. Miller*, 59-393.

4. Under the showing in a particular case, *held*, that it was not error to refuse a motion for default for want of answer and allow an answer to be filed: *Walker v. Hutchinson*, 50-364.

5. In a suit against joint defendants: Judgment by default should not be entered in an equitable action against a portion of defendants when one of them has on file a demurrer or answer going to the merits of the action as to all of them: *Jenkin v. McCully*, Mor., 447.

6. Final judgment should not be rendered against one of two joint debtors by default so long as an answer by one of them going to the validity of the cause of action remains undetermined: *Campbell v. McHarg*, 9-354.

And see *infra*, §§ 90-93, and JUDGMENTS, §§ 34, 35.

7. Failure to answer an amended petition will be accompanied with the same consequences as failure to plead to the original, and the fact that a plea to the original is on file will not prevent defendant from being in default if he has been ruled to replead to the amended petition: *Porter v. Moffett*, Mor., 58.

8. A failure to answer an amended petition entitles plaintiff to default as fully as if the original petition had not been answered: *Brenner v. Gundershiemer*, 14-82.

9. Where plaintiff, after the filing of an answer to his unverified petition, amends the same by adding a verification, defendant must file a verified answer, and will be deemed in default upon failing to do so: *Wilson v. Preston*, 15-246.

10. Appearance without answer: Where defendant enters a written appearance, but does not file any pleading nor ask time to plead, it is not error to enter default and judgment at once: *Shaw v. National State Bank*, 49-179.

11. Where defendant who was in default for want of answer was present when the

case was submitted, making no objection, and there was no issue to try, *held*, that the case was properly heard as one of default, and there being nothing to show upon what evidence the case was heard, the judgment would be affirmed on appeal: *White v. Kelley*, 23-275.

12. Negligence in filing pleading: Where the defendant is ruled to answer by a certain day in vacation, if he is unable to do so then, for a good reason, he should do so as soon thereafter as possible; and on a motion to set aside a default for a failure to answer, an excuse will not be sufficient which applies to the failure to answer on the day fixed, but does not apply to the failure to answer subsequently, and before default was taken: *Thatcher v. Hawn*, 12-303.

13. An action at law being commenced to recover rent by attachment, and defendant, after the lapse of nearly three years, having filed his answer and cross-petition, the latter being in equity and bringing in a new party and praying affirmative relief, *held*, that no notice having been given plaintiff, a decree for defendant based upon *ex parte* testimony should be vacated upon motion: *Allen v. Rogers*, 27-106.

14. Failure to file pleading in vacation: Where an action for an injunction was commenced during term time, and defendants were required to appear and show cause why a temporary injunction should not be allowed, and did appear and demur to the petition, which demurrer was overruled, *held*, that plaintiff was not entitled to default for want of answer until the next term, which was the regular appearance term of the action: *Matter v. Phillips*, 52-232.

15. Where, by rules of court, defendant was required to plead by demurrer or answer in vacation within ten days after service, and upon failure to do so was to be regarded as in default, *held*, that the fact that the notice simply advised him that he was to answer by the time therein fixed could not have misled him as to the character of the pleading which he was entitled to file, and that, not having filed any pleading, default was properly entered: *Lyman v. Bechtel*, 55-487.

16. Default as to one count: Where one of several counts remains unanswered, but the defense interposed as to other counts is

When party deemed in.—Setting aside.

equally applicable to it, the refusal to grant default on such count will not constitute reversible error: *Kinyon v. Palmer*, 20-138.

17. After ruling on demurrer: Where a demurrer to an answer is sustained, default should not be rendered for failure to answer further, in the absence of any rule or order of the court fixing the time in which an answer must be filed: *Wright v. Howell*, 24-150; *Rollins v. Coggs*, 29-510.

18. Defective answer: It is erroneous to render judgment by default against defendant who has an answer on file undisposed of, although it may be defective: *Arbuckle v. Bowman*, 6-70; *Canal Bank v. Newberry*, 7-4; *Burlington & M. R. R. Co. v. Marchand*, 5-468; *Keeney v. Lyon*, 10-546; *Markey v. Mettler*, 1-528; *Brown v. Hollenbeck*, 2 G. Gr., 318; *Wolff v. Hagensick*, 10-590; *Mal-lory v. Sailing*, 48-699; *Levi v. Monroe*, 11-453.

19. Two answers: Also held that it was erroneous to grant default, where defendant had two answers on file, one of which was assailed by demurrer but the other remained undisposed of: *Crafts v. Clark*, 31-77.

20. Motion on file: It is error to render judgment by default where defendant has a material motion on file: *Coffin v. Kemp*, 4 G. Gr., 119.

21. Answer not raising issue: An answer denying the amount of defendant's indebtedness as claimed by plaintiff, but not denying his cause of action, does not entitle defendant to trial but leaves him substantially in default: *Mann v. Howe*, 9-546.

22. Failure of defendant to appear at trial, when he has an answer on file, is not a ground of default, but the issue should be tried by a jury: *Brown v. Hollenbeck*, 2 G. Gr., 318.

23. A judgment against a defendant who has appeared to an action and filed an answer, but at time of trial fails to appear, is not a judgment by default: *Douglass v. Langdon*, 29-245.

24. Presumption: Where default is granted upon motion, it must be presumed, in support of the court's action, in the absence of a showing to the contrary, that a sufficient ground for the default was made to appear to the court: *Thompson v. Savage*, 43-398.

25. Party in contempt in contempt, the court in pleadings offered by him, default: *Saylor v. Mockb*.

26. Where defendant was in contempt for failure to pay alimony as ordered by the court, it was error to strike his answer without granting leave, to show cause why he had failed to comply with the order, and that he was allowed to show any excuse or misfortune, which would excuse him from contempt. While such action may be proper in extreme cases, it is not to the same extent in a divorce suit, where investigation into the merits of the case of a plaintiff in such case of disobedience of such an order is punished by striking the petition or dismissing the action: *F*.

27. A party who is in default right to be heard in default and will be deemed in default if the rule does not apply to the temporary alimony awarded in divorce, where judgment is rendered: *Baily v. Baily*, 69-77.

28. Filing pleading after answer of a defendant v. when the answer is filed and the case is removed from the files on motion. The defendant is entitled to plead in such case, if the default is set aside: *Bray v. County*, 16-44; *Clute v. H*.

29. Waiver of default: Where a default is filed after entry of default by the court, and no steps being taken to set aside the answer from the files, but upon it and trial had, held, that the defendant waived any objection on account of his default: *Jones v. Jones*.

30. The subsequent filing of a petition bringing in other relief, changing the relief asked for, by a defendant in default, will not operate to set aside the default: *McDonald v. Don*.

II. SETTING ASIDE

31. On application of co- a judgment by default against a party.

¹ Code, § 2871. Default may be set aside on such terms as the court may deem just, but that of pleading issuably and forthwith, but not unless an affidavit of merits be filed and

Setting aside.

will affect the interest of a co-defendant who is not in default, such judgment should be set aside: *Broghill v. Lash*, 3 G. Gr., 357.

32. Affidavit of merits: The defendant seeking to have a default set aside must present an affidavit of merits, as well as a reasonable excuse: *Smith v. Watson*, 28-218; *McDonald v. Donaghue*, 30-568; *King v. Stewart*, 48-334.

33. It is not sufficient to state generally that defendant has a good and substantial defense, but the facts should be stated that the court may determine therefrom the question of merits: *King v. Stewart*, 48-334; *Jaeger v. Evans*, 46-188; *McGrew v. Downs*, 67-687.

34. The party seeking to have a default set aside must in an affidavit of merits set out and show the facts constituting the defense which he claims to be meritorious, to the end that the court itself may adjudge whether it be so. In the absence of such showing it is error to set aside the default: *Palmer v. Rogers*, 70—.

35. The filing of an affidavit of merits, after the motion to set aside the default has been overruled for want of such affidavit, is not sufficient to cure the defect: *Thompson v. Savage*, 43-398.

36. Grounds for setting aside default: The fact that defendant failed to defend for the reason that he was advised by an attorney that he had no defense, where it appears that such advice was given by the attorney of the opposite party, and it does not appear that the fact that the attorney giving this advice was employed by the opposite party was known to defendant, will be ground for setting aside the default: *Simmons v. Church*, 31-284.

37. Where rules of court provided for the filing of a copy of petition for the use of defendant, and three days before the appearance day defendant applied for such copy and it was not on file, and he thereupon filed an affidavit of such fact and asked to have a copy, and to be allowed reasonable time thereafter to defend, and thereafter was detained at home by sickness for nine days, held, that upon proper application default against him entered on the regular appearance day should have been set aside: *Brett v. Farr*, 58-442.

38. The excuse shown for having made default, held sufficient in particular cases: *McNulty v. Everett*, 17-581; *Willett v. Millman*, 61-123.

39. Negligence: Default should not be set aside where it is the result of a party's own negligence: *Harrison v. Kramer*, 3-543; *Thatcher v. Haun*, 12-303.

40. Negligence or forgetfulness of counsel: An excuse based upon forgetfulness and carelessness of counsel, held not sufficient to justify interference with the refusal of the court below to set aside the default: *State v. Elgin*, 11-216.

41. A party should not be relieved from the consequence of his own neglect or that of his attorney: *Ordway v. Suchard*, 31-481.

42. Where it appeared that the failure of defendant to appear and plead was owing to an oversight on the part of his attorney, caused by the mislaying of papers in the case, and application to set aside the default was made as soon as the oversight was discovered, and a defense was presented, held, that the default should have been set aside: *Ibid*.

43. Held a sufficient excuse for setting aside a default, that the attorney of the party in default was so ill that forgetfulness of his employment in the case could not be imputed to him as negligence: *Montgomery County v. American Emigrant Co.*, 47-91.

44. Agreement of parties: A judgment on default should not be set aside for an alleged oral understanding between the parties as to the time for appearance, when such agreement was not communicated to the court, or satisfactorily and clearly established in the application: *Dixon v. Brophsey*, 29-460.

45. Sufficiency of showing: A default will not be set aside merely upon the affidavit of defendant that his attorney filed an answer to plaintiff's petition, and that the same was not marked "filed" by some accident and was lost from the papers, it not being satisfactorily shown that such answer was in fact ever filed: *Barnes v. Anderson*, 19-70.

46. In a particular case, held, that the affidavit of merits did not set up any defense, and that the motion to set aside the default was, therefore, properly overruled: *District Tp v. White*, 42-608.

shown for having made such default, nor unless application therefor be made at the term in which default was entered, or if entered in vacation, then on the first day of the succeeding term.

Setting aside.

47. The showing of excuse in a particular case *held* not sufficient to require a reversal of the action of the court below in refusing to vacate a judgment by default: *Miracle v. Lancaster*, 46-179.

48. Where a showing to set aside a default was sufficient as to the term to which default was taken, but it appeared from the record that defendant had failed to answer for more than two years anterior to the term in question, for which no reason or explanation was given, *held*, not an abuse of discretion to overrule the motion: *Kreisinger v. Icarian Community*, 16-586.

49. Judgment of nonsuit for failure to file declarations in time may be set aside upon showing of excuse: *Martin v. Van Bergen*, 1 G. Gr., 314.

50. An answer should accompany the application to set aside the default: *Thatcher v. Haun*, 12-303.

51. Defendant is required, in addition to presenting an excuse for default, to plead issuably and forthwith, and a statement in his affidavit that he has an answer ready to file will not be sufficient to show that the court erred in refusing to permit him to file such answer, where it does not appear what the answer contained: *King v. Stewart*, 48-334.

52. Defendant is not entitled to file his answer until the default is set aside: *Ibid.*

53. Where default is set aside on an affidavit of merits, defendant may be required to plead by answer and the court may refuse to consider a demurrer: *Perkins v. Davis*, 8 G. Gr., 235.

54. Default against garnishee for failure to appear and answer should be set aside on showing of slighter excuse or diligence than would be necessary in case of default against a defendant debtor: *Evans v. Mohn*, 55-302.

And see GARNISHMENT, §§ 124-135.

55. Default improperly granted: The provision requiring an affidavit of merits before a default shall be set aside applies only to cases where the party is really in default. Where default has been entered by mistake or improperly, it should be set aside without such affidavit: *Messenger v. Marsh*, 6-491; *Rice v. Griffith*, 9-539; *Boals v. Shules*, 29-507; *United States Rolling Stock Co. v. Potter*, 48-56.

56. Where default has been improperly granted, it should be set aside upon motion without the showing of a meritorious defense: *Beasley v. Cooper*, 42-542.

57. Default improperly entered should be set aside without showing of excuse or affidavit of merits: *Brandt v. Wilson*, 58-485.

58. Where a default was attempted to be set aside, because a copy of the petition was not served with the notice as required by a rule of court, *held*, that such service of the petition was not a jurisdictional prerequisite, and there being no affidavit of merits, the default should not be set aside. In the absence of a showing, the presumption is that such rule was complied with: *Knapp v. Haight*, 23-75.

59. Time for setting aside: It would seem that the limitation of time within which a motion to set aside a default may be made applies to judgments by default and not to simple defaults, and that the latter may be set aside at any time before or at the term when judgment is rendered thereon, whilst it might also be true that simple defaults taken in vacation are to be set aside at the commencement of the succeeding term: *Harper v. Drake*, 14-533.

60. Dismissal: Where a cause has been dismissed, not for default in pleading, but merely for failure of the plaintiff to appear and prosecute at the time set for trial, it may be reinstated on motion of the plaintiff at the discretion of the court: *Byington v. Quincy*, 61-480.

61. Discretion: The court has a large discretion in passing upon motions to set aside defaults, and unless it is shown that such discretion is abused the appellate court will not interfere: *Marsh v. Colony*, 30-608; *Rogers v. Cummings*, 11-459; *Gilbert v. Wilcox*, 33-594.

62. Unless it appears that the court has improperly exercised its discretion in refusing to set aside a judgment on default, the judgment will be affirmed on appeal: *King v. Kinney*, 8-521.

63. While motions to set aside a default are not to be granted as of course, yet the court has a large discretion, and the supreme court will not interfere with its ruling unless it is manifest that such discretion has been abused: *Clarke v. Hedge*, 10-528.

Effect of; judgment.

64. The matter of setting aside a default granted for failure to file pleadings within the time required by rules or order of court is largely within the discretion of the court, and the supreme court will not interfere unless such discretion has been abused: *Bolander v. Atwell*, 14-85; *Clute v. Hazleton*, 51-355.

65. But the ruling will be reversed when there is a clear abuse of discretion, or misapprehension of duty; and default should be set aside on application made before judgment is rendered, when based upon proper grounds: *Simmons v. Church*, 31-284.

66. It will require a stronger case to warrant the reversal of the action of a court in setting aside a default than in case of refusing to set it aside: *Westphal v. Clark*, 46-262.

67. The presumption in favor of the correctness of the rulings of the court in respect to setting aside a default is stronger than in other cases: *Willett v. Millman*, 61-123.

68. The terms upon which a default will be set aside rest within the sound discretion of the judge, and his action thereon will not be interfered with unless an abuse of discretion be made to appear: *Blough v. Van Hoorebeke*, 48-40.

In case of service by publication: In case of default upon service by publication, defendant is entitled to appear within two years and apply for a retrial and to make a defense: See NEW TRIALS, V.

III. EFFECT OF DEFAULT; JUDGMENT.

69. **Admits plaintiff's cause of action:** A party in default cannot contest the right of plaintiff to recover something. He cannot question the sufficiency of the petition: *Loeber v. Delahaye*, 7-478.

70. **Objection to witnesses:** The party in default cannot object to the admissibility of witnesses called by the plaintiff to establish his claim: *McLott v. Savery*, 11-823.

71. Nor can he object to the introduction of evidence by the opposite party: *Wright v. Lacy*, 52-248.

72. The party in default has no right to offer evidence, address the jury, nor ask instructions: *Cook v. Walters*, 4-72.

73. A party in default may appear at the time of the assessment of damages and cross-

examine the witnesses against him, but for no other purpose. (Code, § 2873.) He cannot introduce evidence in his own behalf: *Carleton v. Byington*, 17-579.

74. A party in default cannot object to the evidence offered, nor cross-examine the witness in relation to portions of the claim which are not referred to in the testimony in chief of such witness; thus held, that where a portion of plaintiff's claim was sufficiently established by a sworn account, and a witness was introduced to prove another portion, the cross-examination could not be extended to items of account established by the sworn account: *Lyman v. Bechtell*, 58-755.

75. A party in default is not entitled to have the damages against him assessed by jury: *Wilkins v. Treynor*, 14-391; *Carleton v. Byington*, 17-579; *Armstrong v. Catlin*, 17-581; *Clute v. Hazleton*, 51-355.

76. A party in default waives his right to demand a jury to assess the damages: *Preston v. Wright*, 60-851.

77. An attorney's fee is a part of the costs, and defendant in default as to the principal indebtedness cannot put in issue the amount of such fee and claim a jury trial thereon: *Musser v. Crum*, 48-52.

78. Where plaintiff in a replevin suit dismisses his action, he is to be regarded as in default and cannot demand a jury trial upon the question as to the amount of defendant's damages: *Wilkins v. Treynor*, 14-391.

79. It is immaterial when the witnesses of plaintiff are examined, and whether any one attends for the purpose of making cross-examination, where the party in default has not claimed the right of such cross-examination: *Olim v. Chicago, M. & St. P. R. Co.*, 61-250.

80. **What deemed admitted by default:** Upon an answer controverting the amount of indebtedness claimed by plaintiff to be due, but not denying his cause of action, the court may proceed to render judgment as upon default: *Mann v. Howe*, 9-546.

81. Where no cause of action is stated in the petition, a default does not admit any indebtedness. Although defendant may be concluded by default, where the facts stated do not constitute a good cause of action in law, or where the petition is so defective as to be vulnerable to a demurrer, yet where

Effect of; judgment.

the petition omits a necessary averment to show liability against defendant, the court can and should, even upon default, refuse to enter judgment: *Bosch v. Kassing*, 64-312.

82. A default admits matters well pleaded, but entitles plaintiff to recover nothing more than the relief sought in the petition, and a judgment should not be rendered by default where no judgment is prayed for: *Johnson v. Mantz*, 69-710.

83. Assessment of damages: A judgment by default admits the averments of the cause of action as alleged in the petition, and that something is due and payable. The only matter to be found in such case is the amount of damages: *Whitney v. Douge*, 9-597.

84. But where the amount due upon a subscription of stock was dependent upon how many instalments had been called for by the board of directors, etc., held, that such facts must be proved to the court before it could assess the amount of recovery: *Burlington & M. R. R. Co. v. Shaw*, 5-463; *Burlington & M. R. R. Co. v. Marchand*, 5-468.

85. Where the amount to be computed by the clerk was left blank, to be filled in when ascertained, and was not filled in, held, that although the rights of third parties had intervened, the judgment was not void as to them: *Lind v. Adams*, 10-398.

86. Where a reasonable attorney's fee is provided for, it may be proved up and should be allowed, although the petition does not state the amount claimed on that account: *Nelson v. Everett*, 29-184.

87. Defendant's demurrer being overruled, and he being in default for want of an answer, held error to render judgment against him without an assessment of damages: *Musser v. Hobart*, 14-248.

88. An assessment of damages is not necessary on an appeal from a justice of the peace. If appellant does not appear in such case, judgment of affirmance may be rendered: *Taylor v. Barber*, 2 G. Gr., 350.

89. A cause will not be reversed upon appeal because testimony was improperly admitted when the appellant is in default and liable to judgment on the pleadings: *Pfantz v. Culver*, 18-312.

90. Default against joint defendants: Where some of several defendants answer, and others make default, plaintiff should not

have any greater relief against those in default than against those who answer: *Piereson v. David*, 4-410.

91. And in such case, if the cause of action is not made out against those who appear, judgment should not be rendered against those in default, but the action should be dismissed as to them, also: *Curtis v. Smith*, 42-665.

92. A defendant, though in default, should have the benefit of a matter pleaded by a co-defendant going to the cause of action or in its nature constituting a defense for both: *Morrison v. Stoner*, 7-493.

93. Where there are two defendants, one of whom makes default, and the other appears, it is not the practice to enter judgment on default against the first, before the issue raised by the answer of the second is disposed of: *Greenough v. Shelden*, 9-503.

And see *supra*, §§ 5, 6.

94. Bill taken pro confesso: Where a bill is taken as confessed, all definite and positive allegations are to be taken as true without proof, but if the allegations are indefinite, or the prayer is uncertain, the certainty requisite to a proper decree must be afforded by proof: *Harrison v. Kramer*, 8-543; *Bolander v. Atwell*, 14-35.

95. Where a bill is taken pro confesso, all distinct and positive averments are to be considered as true, but if allegations are indefinite, or plaintiff's demand is uncertain, the requisite certainty must be afforded by the proof: *Atkins v. Faulkner*, 11-326.

96. A decree by default or pro confesso cannot be assailed by a bill of review on the ground that it was taken without evidence to support it, when it is recited therein that the cause was heard on the evidence: *Barnes v. Anderson*, 19-70.

97. The allegations in a petition to quiet title, that defendant holds certain real estate fraudulently and in trust for another, are to be taken as true when default is made: *Greeley v. Sample*, 22-338.

98. Sufficiency of service: The statutory provision (Code, § 2870) that default shall not be had for want of appearance until the court determines from an inspection of the record that there has been service of notice as required, is simply directory, and if service has been actually made, a judgment ren-

Judgment.—County prosecutor.

dered thereon by default is not void, even though there is no return of service: *Lawrence v. Howell*, 52-62.

99. Where judgment by default is rendered, it will be presumed that proper notice appeared to have been had, unless the contrary is alleged and clearly proved: *Hale v. First Nat. Bank*, 50-642.

100. Where there is service, though defective, a judgment by default will not be void, even when it is error in the court to render it: *Pratt v. Western Stage Co.*, 27-863; *Muscantine Turn Verein v. Funck*, 18-469.

101. The affidavits, etc., required to be filed in cases of service by publication are essential to the validity of a judgment on such service; if materially defective, the judgment will be erroneous, even though it recites that defendant was served with notice. The presumptions in favor of the jurisdiction of the court do not cure such a defect: *Tunis v. Withrow*, 10-305.

102. Where a judgment is taken by default, it should appear affirmatively that there has been such service and compliance with the provisions of the law as gives the court jurisdiction over the person of defendant, and it is clearly irregular to take such judgment where the record discloses the fact that there has not been such service and compliance: *Woodward v. Whitescarver*, 6-1.

And see further, JURISDICTION, IV, b; V.

103. Judgment: Default may be granted and judgment rendered thereon before the cause is regularly reached on the docket: *Brenner v. Gundershiemer*, 14-82.

104. It is not essential that judgment of default be first rendered. The final judgment may embrace judgment of default as well as the determination of the liability of defendant on the cause of action: *Davis v. Burt*, 7-56.

105. Review on appeal: Before judgment on default will be reviewed in the supreme court, motion to set it aside must have been made and overruled in the court below: *Downing v. Harmon*, 13-535; *Hunt v. Stevens*, 25-261.

106. Where judgment is rendered at a time earlier than that at which defendant can be required to answer, a motion to correct the judgment should be made in the

trial court before prosecuting the error on appeal: *Pigman v. Denney*, 12-896.

DEMURRER.

See PLEADINGS, VIII.

DEMURRER TO EVIDENCE.

See PRACTICE, III, f.

DEPOSITIONS.

See EVIDENCE, III, 6.

DESCENT.

See ESTATES OF DECEDENTS, VI, d.

DES MOINES RIVER LANDS.

See PUBLIC LANDS, III.

DETINUE.

See REPLEVIN.

DISMISSAL OF ACTION.

See PRACTICE, IV.

DISTRIBUTION.

See ESTATES OF DECEDENTS, VI.

DISTRICT ATTORNEY.

1. County prosecutor: The duties of the office of county prosecutor, as existing prior to the new constitution, devolved, subsequently to its adoption, upon the district attorney therein provided for, and the office of county prosecutor was thereby abolished: *State v. Moran*, 8-399.

2. Right and duty to represent county: It is the duty of the district attorney to appear for the county, and it is his right to do so: *Clark v. Lyon County*, 37-469; *Tallock v. Louisa County*, 46-138.

Additional counsel.—Grounds for divorce.

3. Additional counsel: The district attorney cannot bind the county to pay fees of additional counsel employed by him: *Tatlock v. Louisa County*, 46-138.

4. But the board of supervisors may employ additional counsel to prosecute criminal cases: *Hopkins v. Clayton County*, 32-15.

5. The board will be bound by a contract for that purpose, although not entered upon the records. Such contract may be proven by parol evidence: *Jordan v. Osceola County*, 59-388.

6. The court may, in the absence of the district attorney, appoint a special prosecutor: *White v. Polk County*, 17-413.

7. But the court cannot, unless perhaps in the absence of the district attorney and to prevent failure of justice, bind the county for the payment of additional counsel for prosecution. The county is liable to pay for additional counsel only as the board of supervisors may have determined such counsel to be necessary: *Seaton v. Polk County*, 59-626.

8. The district attorney is required to appear for the state in *habeas corpus* proceedings, and it is provided that notice of such proceedings shall be served upon him. In such cases, the district attorney is the representative of the state, and, as such, may control them within the limits of his authority and duty: *Miller v. Buena Vista County*, 68-711.

9. Authority: The prosecuting attorney (when there was a prosecuting attorney in each county) had authority to follow and prosecute a case commenced in his county in any other county to which the venue might be changed: *State v. Carothers*, 1 G. Gr., 464.

10. While a case is in the district court, it is under the control of the district attorney, and any agreement he may make with reference to the disposition thereof is binding as against the attorney-general, who controls the case in the supreme court. (Code, §§ 150, 205): *State v. Fleming*, 13-443.

11. Vacancy: The acting the office of district in the volunteer military States, held not to create former office. (But see *Bryan v. Cattell*, 15-538.

DISTRICT

See COURT

DIVORCE

I. GROUNDS FOR.

II. JURISDICTION; PROCEDURE.

As to presumption of DENCE, §§ 864-866.

As to proceedings to a MARRIAGE, II.

I. GROUNDS

1. In general: To justify a divorce, it must appear that the defendant has been guilty of some of the in the statutes as ground not sufficient that the conduct is such as to make on his part of the marital obligations to plaintiff: *M* 325.

2. The causes enumerate the only ones which will justify to the marriage in refusal other: *York v. Ferner*, 59-

3. Where the ground for continuing one, although it may fore the enactment of the for a divorce on that ground afterward for the period sufficient to justify the *v. McCraney*, 5-232, 254.

4. Impotency, insanity grounds for divorce: *Wer*

¹ Code, § 223. Divorces from the bonds of matrimony may be decreed against the husband on the following causes:

1. When he has committed adultery subsequent to the marriage;
2. When he wilfully deserts his wife and absents himself without a reasonable cause for two years;
3. When he is convicted of felony after his marriage;
4. When, after marriage, he becomes addicted to habitual drunkenness;
5. When he is guilty of such inhuman treatment as to endanger the life of his wife.

Grounds for.

5. Under a previous statute providing for divorce, when it was made fully apparent to the court that the parties could not live in peace and happiness together and that their welfare required a separation, *held*, that it must be made fully apparent to the court not only that the parties could not live in peace and happiness, but also that their welfare required their separation: *Inskeep v. Inskeep*, 5-204.

6. Further *held*, that a divorce on this ground could not be granted to the wrongdoer: *Ibid*.

7. It is probably correct to say that a decree in an action for divorce is an adjudication of all causes for divorce then existing: *Rivers v. Rivers*, 65-568.

8. **Adultery:** Where divorce is sought on the ground of adultery, it is not necessary to prove the direct fact of adultery, but it may be inferred from the circumstances. These, however, must be such as would lead the guarded discretion of a just mind to the conclusion of the truth of the facts. If the adulterous disposition of the parties is once established, the crime may be proven from their afterward being together under circumstances authorizing such inference: *Inskeep v. Inskeep*, 5-204.

9. The circumstances are to be taken together, and when combined must tend to establish the criminal disposition of the party charged, a like disposition of the alleged *particeps criminis*, and an opportunity to commit the act: *Ibid*.

10. Adultery can seldom be proven by other than circumstantial evidence, and evidence thereof is sufficient when the circumstances proved lead naturally and fairly to the conclusion of guilt, and are inconsistent with any rational theory of innocence: *Names v. Names*, 67-383.

11. Evidence of adultery in a particular case *held* sufficient to warrant a divorce on that ground: *Ibid*.

12. In a particular case, *held*, that the evidence did not sufficiently establish the truth of the charge of adultery: *Haggard v. Haggard*, 62-82.

13. When the wife deserts the husband without reasonable ground, and before she has been absent long enough to entitle him to a divorce he commits adultery, the wife is en-

titled to divorce and alimony: *Wilson v. Wilson*, 40-230; *Dupont v. Dupont*, 10-112.

14. While the adultery of plaintiff will debar her from procuring a divorce on the ground of a like crime on the part of defendant, yet where the marriage of plaintiff, which was claimed to be adulterous, was contracted in ignorance of the fact that defendant was alive, and in fact he had not been heard of for ten years, *held*, that such marriage on the part of plaintiff would not defeat her action against defendant for divorce: *Smith v. Smith*, 64-682.

As to the crime of adultery, see CRIMINAL LAW, II, 7, c.

15. **Desertion:** A reasonable cause for desertion must be one which would *prima facie* entitle the party so deserting to a divorce: *Pierce v. Pierce*, 33-238.

16. Whether the desertion and absence must both be without reasonable cause, *quære*, though it may well be questioned whether the true meaning of the statute is not "when the defendant wilfully deserts her without reasonable cause and absents himself for two years." But the reasonable cause here contemplated is wrongful conduct on the part of the wife, amounting to a good excuse for the husband's desertion and absence. No other cause can be shown than one arising from the fault of the wife. The statute does not require that the absence shall be wilful, and therefore *held*, that if the desertion occurred while the defendant was sane, his subsequent insanity was no excuse: *Douglass v. Douglass*, 31-421.

17. In case of application for a divorce on the ground of desertion, the petition must state that such desertion was "without reasonable cause:" *Pinkney v. Pinkney*, 4 G. Gr., 324.

18. Where the parties mutually agree to separate, neither one is entitled to divorce on the ground of the absence of the other until such party offers to and expresses a willingness to live with the other, and such offer must appear to be made in good faith: *Farber v. Farber*, 64-362.

19. Facts in a particular case *held* sufficient to constitute a wilful desertion of the husband on the part of the wife: *Pilgrim v. Pilgrim*, 57-370.

20. Evidence in a particular case *held* suf-

 Grounds for.

ficient to show such desertion of the husband by the wife as to entitle the former to a divorce: *Lane v. Lane*, 67-76.

21. In another case, *held*, that the evidence was not sufficient: *Atkinson v. Atkinson*, 67-364.

22. A conviction of felony from which an appeal has been prosecuted and which is liable to reversal is not sufficient ground for a divorce. The conviction must be final and absolute: *Vinsant v. Vinsant*, 49-639.

23. Where it appeared that defendant was convicted on an indictment for felony but the cause was appealed, and at the time of the trial in the divorce suit such appeal was undetermined, *held*, that there was no ground for divorce upon such conviction: *Rivers v. Rivers*, 60-378.

24. But in such case, *held*, that after the affirmance of such conviction a new action for divorce might be brought on the ground of such conviction and would not be barred by the first action: *Rivers v. Rivers*, 65-568.

25. **Habitual drunkenness:** To constitute a person an habitual drunkard, it is not necessary that he be in that condition during business hours: *Wheeler v. Wheeler*, 53-511.

26. **Inhuman treatment:** In order to constitute inhuman treatment within the statutory provision, there must be two ingredients: first, such treatment must be inhuman, and, second, it must be such as to endanger life: *Freerking v. Freerking*, 19-34.

27. In an action for divorce on the ground of inhuman treatment, past treatment is not of itself a ground, and is material only as showing a just foundation for the apprehended danger to life. Threats of violence, where there is danger of harm to the life, will be sufficient, but threatened injury, causing apprehension of bodily harm merely, will not be sufficient. The question is, whether there is reasonable apprehension of danger to the life: *Beebe v. Beebe*, 10-133.

28. Although it is not shown that any act has been done in the way of an attempt to inflict the apprehended injury, yet the court may see that there is danger in such case as well as though there had been many attempts: *Ibid.*

29. There may be inhuman treatment endangering life although no physical injury is shown to have been sustained. Therefore,

held, that where the husband had searched for a revolver with the intention of killing his wife, her life had been in danger within the meaning of the statute, and her husband had exhibited such a criminal disposition that her life would continue to be in danger if she continued to live with him, and she was entitled to a divorce: *Sackrider v. Sackrider*, 60-397.

30. Treatment calculated to affect the mind of plaintiff so as to destroy her health and ultimately endanger her life, or which involves by natural consequence a permanently injurious and prejudicial effect upon her health, will be sufficient: *Caruthers v. Caruthers*, 13-266; *Cole v. Cole*, 23-433.

31. Cruel treatment will not justify a divorce unless it be such as to furnish reasonable ground to apprehend physical danger in the further continuance of the marriage relation, and must not be such as is caused by the party's own misconduct: *Knight v. Knight*, 31-451.

32. Persistent abuse of the wife in the presence of her children, and also in the presence of neighbors and others, by applying to her epithets imputing to her unchastity, must necessarily wound the feelings and utterly destroy her peace of mind, in such sense as to impair her bodily health: *Wheeler v. Wheeler*, 53-511.

33. Inhuman treatment which is the result of insanity will not be a ground of divorce: *Wertz v. Wertz*, 43-534.

34. Acts of cruelty coupled with failure to furnish suitable food and clothing, *held* sufficient in a particular case to constitute ground for divorce: *Harnett v. Harnett*, 55-45.

35. Evidence in a particular case *held* sufficient to show cruel and inhuman treatment on the part of the husband, entitling the wife to divorce: *Platner v. Platner*, 66-378; *Sesterhen v. Sesterhen*, 60-801.

36. In a particular case, *held*, that the evidence was not sufficient to show such cruel and inhuman treatment as to entitle the wife to a divorce: *Rivers v. Rivers*, 60-378; *Whaley v. Whaley*, 68-647.

37. The facts showing that the treatment is inhuman, and such as to endanger life, must be stated. General allegations to that effect will not be sufficient: *Freerking v. Freerking*, 19-34.

Jurisdiction; procedure; decree; alimony.

38. To entitle complainant to a divorce on the ground of inhuman treatment, it is enough to show that fact, although the specifications of the petition are not proved as laid: *Cole v. Cole*, 23-433.

39. **Misconduct of plaintiff:** While plaintiff may be denied relief on the ground of misconduct, notwithstanding the wrong charged on the part of defendant, yet in a particular case, *held*, that the misconduct of plaintiff was not such as to show that she was not entitled to relief: *Marsh v. Marsh*, 64-667.

40. **Condonation:** Sexual intercourse of a wife with her husband after suit was commenced against the husband on the ground of cruel treatment endangering life, *held* not to be a condonation, where it was procured by the husband without the wife's voluntary consent: *Harnett v. Harnett*, 55-45.

41. The fact that a wife seeking divorce remains in the same house with her husband and does the household work for the husband does not amount to condonation sufficient to defeat her action: *Harnett v. Harnett*, 59-401.

42. In a particular case, *held*, that the condonation of the wife in regard to adultery of the husband was not such as to show assent thereto on her part: *Cochran v. Cochran*, 35-477.

43. Facts in a particular case *held* not sufficient to show condonation: *Sesterhen v. Sesterhen*, 60-301.

II. JURISDICTION; PROCEDURE; DECREE; ALIMONY.

44. **Legislative divorces:** The courts have no inherent common law jurisdiction over the matter of divorce. All the authority they can exercise in that respect is derived from legislative enactment. In England, at the time the common law was adopted in this country, a marriage could not be dissolved for any cause without special act of parliament. And after the independence of the states there was no method of obtaining a divorce except by virtue of general or special legislative enactment. Therefore, *held*, that the legislatures of the states are deprived of the power to grant divorces, only so far as that power has been conferred on the courts of the state: *Levins v. Sleator*, 2 G. Gr., 604.

45. **Jurisdiction; residence:** The action is not local, but transitory, and the court being satisfied of the residence of plaintiff, has power to try the case irrespective of the residence of defendant: *Smith v. Smith*, 4 G. Gr., 266.

46. The residence on the part of plaintiff required by statute is a legal and not merely an actual residence; such a residence as that, when a man leaves it, he has an intention of returning to it: *Hinds v. Hinds*, 1-36.

47. A mere temporary sojourn for a season, without intention of domiciliation and citizenship, is insufficient: *Smith v. Smith*, 4 G. Gr., 266; *Whitcomb v. Whitcomb*, 46-437, 443. And see *Rush v. Rush*, 48-701.

48. A Utah divorce obtained without jurisdiction, or where neither party was resident of the territory, is absolutely void: *State v. Fleak*, 54-429.

49. The rule that the domicile of the wife and children is to be considered the same as that of the husband is subject to the exception that, in a proceeding for a divorce, the law recognizes the husband and wife as having separate domiciles, and a valid divorce may be decreed in a suit where only one of the parties resides: *Kline v. Kline*, 57-386.

50. Where the proceeding is brought by the husband in one state against the wife living in another state, and jurisdiction is acquired by service of publication, the court may declare the *status* of the parties and grant the decree, but it cannot make a valid decree as to the custody of the children, who are non-residents of the state where the divorce proceedings were had: *Ibid*.

51. **Jurisdiction as to children:** The provisions as to the custody of a child, made in the decree of divorce regularly obtained and still in force in another state, such child being within the jurisdiction of the court at the time the decree was rendered, will be regarded as binding and conclusive by the courts of this state, when the right to the custody of the child is called in question here, until such decree is modified or reversed or set aside for cause shown to the jurisdiction which rendered it: *Wakefield v. Ives*, 35-238.

52. **Waiver of want of jurisdiction:** Want of jurisdiction of a court to entertain an action for divorce, owing to the non-resi-

Jurisdiction; procedure; decree; alimony.

dence of plaintiff, cannot afterwards be interposed by such plaintiff as an objection to the decree, where it appears that plaintiff authorized the cause to be prosecuted and received the money allowed as alimony: *Ellis v. White*, 61-644.

53. Decree against non-resident: Where the action for divorce is brought by a resident of one state, in the courts of that state, against a non-resident, and service is had by publication only, without appearance by defendant, the court acquires jurisdiction only to declare the *status* of the parties before it, but cannot render a valid decree as to the custody of minor children who are non-residents of the state where the decree is rendered: *Kline v. Kline*, 57-386.

54. The policy and laws of the two states of Nebraska and Iowa being substantially the same as to the mode of procedure that may be adopted to obtain a divorce, it being provided in both states that a divorce may be obtained in some other state or country, *held*, that a divorce granted in Nebraska in accordance with its laws to a resident of that state and against a resident of Iowa, upon personal service, being valid in the state where it was granted, would be recognized as valid in Iowa: *Van Orsdal v. Van Orsdal*, 67-35.

55. The petition: Although the statute (Code, § 2222) requires the petition for a divorce to be sworn to, yet the fact that such petition is not sworn to does not deprive the court of jurisdiction and render subsequent proceedings invalid: *McCraney v. McCraney*, 5-232, 254.

56. Defects in the verification of the petition are not jurisdictional and cannot be urged in a collateral attack: *Ellis v. White*, 61-644.

57. This provision as to the verification of the petition by plaintiff is doubtless mandatory and intended to prevent looseness of practice in actions of divorce and its requirements should be strictly enforced. The fact that defendant answers the petition without objecting to a want of verification will not constitute a waiver of such requirement, for the reason that it is enacted not for the benefit of defendant but as a hindrance to easy divorce, and therefore cannot be waived. But such provision does not relate to the

jurisdiction of the court of action intended only final judgment in the fact that the petition is to deprive the court of jurisdiction order as to temporary alimony: *Van Duzer*, 65-625.

58. Counter-claim: Where, for divorce, and defendant, in the action, interposes a counter-claim for divorce on his part, the counter-claim by defendant is to be regulated under Code, § 266: *Wilson*, 40-230.

59. Temporary alimony exist: Under the statute authorizing the court to order the party to pay the clerk a sum of money for the support and maintenance of the party and children, and to prosecute or defend the action in order to warrant an order for temporary alimony, the fact of the parties must be admitted: *York v. York*, 34-530.

60. The cross-petition under § 2225, for a divorce by the plaintiff may be based upon facts occurring subsequently to the filing of the original action: *son*, 40-230.

61. In a proceeding for divorce, the court has no authority to order the defendant to pay plaintiff to enable her to prosecute the action or to authorize such an order, in the marriage relation shown: *Wilson*, 49-544.

62. But the acts of the parties together again as husband and wife were held sufficient to establish the marital relation as to just and proper order for temporary alimony: *McFarland*, 51-565.

63. The proof of marriage case, *held* sufficient to authorize an order for temporary alimony: 61-138.

64. By court, not judge: The court may make the order for temporary alimony provided in Code, § 2226) the court and not upon the facts: *Prosser v. Prosser*,

Jurisdiction; procedure; decree; alimony.

65. In proceeding for alimony: Where the wife brings action for alimony without divorce, a temporary allowance may be made for the prosecution of the action in the same manner as provided by statute in proceedings for divorce: *Finn v. Finn*, 62-482.

66. Application; allowance: If the application for temporary alimony does not fairly present the facts necessary to enable the court understandingly to pass upon it, all the inferences and presumptions which naturally arise out of the defect of such application will be indulged in against the party preferring it. But the opposite party cannot, by motion for more specific statement, require the number, names and residences of witnesses, and facts expected to be proved by each, to be shown to the court in determining the proper amount to be allowed for the purpose of enabling the cause to be tried. In a particular case, *held*, that the allowance for temporary alimony was excessive: *Champlin v. Champlin*, 42-169.

67. The court may have jurisdiction to make an order as to temporary alimony, although the averments of the petition are not verified as required by Code, § 2222: *Van Duzer v. Van Duzer*, 65-625.

68. Temporary alimony may be granted to either party in a divorce proceeding as against the other; and in a particular case, where the husband sought a divorce from the wife, *held*, that an allowance of temporary alimony to the wife was proper: *Small v. Small*, 42-111.

69. An allowance to the wife of the means of defraying expenses of a suit in which she is plaintiff may properly be made: *Briggs v. Briggs*, 36-883.

70. But *held* that the amount allowed in a particular case was excessive: *Ibid*.

71. In a particular case, *held*, that an allowance of three hundred dollars for attorneys' fees for the prosecution of the action, and two hundred dollars for the payment of witness fees and other expenses, to be paid over to the clerk and used for that purpose, together with an allowance of twenty-five dollars per month for the support of plaintiff during the action, was not excessive: *Van Duzer v. Van Duzer*, 65-625.

72. In a particular case, *held*, that allowance for support pending appeal was not

proper, and that the allowance made in the case was excessive: *Miller v. Miller*, 43-335.

73. In a particular case, an allowance to the wife was upheld: *Maben v. Maben*, 67-284.

74. The husband cannot offset as against the amount which he is required to pay as temporary alimony the value of household goods appropriated by the wife: *Dayton v. Drake*, 64-714.

75. Failure to pay: While failure of plaintiff to pay a sum ordered by the court to be paid to defendant to enable her to defend and to establish her innocence may well be punished by dismissing the action or striking the petition from the files, a similar failure of defendant to pay a sum similarly ordered to plaintiff should only in extreme cases be punished by striking the answer from the files. A full investigation of the merits should not thus be prevented, if the party can show a good excuse, such as misfortune or poverty, for failure to comply with the order: *Peel v. Peel*, 50-521.

76. Failure to pay money awarded as temporary alimony, and for which judgment has been rendered, does not constitute contempt depriving defendant of the right to file a pleading in the case: *Baily v. Baily*, 69-77.

77. Attachment: The provisions of the Code as to attachment in ordinary actions are not applicable to the attachment authorized by Code, § 2227, to secure the payment of alimony: *Smith v. Smith*, 61-138.

78. In a particular case, *held*, that an attachment without a bond was properly allowed: *Ibid*.

79. The remedy by attachment is not exclusive of that by injunction, to restrain the disposition of property by the defendant: *Wharton v. Wharton*, 57-696.

80. The attachment authorized by the section of the Code just referred to may be levied on the homestead: *Daniels v. Morris*, 54-369.

81. Such an attachment may be granted in a suit to annul a legal marriage as well as one for a divorce: *Ibid*.

82. This attachment will not affect the lien of a creditor of the husband whose judgment is obtained prior to the decree; nor can the decree be dated back to the time of attachment so as to cut out intervening judgments: *Daniels v. Lindley*, 44-567.

DIVORCE, II.

• Jurisdiction; procedure; decree; alimony.

83. It is not improper to allow an attachment to compel the performance of an order to pay temporary alimony, on the ground that such attachment interferes with the power of defendant to comply with the order for alimony, it appearing that the means of defendant are ample without taking into consideration the property attached: *Van Duzer v. Van Duzer*, 65-625.

84. Custody and support of children: Pending a proceeding for divorce, the court has power, under Code, § 2226, to provide for the custody and maintenance of children, and may take them from the custody of the father, defendant, if he is shown to be an unfit person: *Green v. Green*, 52-403.

85. Method of trial: By Code, § 2222, the trial of an action for divorce is to be in open court, and such provision is not complied with by trial to referee, and a subsequent hearing of the report of such referee on exceptions thereto. A reference in such cases cannot be made even by consent, but the testimony taken by such referee, appointed in such case, may be treated as taken before a commissioner in accordance with the provisions in that section, and the evidence so taken may be used on the trial in court: *Hobart v. Hobart*, 45-501.

86. As the parties to a proceeding for divorce had the right under the Revision to a jury trial, such right was not taken away by the Code in proceedings commenced before its adoption: *Wadsworth v. Wadsworth*, 40-448.

87. Consent of parties will not warrant the granting of a divorce unless proper ground therefor is shown: *Lyster v. Lyster*, 1-130.

88. Evidence considered and held sufficient to prove a prior marriage and support a decree of divorce therefrom: *Borton v. Borton*, 48-697.

As to evidence of MARRIAGE, see that title, §§ 6-12.

As to presumption of divorce, see EVIDENCE, §§ 864-866.

89. Costs; attorney's fees: The court may tax an attorney's fee as part of the costs in favor of the successful party, but such item of costs cannot be made a lien upon the homestead of the opposite party: *Wilson v. Wilson*, 40-230.

90. The attorney for divorce suit may recover husband as for necessary expenses: *Porter v. Briggs*, 38-1; *Johnson v. Williams*, 3.

91. An attorney who divorces in behalf of the band may recover attorney's fees from husband upon showing of faith and that there was no oppression in the bringing of the suit: not required to establish fault: entitled to a divorce: *Id.*, 65-285.

92. Final decree; custody: A provision under a decree for custody of the parties the custody of the children will have any effect upon the death of the party entitled to the custody. The right of such custody is not transferred to any other person upon such death, the other parent being entitled to such children: *Barney v. Barney*, 14-189.

93. Permanent alimony: Alimony is an incident to a divorce, and such right is not lost in an action for divorce, although the statement in the original petition is not therefor: *McEwen v. McEwen*, 14-189.

94. And this is true although the divorce is had by publication of notice: In such case the court may declare for alimony against real estate of the defendant situated in another county: *Harshberger v. Harshberger*, 26-503.

95. Alimony, custody of children: Alimony may be regulated by order of the court, though no reference thereto is made in the pleadings: *Zuver v. Zuver*, 14-189.

96. An agreement for support of separation will not bar a claim for alimony in a subsequent action: *Wilson v. Wilson*, 40-230.

97. Alimony is an allowance out of the estate of the husband for the support of the wife after the dissolution of the marital relation. The right to alimony is a property in itself, and a contract between husband and the wife by which the husband accepts a provision in lieu of alimony is binding: *Martin v. Martin*, 14-189.

Jurisdiction; procedure; decree; alimony.

98. The relation of husband and wife must exist either *de jure* or *de facto* to justify an order for alimony: *Blythe v. Blythe*, 25-266.

99. Custody of children: As to provisions for custody of children in particular cases, see *Hunt v. Hunt*, 4 G. Gr., 216; *Cole v. Cole*, 28-433; *Zuver v. Zuver*, 36-190.

100. Abatement by death: Upon the death of the defendant, a proceeding for divorce abates, and with it all claim for alimony: *O'Hagan v. O'Hagan's Ex'r*, 4-509; *Barney v. Barney*, 14-189.

101. Suit for alimony without divorce: A court of equity will entertain a suit for alimony alone, without divorce, where the wife is separated from the husband on account of misconduct on his part justifying the separation: *Graves v. Graves*, 36-310; *Whitcomb v. Whitcomb*, 46-437; *Finn v. Finn*, 62-482; *Farber v. Farber*, 64-362; *Platner v. Platner*, 66-378.

102. A wife resident in Iowa, against whom a valid decree of divorce is rendered in another state according to the laws of that state, cannot afterwards maintain an action in Iowa for alimony out of property not belonging to her former husband at the time of the granting of such divorce: *Van Orsdal v. Van Orsdal*, 67-35.

103. An action for alimony cannot be maintained as an independent proceeding after the divorce of the parties: *Wilde v. Wilde*, 86-819.

104. When allowance of alimony proper: Where the wife, without sufficient excuse, had left the husband, and the latter had afterwards committed adultery, for which a divorce was granted the wife, *held*, that she was also entitled to alimony: *Dupont v. Dupont*, 10-112.

105. Where a divorce is granted the husband on account of the adultery of the wife, she will not be entitled to alimony, unless under peculiar circumstances: *Fivecoat v. Fivecoat*, 32-198.

106. Alimony is rarely and only under peculiar circumstances granted to the party in fault, even when that party is the wife; and where a suit was brought by the husband against the wife for divorce on the ground of inhuman treatment, and the wife in a cross-petition asked divorce from the husband on the same ground, and divorce was granted to

the wife and denied to the husband, *held*, that it was error to allow to the husband a sum as alimony and make it a lien on the homestead, which was in the wife's name and acquired from her separate means: *Barnes v. Barnes*, 59-456.

107. As to the amount and kind of alimony proper to be allowed under particular circumstances, see *Abey v. Abey*, 32-575; *Farley v. Farley*, 30-353.

108. Allowance in a particular case *held* not excessive: *Sesterhen v. Sesterhen*, 60-301.

109. Allowing specific property: The court may give the wife as alimony a specific portion of the husband's property in fee: *Jolly v. Jolly*, 1-9. But see *contra*, *Russell v. Russell*, 4 G. Gr., 26.

110. While it is entirely competent for the court to give to the wife a portion of the husband's property absolutely and in her own right, this should not be done if the husband is in condition to pay money, unless there is something in the condition of the wife which would render it equitable and just to give her the property in lieu of the money: *Inskeep v. Inskeep*, 5-204, 221.

111. It is competent for the court to set apart for the plaintiff a specific portion of the defendant's estate as alimony, and this may be done even though no prayer to have this specific property set off as alimony is contained in the petition, and notice of the action is served by publication only: *Twigg v. O'Meara*, 59-326.

112. The various cases in Iowa relating to the proportion of the husband's property which can be given to the wife as alimony discussed, and *held* that in no case had more than about one-third of such property been set apart in that manner, and that where the wife was the defendant against whom divorce was decreed, the proportion should be less: *Zuver v. Zuver*, 36-190.

113. Liability of homestead; lien of judgment: The court may, in rendering judgment for alimony in an action for divorce, declare such judgment a lien upon the homestead of the opposite party; but such lien cannot be extended to cover the costs taxed in the case: *Wilson v. Wilson*, 40-230.

114. Where the husband was given the custody of the children and a general judgment for alimony was rendered in favor of

Jurisdiction; procedure; decree; alimony.

the wife, *held*, that such judgment could not be enforced against the homestead which the husband and children continued to occupy: *Byers v. Byers*, 21-268.

115. But where the decree makes the alimony a lien upon specific property, the fact that such property is a homestead cannot be taken advantage of after decree. It should be set up in the action: *Hemenway v. Wood*, 53-21.

116. Lien of judgment: Under peculiar facts indicating fraud on the part of the mortgagee under a mortgage in which the wife did not join, *held*, that a decree directing the allowance of alimony should be a lien upon the premises prior to such mortgage: *Sesterhen v. Sesterhen*, 60-301.

117. A judgment for alimony declared a lien as against property of defendant in another county will take priority over a subsequent attachment of such property, although the attachment is prior to the filing of a transcript of the lien in the county where the property is situated: *Harshberger v. Harshberger*, 26-503.

118. Setting aside decree: A decree of divorce may be set aside for fraud in obtaining it, although plaintiff has remarried and the rights of subsequent innocent parties have intervened: *Whitcomb v. Whitcomb*, 46-437; *Rush v. Rush*, 46-648; *S. C.*, 48-701.

119. A decree of divorce which is subsequently declared void for fraud in its procurement is no defense to a prosecution for adultery in cohabiting with a woman to whom the party securing the divorce was married after the divorce was granted and before it was set aside. Such a decree is void not merely from the time of setting aside, but from the beginning: *State v. Whitcomb*, 52-85.

120. Where a wife procured a decree of divorce in this state by publication, and defendant, after having known for nearly a year of such decree, and after having himself procured a decree of divorce from his wife in another jurisdiction, and, after the wife had remarried, commenced proceedings to set aside the wife's divorce on the ground of fraud and obtain a new trial, *held*, that he had no interest in the matter entitling him to any relief, especially in view of the fact that he had taken no steps after

learning of the decree against it until after the former wife: *Webster v. Webster*, 32-198.

121. Subsequent change of residence: A provision as to allowance of alimony (Code, § 2229), is doubtful at common law, but the power of the court authorizing subsequent change of residence by the court in these circumstances render them effective: *See* *Webster v. Webster*, 32-198.

122. The right to a change of residence as to alimony does not survive the death of the party against whom sought, and proceedings therefor abate upon the death: *O'Hagan v. O'Hagan's Estate*, 32-198.

123. The power of the court to modify a decree is not limited to a modification thereof, but it is not for that purpose as long as the decree remains unexecuted, and even though the decree is removed from the state: *See* *Webster v. Webster*, 32-198.

124. The time and manner of subsequent changes of residence within the discretion of the court: *Jungk*, 5-541.

125. The provisions in a decree as to alimony, custody of children, and other matters are conclusive as to the circumstances at that time, and it is not in such circumstances that the court can make subsequent changes: *See* *Webster v. Webster*, 32-198.

126. Where the matter has once been fairly settled, a subsequent change ought to be carefully considered where an alteration of circumstances has been brought about by the party asking the change: *Fisher*, 32-20.

127. Where a divorce is granted by default, and no alimony is intended to be claimed

Changes in decree.—Creation of private way.

ant could not, in a subsequent proceeding, have a modification of the decree, so as to allow alimony: *Rouse v. Rouse*, 47-422.

128. Whether any other court than the one granting the divorce can make subsequent changes in the provisions of the decree, *quære*. But the jurisdiction of the court granting the divorce is not exclusive in such sense that a judge of another court cannot make an order in a *habeas corpus* proceeding as to the custody of a child, and the judge of the court granting the divorce cannot interfere with such order in the *habeas corpus* proceeding: *Shaw v. McHenry*, 52-182.

129. The statutory provision as to subsequent change of decree evidently contemplates a proceeding brought for the purpose of obtaining such change. In the absence of this being done, a decree entered must amount to an adjudication. Therefore, *held*, that the rights of a parent to the custody of the children as provided for in the decree of divorce not having been waived or surrendered, and the parent still being in condition to take care of and have the custody of the children, such decree could not be attacked or changed in a collateral proceeding for the custody of the children: *Jennings v. Jennings*, 56-288.

130. The facts in a particular case *held* sufficient to show that the father, to whom the custody of children was given in a decree of divorce against him, was not a proper person to have charge of them, and a change in the decree was made, giving the custody of the children to the wife and awarding her alimony for their keeping: *Boggs v. Boggs*, 49-190.

131. Circumstances of a particular case *held* sufficient to justify modification of a decree of divorce, so as to change the custody of a child from one parent to another: *Sherwood v. Sherwood*, 56-608.

132. The provision allowing subsequent changes in the decree *held* applicable under previous statutes to divorces *a vinculo matrimonii*, as well as those *a mensa et thoro*: *Jungk v. Jungk*, 5-541.

133. Effect of decree: The party to whom the divorce is granted cannot have any further right or interest in the property of the other party than that which is given in the

decree, and cannot claim any share by way of dower in case of survival: *Marvin v. Marvin*, 59-899; *Boyles v. Latham*, 61-174.

134. A decree of divorce against the wife as the guilty party bars any claim to dower in the property of the husband: *McCraney v. McCraney*, 5-232, 250.

DOGS.

See ANIMALS, §§ 26-29.

DOMICILE.

See RESIDENCE.

DOWER.

See ESTATES OF DECEDENTS, VI, c.

DRAINS.

See WATERS.

EASEMENTS.

As to DEDICATION and HIGHWAYS, see those titles, respectively.

1. Creation of private way: The grant of an easement to use a way described as "the present road to his (grantee's) timber," *held* sufficient to convey a private way as an easement over the lands of the grantor, it being shown that the road referred to was a well defined and certain way still in use by the grantee: *Roundy v. Bonowitz*, 40-44.

2. An agreement of partition contained the following stipulations: "John has the privilege of a road and landing upon the bank of the" M. river, etc., and "it is further distinctly understood that the said John shall have the privilege of a road through the land of the said B. so as to enable him to take the nearest and the best road to Dubuque," *held*, that the right stipulated for was an easement in the nature of a reservation, appurtenant to the land, and passing by conveyance or devise: *Karmuller v. Krotz*, 18-352.

3. When the privilege of a road is created by stipulation and the road is not located by

Right of way; light and air.

the contract, it may be located by agreement, or use and acquiescence, and when thus located it cannot be changed except by consent of both parties: *Ibid.*

4. **Right of way by necessity:** The grantor of premises to which there is no right of way for access is under no obligation to furnish such right of way, in the absence of fraudulent representations, and his subsequent promise without consideration to do so, would not be binding: *Handrahan v. O'Regan*, 45-298.

5. **Common stairway:** Where the owners of three contiguous lots erected a block of buildings thereon upon a plan agreed upon between them, by which accession to the entire upper story of the block was had by means of one stairway, and afterwards, by mutual consent, each became owner of one of the lots, *held*, that each acquired the right of way for access to the upper story by means of such stairway erected on the line between two of the lots, and the entries leading therefrom, such right being appurtenant to each lot: *Thompson v. Miner*, 30-386.

6. *Held*, also, that the purchaser of any of the lots with knowledge of the plan of construction of the building and common use of the stairway and passages was charged with the rights of the other owners therein, and could not extinguish the easement: *Ibid.*

7. Where the owners of adjoining buildings, by contract, stipulated that the third stories should be occupied together as one hall, with access thereto by a common stairway on the property of one proprietor, with a partition of profits, and allowance for use of such stairway, *held*, that upon proof that the separate use of the property would be more profitable and by consent, partition and separate use might be decreed; but that the right to the common use of the stairway exclusively for access to the third story remained upon the same terms of compensation before: *First Nat. Bank v. Taylor*, 44-343.

8. **Right of footway**, not in connection with a right to pass with carriages, cannot be acquired by prescription or adverse use for any length of time. So *held* in reference to a hallway on the second floor of a building: *Willard v. Calhoun*, 70—.

9. **Mill-race:** Where the owner of land consents to the construction of a mill-race

thereon and allows money to be expended on the strength of such consent, an easement is created which is irrevocable, and may be transferred in connection with the estate to which it is appurtenant: *Decorah Woolen Mill Co. v. Greer*, 49-490.

10. **Easement distinguished from license:** A license is an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein, and is not assignable, nor within the statute of frauds; while an easement is a permanent interest in another's land, and must be founded upon a grant in writing or upon prescription. In a particular case, *held*, that a written conveyance manifesting the intention to grant a privilege in land distinct from the ownership of the soil, and as contra-distinguished from the mere authority to do an act or series of acts upon it, created an easement and was not a mere license: *Cook v. Chicago, B. & Q. R. Co.*, 40-451.

11. **Implied easement:** The doctrine of implied easements rests upon the supposed intention of the parties as deduced from the situation and condition of the two estates: *Morrison v. Marquardt*, 24-35.

12. **Light and air:** In a particular case certain conditions and circumstances were held to negative an implication of a grant of an easement in light and air. The law of easements in light and air discussed: *Ibid.*

13. **Right of way:** The conveyance to a railroad company of a right of way for its railroad simply conveys an easement: *Brown v. Young*, 69-625.

As to right of way for HIGHWAYS and RAILWAYS, see those titles respectively.

14. **Use of private way, gates, etc.:** Where a private right of way ran angling through an eighty-acre tract of land, and it was evident that it was not intended that such right of way should be fenced off from the remainder of the tract, *held*, that the erection and maintenance of a gate at the entrance by the owner of the land, to protect his inclosure, was not inconsistent with a reasonable use of the right of way by the party entitled thereto, and that the latter was liable for damages for removing such gate so as to leave the inclosure open: *Houpes v. Alderson*, 22-160.

15. **Facilities for passage**, where a private

 Conveyance; non-user.— Notice of election.

right of way exists, are to be regulated by the nature of the place and the circumstances of the case; and under particular circumstances, *held*, that the owner of the right of way was not entitled to an open road: *Amondson v. Severson*, 37-602.

16. Where the right of way over a strip of land was purchased to be used for access to the highway, which, at the time of acquisition, was bounded upon one side by a fence, the purchaser agreeing to erect a fence on the other side, *held*, that it would be presumed that it was not intended that the outlet of the right of way at the highway should be closed by a fence and gate: *Devore v. Ellis*, 62-505.

17. As to division of dominant estate: While an easement appurtenant to an estate is so to every part of it, whatever the subdivision at the time or subsequently, it is equally true that the servient estate is not to be burdened to a greater extent than was contemplated at the creation of the easement. In determining the rights of parties, title papers are to be construed in the light of surrounding circumstances, and a subsequent sale of a part of the dominant estate cannot operate to extend the original right, nor to increase the burden upon the servient estate. The grant of a right of way construed under the facts of a particular case: *Brossart v. Corlett*, 27-288.

18. Easement in undivided interest: There cannot be any easement in an undivided interest, for the reason that it could not be enjoyed without infringing upon the rights of the other owners in common: *Willard v. Calhoun*, 70—.

19. Conveyance: The use of the word "appurtenance" is not necessary to pass an easement with the grant or devise of the principal thing to which it is incident: *Karmuller v. Krotz*, 18-352.

20. An apparent, visible easement, attached to and actually used and continuously enjoyed in connection with a farm, will pass by implication as an incident to the grant of the farm: *Wetherell v. Brobst*, 23-586.

21. An easement appurtenant to land will pass with a conveyance of the land without express grant, but in such case the easement must be actually appurtenant by use and enjoyment, that is, practically annexed

to the granted premises: *Decorah Woolen Mill Co. v. Greer*, 49-490.

22. Non-user; adverse possession: An easement acquired by express grant and not by prescription is not extinguished by non-user, if the owner of the servient estate does no act which prevents the use: *Noll v. Dubuque, B. & M. R. Co.*, 32-66.

23. There must be some use adverse to that of the grantee to extinguish an easement: *Barlow v. Chicago, R. I. & P. R. Co.*, 29-276.

24. Damages: Where the plaintiff sued for damages resulting from the destruction of his mill-race by back-water from another dam, *held*, that the fact that it was not entitled to maintain such easement upon a certain lot which it crossed would not defeat its right to damages against defendant, it being at the time of the injury in the undisturbed possession and enjoyment of such easement: *Decorah Woolen Mill Co. v. Greer*, 49-490.

25. Where defendant destroyed a building upon which the plaintiff had an easement, *held*, that plaintiff could elect to have the building restored at defendant's expense, or claim damages: *Morrison v. Marquardt*, 24-85.

EJECTMENT.

See REAL PROPERTY, II.

ELECTIONS.

As to school elections, see SCHOOLS.

1. Notice of: Where the time of the regular election is fixed by law, such time is to be taken notice of judicially: *Davis v. Best*, 2-96.

2. Failure to give proper notice of an election will not invalidate it. In matters of such public nature the observance of the particular requirement is not a prerequisite to validity, and the statutes as to notice are to be deemed directory. The people are not to be disfranchised or deprived of their voice by the omission of some duty by an officer: *Dishon v. Smith*, 10-212.

3. If an election has in fact been held at the proper time, and it is not alleged or shown that any portion of the electors failed in knowledge of the pendency of the question

Qualifications of voter.

submitted at such election, or to exercise their franchise, it will not be held void on account of want of notice: *Ibid.*

4. Where a proposition is submitted for ratification at an election, it is necessary that the voters shall be advised of the nature or terms of the contract or proposition submitted, and when or where they are called upon to express by vote their assent or dissent: *Page County v. American Emigrant Co.*, 41-115.

5. The manner and form of notice is not essential if there has been sufficient notice in fact upon which the voters of the county have acted; and in a particular case, *held*, that a notice of submission of a proposition for the disposition of swamp lands by the county was sufficient although such notice was not in the form required by statute: *Ibid.*

6. **Qualifications of voter; residence:** By going into a township and remaining there for the sole purpose of voting, with no intention of remaining longer, one will not acquire sufficient residence to entitle him to vote; but if the removal is in good faith, no length of residence is necessary: *State v. Munnick*, 15-123.

7. If no requirements as to the length of residence were contained in the constitution, the legislature might fix such length of residence as it should see fit: *Morrison v. Springer*, 15-304.

8. The residence of a voter is the place of his domicile or place of abode, as distinguished from the residence acquired as a sojourner for business, education or other temporary purpose. Therefore, *held*, that a student in the university at Iowa City, sent there and supported by his father, and making his father's home his "headquarters" during vacation, was not entitled to vote in Iowa City though he had been there the requisite length of time, and had no present intention of leaving there when he ceased to attend the university: *Vanderpoel v. O'Hanlon*, 53-246.

9. If the ballot of a voter is received it is no ground of complaint that an improper oath has been administered to him touching his qualifications: *State ex rel. v. O'Day*, 69-368.

10. **Persons in military service:** A soldier serving in the volunteer forces of the federal

government does not lose his place of residence, or the county of his residence, upon entering the service; and such county on the day of election unquestionably have the vote, if otherwise qualified: *M. v. 15-304.*

11. And *held*, that the legislature may authorize the casting of points where they are situated: *Ibid.*

12. Under the statute requiring a voter to be absent from the state in order to vote at general elections, the submission of a proposition for the disposition of swamp lands at a special election to persons in the military service, was not illegal: *Cedars v. Boone County*, 3

13. **Registration:** The requirement of the registry of voters in conflict with the provisions of the constitution prescribing the qualifications of voters: *monds v. Banbury*, 28-267.

14. An election held in a place where registration is required is void. The provisions of the constitution are mandatory and imperative: *Ne v. St. P. R. Co.*, 36-642.

15. **Place:** Where the time and place of holding elections are prescribed by the constitution but committal to the legislature, the reception of votes in a place distinct from the county of election is not constitutionally authorized: *Springer*, 15-304.

16. **How long polls last:** The polls at a school district election kept open only forty minutes after the meeting had formally adjourned, and the officers and electors refused to receive electors who applied to vote, was not a violation of the constitution: *mission to do so, held*, that the election was invalid: *State ex rel. v. I*

17. So where, at such a time, the polls were only kept open for a short time soon after they were closed, and offered their votes, the election was still present, *held*, that the election was not void, although the electors refused such votes, although by formal motion, adjourned: *Woolm*, 39-380.

Form of ballot; canvassing ballots; returns.

18. Form of ballot: In canvassing votes of electors their intention must be ascertained by their ballots, which must be counted to accord with such intention. If the ballots express such intention beyond a reasonable doubt, it is sufficient without regard to technical inaccuracies or the form adopted by the voter to express his intention. The language of the ballot is to be construed in the light of facts connected with the election: *Hawes v. Miller*, 56-395.

19. In voting upon a proposition to authorize a county to issue bonds in aid of a railway, *held*, that ballots containing the words "for the Lyons railroad," or "against the Lyons railroad," were sufficiently specific: *State ex rel. v. Bissell*, 4 G. Gr., 328.

20. Where in a ballot upon the question of the removal of a county seat, the name of the place voted for being that by which the location of the county seat was generally designated, although it was not thus designated in the proposition for the election, *held*, that the judges of election might properly exercise the ministerial power of counting such votes in favor of the existing location of the county seat, especially when it was shown that the ballots were actually cast in favor of that place: *State v. Cavers*, 22-343.

21. At an election where the ballots were to be for or against a proposition to levy a tax, certain ballots read "Against taxation for the benefit of railroad companies or any other monopolies. To the indebtedness of the poor man," *held*, that the ballot was not conditional but a valid ballot against the proposition for levying a tax: *Cattell v. Lowry*, 45-478.

22. Where the board of supervisors is increased as authorized by law, the additional members are not to be designated on the ballots for their election in any different manner from the others: *Bradfield v. Wart*, 36-291.

23. Canvassing ballots: The board of supervisors and not the township trustees are to canvass the ballots for justice of the peace: *Lynch v. Vermazen*, 61-76.

24. The constable is properly a township officer although he is to be voted for like a justice of the peace as a county officer by the voters of his township (Code, § 598): *State v. Bevans*, 37-178.

25. Evidence as to a mistake in a count of

the ballots as to one candidate is immaterial upon the question as to whether there was a mistake in the count as to another candidate: *McIntosh v. Livingston*, 41-219.

26. Returns: Where an officer was authorized to examine the returns of an election for a county seat, and on being satisfied that either place voted for had a greater number of votes than the other, the record of such result was to be made, *held*, that he had no authority to inquire into the legality of the votes cast, but was bound by the returns as made to him: *United States ex rel. v. Commissioners*, Mor., 31.

27. The action of the board in canvassing returns is ministerial rather than judicial. Nor is there any discretion to be exercised. The board has no authority to judge of the validity of returns or of votes. Its duty is to receive the returns and count them, provided they are sufficiently proved to be such, although irregular. So *held* in regard to the canvass of votes at a special election as to the relocation of a county seat: *State ex rel. v. County Judge*, 7-186; *State ex rel. v. Bailey*, 7-390.

28. The canvassers may reject improper returns, such as are not properly signed, or have not been in the proper custody, or have been mutilated or changed; and after they have declared the result they may, by *mandamus*, be compelled to reassemble and re-canvass the vote to correct a mistake in improperly rejecting returns: *Price v. Harner*, 1-473.

29. So the board may be compelled to correct a mistake in counting improper returns: *State ex rel. v. County Judge*, 13-189.

30. Although a canvassing board has not judicial authority to hear testimony and determine the legality of the votes returned, yet it may be required to exercise a judgment or opinion. So where there appeared to be an alteration of the return, *held*, that the board might determine the number of votes therein reported, and in so doing their discretion could not be controlled by writ of *mandamus*: *State ex rel. v. Bailey*, 7-390.

31. In a case involving the validity of votes cast at an election the court is not precluded by the return, but he may receive evidence as to the compliance with the law on the part of the officers of the election, and

Failure of officers of election to qualify; mandamus; inju

may therefore receive evidence that the officers were duly sworn, although such fact does not appear on the face of the return: *Dishon v. Smith*, 10-212.

32. Where two corresponding returns were made out by the judges of election, one of which was on its face informal and unauthenticated, and the other was formal and on its face duly authenticated, *held*, that the county board of canvassers could not refuse to receive evidence *aliunde* to establish the former, and yet receive such evidence to defeat the latter, but must count the votes as returned: *State v. Cavers*, 22-343.

33. Failure of officers of election to qualify: Failure of officers of election to be sworn as required by law will not vitiate the election. The return is not conclusive in this respect, and the fact that the officers were sworn may be proved *aliunde*: *Dishon v. Smith*, 10-212.

34. Mandamus against board of canvassers: *Mandamus* is the proper remedy to compel the canvassers to declare elected and certify to the election of the party receiving the highest number of votes: *Bradfield v. Wart*, 36-291.

35. Where the canvass of votes at an election was to be made by the county judge calling to his assistance two justices of the peace, and an action by *mandamus* was instituted to compel a recanvass, *held*, that such *mandamus* properly issued to the judge alone and not to the board as originally constituted: *State ex rel. v. County Judge*, 7-186; *Rice v. Smith*, 9-570.

36. Where a writ of *mandamus* was granted to compel a reassembling of the canvassing board of the county by the county judge for the purpose of recanvassing the returns, *held*, that the primary writ should issue to such county judge in his individual name, and that upon failure of the other members of the board summoned by him, in pursuance of law, to constitute such board and canvass such returns to comply with the writ, an *alias* writ might be directed to such other members, and a proper canvass compelled: *State ex rel. v. Smith*, 9-334.

37. Injunction: Although *mandamus* may have issued to compel a board of canvassers to count and record the votes contained in certain returns, yet an injunction

restraining any action thus recorded will not be inconsistent with the *mandamus* the votes which the board should not be counted existing outside of the *Smith*, 10-212.

38. Certificate: It is not a certificate that it does not declare as to the time and place. The caption and the certificate together: *Ibid*.

39. Where it was required of the election, at which no vote was voted, should be certified of the election, *held*, that it is by the judges and attested, sufficient: *Casady v. Low*.

40. Excessive votes: The canvassers should not order a county officer on the ground that there appears to be an excess of ballots is an excess of ballots as to one office will be an election as to another office is no excess: *Rankin v. Pitt*.

41. Bribery and undue influence: Before election a candidate offered and held out as an agent to obtain votes that he would pay for the office for a less amount than provided by law, and turn the fees into the county treasury was the offer of a bribe by the canvassers, and his election null under the provision of statute: *the election on the ground* *rothers v. Russell*, 53-346.

42. It does not constitute an election to relocate a county seat interested in the location as to agree to give or furnish the convenience of the whole county to agree to give property or to be for the advantage of the county for instance, land on which to build a school building, etc.: *Dishon v. Miller*, 56-346.

43. Where an agent authorized to represent a railway company in the location of a proposition to locate

Bribery, etc.; contests.—Jurisdiction.

of such railway, held out as an inducement to voters to vote the tax that the company would pay them fifty per cent. on the dollar for their certificates when issued, and thereby influenced the action of some of the voters at such election, *held*, that the tax was thereby rendered illegal: *Chicago, M. & St. P. R. Co. v. Shea*, 67-728.

44. Where, at an election to pass upon a contract for the sale of swamp land, improper inducements by way of personal advantage were held out to the electors of the county, *held*, that the contract thus ratified by them could not be enforced: *Palo Alto County v. Harrison*, 68-81.

45. To constitute fraud in the submission of a proposition at a special election, there must be some showing of artifice to conceal material facts within the knowledge of the persons submitting the proposition to vote, and which are not open and obtainable by others. There cannot be deemed to be a fraudulent concealment of matters which are public, and can be as well known to the people and voters as to the officers submitting the question to vote: *Starr v. Board of Supervisors*, 22-491.

Further as to illegal voting, see CRIMINAL LAW, II, 6, b.

46. **Liability of officers:** Certain duties being imposed by law on the members of the board of supervisors in relation to canvassing votes cast at elections, the performance of such duties will be enforced by writ of *mandamus*, but an action will not lie to recover damages caused by reason of non-performance of such duties: *Jayne v. Drorbaugh*, 68-711.

As to submission of propositions to levy tax for erection of county buildings, etc., see MUNICIPAL CORPORATIONS, §§ 873-883.

As to submission of a proposition to change the county seat, see MUNICIPAL CORPORATIONS, §§ 780-802.

As to eligibility to office, qualification of officers, etc., see OFFICERS.

47. **Contesting elections:** Whether notice of appeal in proceedings to contest an election should be in writing, *quære*; but where verbal notice was given at the time the judgment of the court of contest was rendered, and the parties then agreed as to the disposition to be made of the ballot-box, *held*, that

the notice was sufficient under the circumstances: *McIntosh v. Livingston*, 41-219.

EMINENT DOMAIN.

See CONSTITUTIONAL LAW, I, h.

EQUITY.

I. JURISDICTION IN GENERAL, AND GENERAL PRINCIPLES.

II. PARTICULAR HEADS OF EQUITABLE JURISDICTION AND RELIEF.

- a. *Cancellation, setting aside, rescission, correction, and reformation, of instruments.*
- b. *What constitutes such fraud or mistake as to warrant equitable relief.*
- c. *Relief against judgments.*
- d. *Marshaling assets.*
- e. *Quieting title.*
- f. *Miscellaneous cases.*

III. PLEADING AND PROCEDURE.

As to PLEADING and PRACTICE, in general, see those titles.

As to trial *de novo* in equity cases on appeal, see APPEALS, VII, d.

As to abatement of nuisances in equity, see NUISANCES.

As to what actions are to be brought in equity, and the effect of error in that respect, see ACTIONS, §§ 10-44.

Jurisdiction of equity as to charitable trusts, see TRUSTS.

Jurisdiction to set aside an award, see ARBITRATION, § 51.

As to equitable assignments, see ASSIGNMENT, IV.

I. JURISDICTION IN GENERAL, AND GENERAL PRINCIPLES.

1. **To prevent failure of justice:** Where from any defect in the common law, want of foresight in the parties, or other mistake or accident, there would be a failure of justice, it is the duty of a court of equity to supply the defect and furnish a remedy: *Preston v. Daniels*, 2 G. Gr., 536.

2. **Authority to sue:** A court of equity cannot empower a person to bring an action where the right does not already exist, and

Jurisdiction in general, and general principles.

where it does exist no equitable relief is necessary: *Getchell v. McGuire*, 70—.

3. Remedy in personam: In cases of fraud, of trust, or of contract, the jurisdiction of the court of chancery is sustainable wherever the person is found, although real property not within the jurisdiction of the court may be affected by the decree. When the case, however, involves the naked question of title, the courts of a state other than that where the land is situated cannot entertain jurisdiction: *MacGregor v. MacGregor*, 9-65.

4. The principle is that in all cases of equity the primary decree is *in personam* and not *in rem*, and that in these cases peculiarly the courts, having authority to act on the person, may make decrees not binding upon the land itself, and compel the person to perform his contract or execute his trust or answer for his fraud according to conscience and good faith: *Ibid.*

5. Therefore, *held*, that courts of one state having jurisdiction over the person of a trustee might inquire as to the disposition of the trust fund claimed to have been invested in land in another state: *Ibid.*

6. Extension of equitable jurisdiction: Although courts of equity did not, at the time of the adoption of the state constitution, have jurisdiction to abate a nuisance in a case not involving property rights, yet it is competent for the legislature to enlarge the jurisdiction of the court in such cases, so as to embrace cases in which property rights are not involved: *Littleton v. Fritz*, 65-488.

7. The circuit court, as originally organized, was given jurisdiction in actions at law, and to try and determine equitable issues arising in actions at law. But these provisions were held not sufficient to confer upon those courts general chancery jurisdiction or power to administer equitable relief although asked by plaintiff in an action at law, without objection by defendant, such power being beyond the jurisdiction of the court: *Walker v. Kynett*, 32-524.

8. So, also, it was held as to such courts, that although they were given jurisdiction of actions to foreclose mortgages, yet where it was sought in the same action to set aside the satisfaction of a mortgage already entered, the court had no jurisdiction: *Mally v. Mally*, 31-60.

9. Justices of the peace have no jurisdiction: *David v. A.*

10. Where there is a remedy at law: The doctrine is that a party who has a plain, speedy, and adequate remedy at law cannot resort to equity: *Council Bluffs v. Claussen v. Lafrenz*, 4 G. Gr., 485.

11. That the complainant cannot have a remedy at law is a ground for a bill in equity: *Preston v. Preston*, 536.

12. Jurisdiction to award damages does not extend to a party who has a perfect remedy at law: *Barrett v. Barrett*, 1 G. Gr., 302.

13. A contract will not be enforced in equity for mistake, unless the injury will result for which there is no adequate remedy at law: *Beale*, 68-463.

14. Where the party has a choice given by law, one legal and one equitable, he has his election, and is not compelled to take either one in preference to the other: *Barron v. Easton*, 2 G. Gr., 202.

And further on this point, see §§ 1-8.

15. Where equity acquiesces in a proper purpose, it will not interfere and give a complete remedy, though by so doing it may be turning over to another party what it will do complete and equitable: *Franklin Ins. Co. v. Franklin*, 229.

16. Thus if plaintiff shows that he has no remedy at law, and that the decree of a court of equity is necessary to secure equity, the court will, in order to secure equity, turn him over to a court of law for an action for possession: *Thatcher v. Thatcher*, 303.

17. Where a court of equity has jurisdiction over the parties for a particular purpose, it will, in order to secure equity, retain the cause between them, retain the cause until the controversy is finished: *McDonald v. McDonald*, 448.

18. Therefore, *held*, that a court of equity has jurisdiction to foreclose a mortgage for the benefit of the mortgage debt falling due.

Jurisdiction in general, and general principles.

having obtained jurisdiction would retain the cause until the whole debt fell due, that a foreclosure might be ordered if the other instalments of the debt were not paid: *Ibid.*

19. In an action in equity to reform a deed for the purpose of correcting a mistake the court will retain jurisdiction and award to plaintiff complete relief, including such damages as should rightfully appear to be due him: *Wright v. McCormick*, 22-545.

20. Where a party is compelled to resort to a court of equity to annul a contract, such court having obtained jurisdiction of the parties and the subject-matter in the controversy, will, in order to administer full and equitable relief, retain the case and do complete justice, though it is necessary to adopt and apply remedies that could have been sought at law: *McMurray v. Van Gilder*, 56-605.

21. Where the subject-matter and the parties are before the court, the party seeking relief will not be sent out of court to commence a new action which would place the parties in the same position they occupied previous to the dismissal: *Joliet Iron, etc., Co. v. Chicago, C. & W. R. Co.*, 51-300; *Young v. Tucker*, 39-596.

22. Where equity has acquired jurisdiction of a cause, it will grant relief although a remedy could have been had in an action at law: *Whiting v. Root*, 52-292.

23. Where, on a proper case made, a court of equity obtains jurisdiction, it will not be ousted of its jurisdiction by facts subsequently developed which prevent the granting of equitable relief, but may retain the case and grant such relief as might have been had in a court of law: *Renkin v. Hill*, 49-270.

24. When a court of equity obtains jurisdiction, it will retain it even though the relief be ultimately a mere money judgment: *Hosleton v. Dickinson*, 51-244.

25. While money paid by mistake may be recovered in an action at law, yet if, for any reason, the case is of equitable cognizance, the party will not be required to go to another forum to recover, but will have full relief in equity: *Rose v. Schaffner*, 50-483.

26. While if equity has properly acquired jurisdiction for any purpose it may retain the case and grant proper relief by way of

damages, it cannot do so when jurisdiction is wanting for any purpose, recognized as a ground of equitable jurisdiction: *Richmond v. Dubuque & S. C. R. Co.*, 33-422, 489.

27. In an action in equity, the judgment may properly cover damages accruing after the commencement of the suit up to the time of final judgment: *Ibid.*, 504.

28. Where plaintiff removed a proceeding by defendant to foreclose a chattel mortgage into the circuit court, claiming that by previous transactions the debt had been paid, and demanding an accounting of defendant, and upon such accounting being made it appeared that defendant was entitled to an additional sum on account beyond that claimed in the foreclosure proceeding, held, that it was proper in such equitable action to grant the foreclosure of the mortgage and also give judgment for the amount due on account: *Wakefield v. Ballard*, 49-344.

29. He who seeks equity must do equity: *Ingle v. Culbertson*, 43-265; *Ingle v. Jones*, 43-286; *Parsons v. Nutting*, 45-404; *Strong v. Burdick*, 52-630; *Anamosa v. Wurtzbacher*, 37-25.

30. Therefore where a party is in conscience bound to pay a certain sum of money, which together with the amount which he is not legally bound to pay is brought as a legal claim against him, equity will not restrain the collection of the whole, unless he pays or tenders the sum legally owed: *Morrison v. Hershire*, 32-271.

31. Where relief was sought as against an administrator's sale by an equitable action to set it aside, held, that failure of plaintiff to offer to restore to the purchaser the proceeds of the sale was not a ground of demurrer, it not appearing but that by reason of receipt of rents and profits or in some other way the right of the purchaser to have the purchase money refunded had been extinguished: *Washburn v. Carmichael*, 32-475.

32. Where a party goes into equity to have a judgment set aside, and it appears that some amount is justly due on the claim on which judgment was rendered, he is not entitled to relief unless he offers to pay the amount due or allows judgment to be rendered for such amount: *Byers v. Odell*, 56-618.

33. Where a party claims that an assessment for improvements is grossly inequitable, he cannot have relief from such assessment without paying or offering to pay the portion thereof which is justly due: *Grimmell v. Des Moines*, 57-144.

34. Where a party seeks in equity to set aside a tax sale, valid on its face, by reason of want of authority on the part of the officer to make it, he should be required to pay the amount of taxes paid by the purchaser in pursuance of such sale: *Gardner v. Early*, 69-42.

35. Where the grantee of property conveyed as a gift sought to have her title to such property quieted, *held*, that a decree to that effect should contain the provision that the property was subject to the lien of an obligation which was a condition of the gift, that the grantee should furnish one-third of the support of the donor during life: *Wamsley v. Lincicum*, 68-556.

36. The principle that he who asks equity must do equity is not applicable except where it is invoked against a party seeking affirmative relief: *White v. Secor*, 58-533.

37. Regarding that done which ought to be done: The equitable rule which regards that as done which a party has agreed to do only applies where a party has bound himself independently of any contingency which may or may not occur: *Ball v. Keokuk & N. W. R. Co.*, 62-751.

38. Laches; statute of limitations: A claim satisfactorily established will not be regarded as stale by a court of equity and its enforcement refused when it has not run for a period that is necessary to create a bar under the statute of limitations: *Cotton v. Wood*, 25-43.

39. The doctrine of equity which denies relief to parties guilty of laches is restrained as a general rule to a case where third persons have during the delay acquired rights, or the opposite party has so changed his situation that he would be prejudiced by allowing plaintiff to assert his rights: *Williams v. Allison*, 33-278.

40. An action to rescind or set aside a contract must be brought promptly. Equity will not enforce a stale demand. If the action is not brought within a reasonable time, relief will be denied, although the statute of

limitations is not pleaded: *County*, 49-481.

41. Where more than one year has elapsed between a settlement of an account and the commencement of an action thereon, a claim based upon the settlement was stale: *Clute v. Fras*.

42. Where, by the execution and the sale of real property thereon, a purchaser failed to go to the property, *held*, that he was not entitled to relief in equity as against the vendor of such laches: *Butch*.

43. It is not in the equity generally to extend the statute of limitations or relieve from where the statute itself is not pleaded. A party relying upon the statute to be filed against an action was lost, and he did not show whether it was filed at the time for filing claims. He had no ground for equity: *Wheeler*, 58-659.

That the statute of limitations applies to actions upon courts of equity, ACTIONS, §§ 1-3.

44. Legal title will be given to the holder of equities of two claimants, one of whom is equal and one of them is inferior. The legal title, if acquired by the holder, is protected: *Preston v. Turn*.

II. PARTICULAR HEADS OF EQUITY JURISDICTION.

a. Cancellation, setting aside, correction, or reformation of instrument.

45. Rescission, or setting aside, or rescinding deeds, obligations, or contracts, are founded upon actual fraud, or upon the obligation or contract being void or voidable for fraud against public policy: *Holsapple*, 4 G. Gr., 485.

46. Equity may proper in an action to set aside a contract made by officers of a corporation for the purpose of protecting the corporation from frauds attempted to be committed by them.

Cancellation, rescission, correction, etc., of instruments.

who have taken advantage of the negligence or confidence of the officers of such corporation in procuring such contract: *Carthan v. Lang*, 69-884.

47. Equity has jurisdiction of an action for the rescission of an agreement for a cause existing at the time it was made: *Paige v. Lindsey*, 69-593.

As to rescission of contracts for fraud, see CONTRACTS, § 534.

48. An action to cancel certain deeds and have them declared null and void by reason of certain facts not appearing in the deeds themselves, *held* to have been properly brought in equity: *Gray v. Coan*, 23-344.

49. Equity will rescind a contract of conveyance after it has been executed, for the purpose of restoring the grantee to his former rights, if it is made to appear that there were outstanding equities at the time of the conveyance against which it is reasonably doubtful whether the title can be maintained: *Anderson v. Buck*, 66-490.

50. In an action on a note given for a portion of the purchase price of land, defendant, by a cross-petition in equity, set up fraudulent representations, mistake, etc., as to the amount of land, and asked cancellation of the note in suit and another note, but subsequently and before trial defendant paid the other note, which had passed into the hands of an innocent purchaser; *held*, that the cross-petition was properly treated as an equitable action: *Hosleton v. Dickinson*, 51-244.

51. Rescission: Failure of title to a portion of property conveyed will not be ground for rescinding the contract, where the party has an adequate remedy at law for such failure of title. Courts will interfere to cancel or rescind an executed contract founded in mutual mistake only where it is made reasonably to appear that the party seeking relief will, unless such relief is granted, sustain an injury for which he would have no adequate remedy at law: *Morse v. Beale*, 68-463.

52. Setting aside: Under the evidence, from which it appeared that a father gave a deed of his property to his daughter, intending that she should support him during the remainder of his life, and she also intended at the time to do so, but it was not intended by grantor that the deed be absolute, *held*, in an action by the father to set aside the

deed, that it should be set aside, or at the defendant's election permitted to stand, making the father's support a charge on the land: *Gruing v. Richards*, 23-288.

53. Inadequacy of consideration, in a particular case, *held* not sufficient to warrant the setting aside of a conveyance: *Audubon County v. American Emigrant Co.*, 40-460.

54. Weakness of mind: Courts of equity have long recognized and enforced the rule that acts and contracts of persons who are of weak understandings, and are therefore liable to imposition, will be held void, if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented or overcome by cunning or artifice or undue influence: *Oakey v. Ritchie*, 69-69.

55. If the power to contract exists, mere weakness of mind without fraud or undue influence is not sufficient to warrant the setting aside of a conveyance: *Campbell v. Campbell*, 51-713.

56. Breach of contract or warranty: An action to rescind a contract on the ground of breach thereof cannot be maintained in equity, there being an adequate remedy at law by way of damages: *Brainard v. Holsapple*, 4 G. Gr., 485.

57. Where a grantor conveys land in good faith, warranting the title, the mere fact that the title fails as to the particular property will not warrant setting aside the conveyance in equity, unless there are elements of fraud, accident or mistake in the transaction: *McDunn v. Des Moines*, 34-487.

58. Placing party in statu quo: Equity will not decree the rescission of a contract at the suit of one party thereto on the ground that the other has failed to fulfill his part of the engagement, if the party cannot be placed in statu quo and injury would result to him from the rescission: *Stringer v. Keokuk, Mt. P. & N. R. Co.*, 59-277.

59. Where the purchaser took possession of the property and made improvements and held possession for more than five years, receiving the rents and profits, and made no offer to return the possession to the vendor or place him in statu quo, *held*, that he could not have a rescission of the contract: *Montgomery v. Gibbs*, 40-652.

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60. A contract will not be rescinded in equity where complainant can not or does not offer to put defendant in the position which he occupied before the contract was made. If the consideration has been received it should be restored within a reasonable time: *Rymear v. Neilin*, 3 G. Gr., 310.

61. Where an action is brought in equity to rescind a contract or set aside the conveyance of real property, the petition is demurrable unless it contains an offer to repay the consideration received: *Seymour v. Shea*, 62-708.

62. Where, however, the petition does not show that any consideration was received and does not contain any tender, the defendant, if he wishes to rely upon the absence of tender, must plead in his answer the fact of consideration being paid, and, if he does not do so, his objection to the petition on the ground of want of tender will be deemed waived: *Ibid.*

63. Where a reconveyance tendered by plaintiff in an action to set aside a conveyance on the ground of mistake or fraud was simply erroneous in form, *held*, that such fact would not defeat the action, but that the proper conveyance should be provided for in the decree: *Montgomery v. Shockey*, 37-107.

64. Reformation, when proper: Though a written contract may not embody the intention of one of the parties thereto, it will not be reformed in equity, unless there is a showing of fraud, accident, or mistake in drafting it: *Ritter v. Doerr*, 25-121.

65. If mistake exists, not in the subject-matter which prevents the minds of the parties from meeting, but merely in the terms of a writing by which the parties undertook to express their valid oral agreement, the writing, being conclusive in an action at law, can in a court of equity only be reformed so as to express the true agreement of the parties; but the determination of the existence or non-existence of the contract where no reformation or cancellation is asked may be made in a court of law: *Carey v. Gunnison*, 65-702.

66. Where a written contract, by reason of the mistake of the parties as to the legal import of the terms used, fails to set forth the agreement and understanding of the party, it may be reformed in equity. Such a mis-

take is not one of law, but of fact, and the failure of the parties to state the meaning intended:

67. Therefore, *held*, that a contract entered into a lease with the understanding that in case the building by fire the lease for rents should cease, but reducing the contract to legal effect, express such in an action for rent and destruction of the building might, by way of equitable relief, have the writing reformed.

68. Where an indorser stated that it was given to a certain person, and it was the holder of the note that it was to secure not only existing, drafts, and the recitals of the note to secure such note showed the intention of the parties, *held*, sufficient evidence on which a statement on the note as to the principal and sureties therein: *change Bank v. McLeod*, 67-376.

69. Courts of equity will not grant a decree in an imperfect contract not supported by either a valuable consideration, as against the grantor or his representative: *Wright v. McCord*, 67-376.

70. Where the parties to a conveyance of certain lands made certain improvements thereon, and the conveyance did not contain the lands and improvements were situated on the land, the grantee was entitled to the instrument in equity, and in the same action, have the instrument reformed: *Wright v. McCord*.

71. Where a conveyance was made to a mortgage described in the instrument for a certain amount, but the amount specified was made up of the principal of another mortgage in addition to the amount of the mortgage, *held*, that in an action by the mortgagee to recover from the grantor the amount of the mortgage not due, the mortgagee might sue on the instrument and have the deed corrected: *Wright v. McCord*, 64-88.

72. A quitclaim deed e

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sideration, without fraud, and intended to convey an interest in the property, may be corrected in equity, although there be no covenants therein: *Deford v. Mercer*, 24-118.

73. Where, after a conveyance by husband to wife, a grantee of the wife sought to have the husband's deed corrected because the name of the township in which the land was situated was not stated, it was *held*, in the absence of a showing of fraud or undue influence in a legal sense, that the fact that the husband had been importuned to make the deed and had made it without actual consideration, and purposely left out the name of the township, would not prevent plaintiff from having such correction made: *Stewart v. Brand*, 23-477.

74. Defective conveyance deemed contract: When an instrument intended to operate as a conveyance of lands is so executed as not to pass the title, equity will, if the consideration has been paid, treat it as a contract for a deed, and the defective conveyance will bind the land in equity against the grantor, his heirs, and subsequent purchasers with notice: *Doniphan v. Street*, 17-317.

75. Insurance policy: In a suit to recover upon an insurance policy a court of equity will reform the instrument to correct a misstatement therein resulting from misplaced confidence on the one hand and false information or misrepresentation on the other, so as to make it conform to the intention of the parties: *Longhurst v. Star Ins. Co.*, 19-364.

76. Will: A court of equity has no jurisdiction to reform a will: *Chambers v. Watson*, 56-676.

77. Reformation and specific performance may be had in the same action where the contract to convey is erroneous by reason of mistake: *Ring v. Ashworth*, 3-452.

78. Effect of reformation: In a suit to reform a written contract on the ground of mistake, the court will not reform it or impair its validity in other particulars than that as to which knowledge and mistake is alleged to exist: *Rump v. Schwartz*, 53-611.

79. Where, subsequent to foreclosure and sale under a mortgage, an action was brought to correct the description of property in the mortgage and sale, to which the party holding the right of redemption was a party, *held* that, after such reformation was made,

the party was not entitled to any extension of the time for redemption: *McKissick v. Mill Owners' Mut. F. Ins. Co.*, 50-116.

80. Third parties not to be affected: In an action to correct a deed in which the wife of grantor relinquished her dower, *held*, that although the mistake was clearly made out as against grantor, the deed could not be thus reformed so as to cut off the wife's dower right in the land which grantor intended to convey, in the absence of any proof that such mistake and intention was shared by the wife: *Sieben v. Franks*, 52-642.

81. A conveyance to an innocent purchaser cannot be set aside because of fraud practiced upon the grantor by reason of negligence in failing to read the instrument constituting his title: *Weaver v. Carpenter*, 42-313.

82. Courts of equity will correct mistakes in conveyances, even as against subsequent purchasers, if such purchasers have notice of the fact of the prior conveyance and of the mistake: *Warburton v. Lauman*, 2 G. Gr., 420.

83. Where a land agent who effected a loan and took a mortgage for the mortgagee had knowledge in his business that a mortgage given by a prior grantee of the property was probably intended to cover the property in question, although other property was described therein, *held*, that such prior mortgage might be reformed as against the last mortgagee: *Sowler v. Day*, 58-252.

84. Where there is an intent and attempt to execute a mortgage upon particular property, and by mistake other property is described, the mortgagee secures a lien on the property attempted to be covered which equity will recognize and enforce, and the obligation of the mortgagor to correct the mortgage is one which will bind his heirs, voluntary grantees and purchasers with notice: *Welton v. Tizzard*, 15-495.

85. Burden of proof: He who seeks to reform a written instrument on account of mistake has the burden of showing the fact of mistake: *George v. Howard*, 56-646.

86. Where plaintiff seeks to have canceled a recorded mortgage on the ground that the mortgage and notes secured thereby, although in the possession of the mortgagee, were never delivered, he has the burden of

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showing by a preponderance of evidence that they were not delivered: *Kreck v. Pitzelberger*, 64-108.

87. Sufficiency of evidence: A written contract will be accepted as a full and correct expression of the contract of the parties until the contrary is established beyond reasonable controversy, and if the proofs are doubtful, or if the mistake is not plainly shown, equity will not interfere to reform it: *Tufts v. Larned*, 27-330.

88. While parol evidence is admissible for the purpose of showing that a written agreement, on account of fraud, accident or mistake, fails to show the whole or true contract, and to enable the court to reform it, this fact must be made entirely clear and be established by the most satisfactory proof: *Gelpcke v. Blake*, 15-387; *Jack v. Naber*, 15-450.

89. To authorize a court to reform an instrument on the ground of mistake, the proof should clearly make out the mistake and should strike all minds as being unquestionable and free from all reasonable doubt, and relief will be denied if the evidence is equivocal, or contradictory in its nature: *Hervey v. Savery*, 48-313; *Clute v. Frasier*, 58-268.

90. In an action to correct a deed for mistake sought to be established by parol, the evidence should be clear and satisfactory: *McTucker v. Taggart*, 29-478.

91. And the mistake must be made out by a clear preponderance of evidence: *Strayer v. Stone*, 47-333.

92. The evidence must be clear, satisfactory and beyond a reasonable doubt, and it must appear that the mistake was mutual: *Wachendorf v. Lancaster*, 61-509.

93. In a particular case, *held*, that the evidence was not sufficiently clear and conclusive to entitle plaintiff to relief: *Cummins v. Monteith*, 61-541.

b. *What constitutes such fraud or mistake as to warrant equitable relief.*

94. Fraud: The term fraud as used in equity properly includes all acts, omissions and concealments which involve a breach

either of legal or eq confidence justly repo to another, or by whi conscientious advanta *De Louis v. Meek*, 2 *Grimes*, 2 G. Gr., 77.

95. Mere refusal to which is not in writing evidenced and a denial not constitute such fi court of equity in gran *Sheridan*, 36-125; *McC* 167.

96. Representations patent and the novel held to be expressions of statements of fact, an matters as to which th means of information, a ficient to require the s veyance made in conside of such patent: *Rawson*

Further as to what co that title.

97. Effect of fraud at A written instrument r fraud at law as well a action to recover money. action is based on the f ment is void for fraud, ferred to the equity cal 42-123.

98. So far as courts exercise their jurisdiction may be considered to that of courts of equity 2 G. Gr., 77.

99. While at law frau equity it may be presun

100. While fraud viti there are some frauds w zable in a court of equi 8-126.

101. The fact that a fraud cannot be relied law for the purpose of r holder of the legal titl successfully plead his t table claim of another, forced in an ordinary legal title, it must be a and in that forum decl *Kynett*, 32-524.

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102. False representations: Materially false representations within the knowledge of the person making them amount to fraud in a contract, and entitle the other party to a rescission in equity: *Mitchell v. Moore*, 24-894.

103. Equity will grant relief on the ground of fraud, although the party representing the material fact made the assertion complained of, without knowing whether it was true or not; and even if by mistake and innocently a party misrepresents a material fact on which another is induced to act, it is as clearly a ground for relief in equity as a wilfully false assertion: *Wilcox v. Iowa Wesleyan University*, 32-367; *Day v. Loun*, 51-364.

104. And in a particular case, *held*, that the burden was upon the party making the representation, to show that it was true or that he had reason so to believe, in order to rebut fraudulent intent on his part: *Day v. Loun*, 51-364.

105. A grantee may have relief in equity on account of misrepresentations as to the quantity of land conveyed, although such misrepresentations were not fraudulent. The relief will be granted on the ground of mutual mistake: *Sweezy v. Collins*, 86-589.

106. False representations honestly made, and thus giving rise to a cause of mutual mistake, may be a ground for setting a conveyance aside to the same extent that fraudulent representations would be: *Montgomery v. Shockey*, 87-107.

107. The rule which grants relief in cases of false representations only when they are known to be false by the party making them is applicable alone in actions at law and has no place in cases cognizable in equity. Whether a party representing a material fact knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial, and even if the party innocently misrepresents a material fact, it is equally conclusive, for it operates as a surprise and imposition on the other party: *Curry v. Supervisors*, 61-71.

108. A misrepresentation, in order to entitle a party to relief from a contract on the ground of fraud, must be material, and must be in something in regard to which a known trust is placed upon the party making it: *Stafford v. Maus*, 88-133.

109. In a particular case, *held*, that certain misrepresentations to a wife with reference to her interest in the lands of her husband, made by mutual friends chosen to effect a separation by agreement, would not enable her to avoid her deed, it appearing that there was no intention to deceive and that she was not induced thereby to execute the deed: *Robertson v. Robertson*, 25-350.

110. Certain representations made by a party, who afterwards became the purchaser of land, as to the location, etc., *held* not to be material or fraudulent and therefore not a ground for rescission in equity: *Collar v. Ford*, 45-331.

111. Even a great discrepancy between the value of property and the price paid therefor will not alone show fraud, although it is a circumstance which may be considered with others on that question: *Ibid*.

112. Statements concerning the value of property or its condition or adaptation to particular uses which are only matters of opinion cannot be relied on by a purchaser and will not constitute fraudulent representations: *Vincent v. Berry*, 46-571.

113. Where plaintiffs exchanged a stock of goods for certain mortgage securities held by defendant, which they were requested to investigate and which they did examine to some extent and had full opportunity to investigate, *held*, that statements of defendant as to the value of such securities and the responsibility of the parties and the title to the property, such title being of record, even though false, would not entitle plaintiffs to rescission in equity: *Ibid*.

114. To avoid a conveyance on account of false representations, the representations relied on must relate to the subject-matter and not to matters of mere inducement. Therefore, *held*, that false representations as to the condition of the grantee, by which, from motives of charity, the holder of a tax deed was induced to convey the land to him, which he was under no obligation to do, would not be sufficient to avoid the conveyance: *Noel v. Horton*, 50-687.

115. Where vendee required vendor to put his statements in regard to the land in writing, *held*, that other statements not required to be put in writing could not have been deemed material, and could not therefore

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be shown by parol evidence: *Porter v. McElhiney*, 56-93.

116. Acts of a railroad company in running so-called scare-lines for the purpose of inducing a county to make grants of aid to secure a particular line, *held*, not to amount to fraudulent representations: *Mills County v. Burlington & M. R. R. Co.*, 47-66.

117. Evidence in a particular case *held* sufficient to show fraudulent and material misrepresentations as to real property sold: *Parks v. Eurbank*, 58-707.

118. Parol evidence is admissible to show that a deed was procured by fraud and undue influence: *Day v. Lown*, 51-364.

119. Where a grantor made fraudulent representations as to his title, and by deception induced grantee to accept the conveyance of the grantor's title and interest instead of an ordinary conveyance by warranty deed, whereby grantee was unable to hold the property as against parties claiming under a recorded instrument, *held*, that grantee was entitled to relief in equity: *Anderson v. Buck*, 66-490.

120. Where it appears that grantee had knowledge of all the facts relating to the value of the property, and the grantor had not, and that the grantee obtained a conveyance by false representations for a grossly inadequate consideration, where he was under peculiar obligations to state truly what he did state in the transaction, *held*, that the conveyance should be set aside at the suit of the grantor: *Smith v. Dell*, 30-594.

Further as to effect of false representations in the sale of land, see VENDORS, II.

As to fraudulent representations, see, also, FRAUD, §§ 3-13.

121. **Fraud of agent:** Where an agent, acting under power of attorney, conveys the property of his principal without consideration and with the purpose of acquiring title in himself, such conveyance will be *held* fraudulent in a court of equity. If the conveyance by the agent appears to have been without consideration and for the sole purpose of defeating the title of his principal, and to advance his own interest, the transaction carries fraud upon the face of it, and a court of equity will, without further inquiry as to the equity of the person making such sale, set it aside: *MacGregor v. Gardner*, 14-326.

122. **Confidential** cannot generally have a conveyance procurements as to its clearly executed it will does not apply where tion of parent and *Kelso*, 53-367.

123. Where a father marriage conveyed real property without the knowledge of his wife, *held*, that, it not made any representation of his property or was otherwise the conveyance could be set aside at the suit of the wife as fraudulent: *Smith*, 57-15.

124. Contracts made between parties of equal age and infirm mother is relied upon by her as a porter, where it appears that the controlling mind and influence of property or money, are jealously watched by courts of equity, and beneficiary shows the bona fide action: *Spargur v. Hall*.

125. Evidence *held* not sufficient to show fraud practiced by the wife in inducing her to convey land conveyed by him to his daughter by *Hatcher v. Day*, 53-671.

126. In a particular case where there was no evidence that a child was made under a conveyance was procured by reason of representations, and it was there *held*: *Samson*, 67-253.

See, also, FRAUD, §§ 1-2.

127. **Who may have** Fraud can only be avoided if there is a prior interest in the property by the person who, subsequently to the fraud, acquires the property: *Brace v. Reid*, 3 G. Gr., 1-2.

128. One who has been defrauded by fraudulent conveyance may maintain an action to recover the purchase price of the property: *Lucas*, 59-22.

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129. Effect of mistake, cognizable at law: A material mutual mistake by the parties with respect to the subject-matter of a contract prevents the minds of the parties from meeting, so that in contemplation of law there is no contract. If action be brought thereon, defendant may deny its existence, and in support of the denial allege and prove the mistake. Such defense may be made in an action at law, and is not equitable in its nature. But if defendant desires the cancellation of the contract on account of such mistake, or that it shall be reformed in order to express the true agreement of the parties, he may ask relief by cross-action, and such relief would be equitable in its nature: *Carey v. Gunnison*, 65-702.

130. An action at law for money paid by mutual mistake, or by the mistake of one party alone, and fraudulently received and retained by the other, was always maintainable: *Higgins v. Mendenhall*, 51-135.

131. Where, by mistake in computing the amount necessary to redeem from an execution sale, the amount paid for that purpose within the year allowed for redemption was not sufficient by a small amount for that purpose by reason of mistake of the clerk in making computation, *held*, that the person seeking to redeem was entitled to equitable relief after the expiration of the year for redemption as against the sheriff's deed issued notwithstanding such attempted redemption: *Wakefield v. Rotherham*, 67-444.

132. Materiality: In the absence of fraud, a mistake of fact which does not materially affect the rights of the parties will not be sufficient to require the setting aside of a contract deliberately entered into: *Chapman v. Coats*, 26-288.

133. Materiality is an important element entering into such mistakes as will be corrected in a court of equity: *Burlington v. Gilbert*, 31-356.

134. When presumed: Where mistake is shown, and the conduct of the party is such as would be against all human experience as to the action of men in their own affairs, if he had known of the mistake, it will be presumed that he would not have so acted if he had not been ignorant of such material fact: *Bruse v. Nelson*, 35-157.

135. Parol evidence ought not to be ad-

mitted to vary or contradict the terms of the written agreement unless it be made to appear that the parties, at the time of consummating the agreement, actually intended and understood that such terms and stipulations should be incorporated, and omitted the same by accident, mistake or fraud: *Gelpcke v. Blake*, 15-387; *Jack v. Naber*, 15-450.

Further as to parol evidence to vary writing, see EVIDENCE, II, 4.

136. Before a court can disturb the provisions of a written agreement for the purpose of reforming it there should be clear and convincing evidence that the instrument does not set forth the true intent of the parties, and that the failure to make it express such intent arose from oversight or mistake in drafting it. But where a mining lease was entered into under the mistaken, though honest, belief that there was coal in the premises described, *held*, that equity would grant relief: *Fritzler v. Robinson*, 70—.

137. Negligence: Signing a written instrument without reading it constitutes such gross negligence as to be an insuperable objection to granting any relief therefrom in equity on the ground that it does not correspond with the intention of the party executing it: *Glenn v. Statler*, 42-107.

138. Where the grantor did not understand the stipulations contained in a conveyance by reason of his inability to understand the English language, *held*, that although before signing the instrument he had had it read over and explained to him by an interpreter, he might still have the mistake corrected in equity: *Zack v. Krall*, 64-88.

And see CONTRACTS, §§ 115-119.

139. Although equity denies relief on the ground of mistake coupled with negligence, this rule applies only when it is the duty of the party to make inquiry, and he chooses to omit the inquiry which would have enabled him to correct the mistake or obviate its evil consequences: *Snyder v. Ives*, 42-157.

140. Equal means of information: Where the means of correct information are alike open to both parties and there is no fraud on the part of the one party, the other party is not entitled to be relieved from a mistake which ordinary vigilance would have prevented: *Burlington v. Gilbert*, 31-356.

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141. Where plaintiff sought the rescission of a contract for the purchase of a patent-right on the ground of mutual mistake as to the novelty of the invention, and the consequent invalidity of the patent, held, that both parties having acted in good faith, they must be considered as possessed of equal means of information, and therefore there was no ground for rescission: *Rawson v. Harger*, 48-269.

142. Estoppel: Where an administrator, under leave to sell real property, conveyed certain property to a purchaser, held, that the representatives of such administrator could not set up as against such deed the fact that the equitable title in a portion of the land conveyed was in the administrator in his own right, and that the deed covering that portion was executed by mistake. Also, held, that the mere knowledge of the grantee that the administrator claimed some personal interest in the property would not defeat his rights under the conveyance: *Donaho v. Smith*, 50-218.

143. Description of land: Where by mistake in the description of land a conveyance covers more than was intended by the parties, it may be corrected in an action in equity: *Hulson v. Fumas*, 31-154.

144. In a particular case, held, that a conveyance should be set aside on the ground of mistake as to the property conveyed: *Larsen v. Burke*, 39-703.

145. If a person contracts for a piece of property and unknowingly accepts different property, this must be deemed a mistake as to which equity will grant relief. Therefore, held, that where a mortgage was executed under a belief by both parties that it covered property not described therein, such mortgage would be reformed in equity: *Sowler v. Day*, 58-252.

146. Where the owner of two lots, believing each to be four rods in width and that there was an alley between them, which had been vacated, sold the first to defendant, measuring the width and marking the supposed boundary line, and conveyed the same, describing it by the number of the lot merely, and afterwards, intending to convey the balance of the property to plaintiff, pointed out to him, in the presence of defendant, the boundary lines between them,

and in the conveyance also by the number of the supposed vacated alley, it appeared that there was a mistake, held, that the lot described by defendant was five rods four, held, that plaintiff's title to the portion conveyed to him, and point of sale, quieted as against defendant: *ton v. Eggleston*, 61-163.

147. Evidence in a suit to show a mistake of property in a title: *v. Nockles*, 58-649.

148. Under the facts in a case, held, that a mistake in plaintiff's title to the property was sufficiently shown to entitle him to a decree to have his title quieted: *v. Greene*, 65-401.

149. Evidence in a case to show mistake of the parties to a contract, as to the character and quality of the transaction, such as to entitle the parties to a rescission thereof on the part of one of them, annulling of a deed of conveyance of the property transferred other property: *v. Snyder*, 22-525.

150. Mistake in quantity: Where a deed mentions a certain number of acres, "more or less," if there is a mistake between the real and supposed quantity, great as to imply a mutual mistake, equity will grant relief, but not a decree for variation: *Hosleton v. Dyer*, 39-703.

151. Mistake of law: Where a deed mentions a certain number of acres, "more or less," if there is a mistake between the real and supposed quantity, great as to imply a mutual mistake, equity will grant relief, but not a decree for variation: *Hosleton v. Dyer*, 39-703.

152. A contract is to be construed according to the meaning of the words employed therein and not according to the views of its meaning of the parties drawing it, and not according to the plain language of the contract, in order to conform it to a technical meaning entertained by the courts in cutting it, in the absence of fraud, accident or mistake: *W. v. W.*, 43-329.

153. Mistake as to title:

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transaction is not ground of defense as against the liability legally incurred therein. Such a mistake on the part of one party in connection with concealment thereof on the part of the other party does not constitute fraud: *Hale v. Walker*, 31-844.

154. Where the covenants in a deed express the original intentions of the parties, but the deed is executed under a mistake of law on part of the grantor as to the effect of such covenants, he is not entitled to relief therefrom: *Gerald v. Elley*, 45-322.

155. The fact that parties enter into a written agreement under the belief that it is modified or affected by a prior or contemporaneous oral agreement is not a mistake against which equity will afford relief: *Baldwin v. State Ins. Co.*, 60-497.

156. Where a prior parol contract is reduced to writing by a draftsman employed for that purpose, but, by mistake of law on his part as to the meaning of terms, such written contract does not properly set forth the terms of the prior oral agreement, the contract may in an equitable action be corrected to correspond with the original agreement: *Nowlin v. Pyne*, 47-293; *Courtright v. Courtright*, 63-356.

157. Therefore, where upon exchange of lands between married women in which their husbands joined to relinquish dower, the names of both wife and husband were inserted in each case as grantees, the scrivener supposing that the insertion of the name of the wife first would vest the fee-simple title in her, *held*, that the conveyance might be so reformed in equity so as to show the title to be in the wife alone and not in the wife and husband as tenants in common: *Courtright v. Courtright*, 63-356.

158. Where a written instrument fails to present the agreement of the parties, equity will reform the writing so as to cause it to express their intention, and this relief will be granted without regard to the cause of the failure of the instrument to express the true contract, whether it be from mistake of fact or mistake of law. Mistakes of law against which equity will not relieve are those which pertain to the subject-matter of the contract and were inducements thereto or conditions therefor. The rule has no application to mistakes in the language of the contract or in

the choice of form of the instrument, by reason of which it has an effect different from the intention of the parties: *Stafford v. Fetters*, 55-484.

159. Therefore, *held*, that the payee of a note signing the same by written indorsement might have such indorsement reformed to correspond with the agreement between the parties that the transfer was to be made without liability on the part of such indorser: *Ibid*.

160. Where a contract, by reason of mistake of the parties as to the legal import of the terms used, fails to set forth their agreement and understanding, it may be reformed in equity. Such a mistake is not one of law, the legal import of the contract entered into in fact being understood, but a mistake arising from failure of the parties to use words having the meaning intended: *Reed v. Root*, 59-359.

161. Therefore, *held*, that where the parties entered into a lease with the intention and understanding that, in case of the destruction of the building by fire, the liability of the tenant for rent should cease, but the words used in reducing the contract to writing did not in legal effect express such meaning, *held*, that in an action for rent accruing after the destruction of such building by fire, the tenant might, by way of equitable relief, have the writing reformed: *Ibid*.

162. Where a policy of insurance described the interest of the insured as that of a mortgagee, and he was induced to execute the policy under the representation that it sufficiently described his interest, which was in fact a mechanic's lien, *held*, that in an action in equity evidence of such fact was admissible and would entitle plaintiff to recover for loss of the property: *Stout v. City F. Ins. Co.*, 12-371.

163. While mistakes in matters of law are not in general grounds of equitable relief, yet if, through misapprehension or mistake of law, a party parts with a private right of property or assumes obligations upon grounds which he would not have acted upon but for such misapprehension, equity may grant relief: *Baker v. Massey*, 50-399.

164. Where a guardian's deed conveyed the interest of minor heirs in certain property which was subject to dower, and it ap-

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peared that all the parties understood that the dower was one-third of the property in fee, whereas in fact such interest, as the law then stood, was one-third for life only, *held*, that in equity such deed would operate as a conveyance of the interest of the minor heirs in two-thirds of the property only: *Ibid*.

165. In such case the mistake is to be deemed only of fact: *Ibid*.

166. Mistake in the verdict in an action at law should be corrected on motion where the mistake is known to the party. It cannot be made a ground for relief in equity: *McFaul v. Woodbury County*, 57-99.

167. Mistake in judicial sale: Where a decree was furnished by plaintiff's attorney in a foreclosure case, and by mistake of the clerk in entering and issuing execution thereon, a portion of the property involved in the action was not described in the decree nor offered for sale under the execution, and plaintiff's attorney, acting under the belief that the entire property was being sold, bid it in at the sale for the plaintiff, *held*, that the circumstances were such as to entitle plaintiff to relief in equity from the sale: *Snyder v. Ives*, 42-157.

c. Relief against judgments.

As to injunction to restrain enforcement of judgment, see INJUNCTION, §§ 54-67.

As to setting aside judgments, see JUDGMENTS, II, a.

168. Decree of divorce: A decree in equity cannot be reversed except by an appellate court or on an application by bill to the court rendering the same, impeaching it for fraud or otherwise. Therefore, *held*, that a previous decree of divorce awarding the custody of children to one of the parties could not be interfered with except by a showing of fraud or incapacity of the party to whom the custody of the child was awarded to perform the duties of guardian, such incapacity happening since the decree: *Deeds v. Deeds*, 1 G. Gr., 394.

169. Decree procured by fraud: When a decree has been made with consent, and that consent has been fraudulently obtained, the party may have relief by an original bill. If, upon the bill of one of the parties to a decree,

such decree is set aside, it will be regarded as parties to the original decree: *Meek*, 2 G. Gr., 55.

170. A party cannot have relief in equity which has been procured by fraud, if the time for appeal has expired, unless the party is without other remedy: *Young v. Young*, 15-207.

171. Fraud of attorney: A decree cannot be vacated for fraud of attorney when the opposing party has been deceived or misled by such acts: *Humphreys v. Humphreys*, 15-207.

172. The act of the attorney in representing that the case was pending at the term of court, when the other party was induced to accept of a judgment sufficient to invalidate a term: *De Louis v. Meek*, 15-207.

173. Fraudulent judgments: A judgment rendered by parties directly interested, who are indirectly affected by the fraudulent acts of a justice of the peace in procuring the judgment: *Austin v. Carpenter*, 15-207.

174. The decision of a justice of the peace may be attacked for fraud in procuring the judgment on that ground: *Bisby v. Bisby*, 49-507.

175. What constitutes fraud: What justifies the setting aside of a judgment procured in a particular case: *Ing*, 3 G. Gr., 443.

176. A defendant who has obtained a judgment in an action and is represented by an attorney is entitled to relief by a direct action to set aside the judgment, but such action brought after defendant's death: *Bryant v. Williams*, 15-207.

177. To entitle a party to a judgment at law that he failed to obtain at law by the fraud of the inevitable accident or misfortune either on his own part or on the part of his counsel: *Bellows v. Tod*, 15-207.

178. Where a defendant has been served with personal notice and has failed to appear, he cannot be relieved from

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court of equity, unless plaintiff was guilty of a fraudulent concealment of a material fact of which defendant was excusably ignorant, or unless the judgment was obtained by some fraudulent practice in the conduct of the case. The mere fact that the judgment plaintiff had knowledge that the claim was invalid would not be ground for such relief: *Merrill v. Bowe*, 67-686.

179. So a third person who is under obligation to indemnify defendant against such judgment cannot have relief against the judgment upon a mere averment that the judgment plaintiff had knowledge of the invalidity of his claim, such third person having had notice of the action: *Ibid*.

180. **Setting aside:** The statutory provision (Code, § 2522) that judgments in ordinary proceedings shall not be annulled or modified in an action by equitable proceedings except for a defense afterward arising or discovered, does not prevent the issuance of an injunction against the collection of a judgment which is being enforced contrary to the agreement of parties: *Baker v. Redd*, 44-179.

181. Matters which might have been set up as a ground for new trial cannot be interposed in equity as a ground for setting aside the judgment: *Hintrager v. Sumbargo*, 54-604.

182. Judgment in garnishment proceedings, although rendered for an amount in excess of garnishee's liability to the judgment debtor, cannot be modified in an action in equity: *Burlington & M. R. R. Co. v. Hall*, 37-620.

183. Where an action was, without the knowledge of one of the parties, consolidated with another action between the same parties and transferred to another court, and allowed to remain there for three years without any action being taken, and then a decree was procured against the party, who had no knowledge of such transfer, *held*, that on a petition in equity to set aside such decree, he was properly granted relief: *Rivers v. Olmsted*, 66-186.

184. Where judgment was obtained by default on the representation that the plaintiff therein did not wish to recover of the defendant but desired the judgment to more readily recover from another party, *held*, that a subsequent effort to enforce such judg-

ment in violation of the agreement could be enjoined in equity, notwithstanding the statutory provision above referred to: *Baker v. Redd*, 44-179.

185. Where by an agreement for the settlement of a suit defendant was to pay the costs, no definite time therefor being specified, but when the next term of court arrived, the costs not yet being paid, plaintiff took judgment, *held*, that there was not sufficient ground for setting the judgment aside in an action in equity for that purpose: *Bigelow v. Church*, 48-175.

186. A party is not entitled to have a decree and sale set aside if the effect of so doing would be grossly unjust and inequitable: *Strong v. Burdick*, 52-630.

187. **Correction of mistake:** A mistake of plaintiff's attorney in calculating the amount due on a note for which judgment is recovered, if occurring without the want of ordinary care and diligence, may be ground for correcting the judgment in equity: *Barthell v. Roderick*, 34-517.

188. Relief in equity by way of reformation of judgment to correct a mistake will not be granted where no prejudice has resulted or can result to the party complaining: *Crenshaw v. Wickersham*, 15-154.

189. **What sufficient showing; burden of proof:** In order to justify a court of equity in interfering with a judgment at law, the evidence should make it appear clearly and unequivocally that such judgment was wrongfully and fraudulently obtained. The burden of proof is with the party attacking the judgment, and before he can be entitled to relief he must fully establish his allegations: *Johnson v. Lyon*, 14-431.

190. **Objection not raised at proper time:** A party cannot in equity have a judgment canceled or enjoined because of failure to affix a revenue stamp to the original notice in the action, when with full knowledge of the defect he appeared to the action and failed to avail himself of it, was not taken by surprise, had full time to prepare his defense and subsequently stayed the judgment: *Wilsey v. Maynard*, 21-107.

191. Action to set aside a judgment cannot be maintained for a cause which might have been set up as a defense in the original action: *Ebersole v. Lattimer*, 65-164.

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192. Where it appeared that a party had dismissed his petition for new trial filed in proper time under the statute, and no good cause for his not obtaining relief in that method appeared, *held*, that he could not afterward have the judgment set aside in equity: *Dalhoff v. Keenan*, 66-679.

193. Equity will grant relief from a judgment after the expiration of the period of one year allowed by statute for filing a petition to set it aside has expired, only when proper grounds are shown: *Bond v. Epley*, 48-600.

And see JUDGMENTS, II, a.

194. To entitle a party to relief against a judgment at law it must appear that it is against conscience to execute the judgment, and that the party applying for relief has been guilty of no fault or negligence. Such relief will not be granted against a judgment for error therein which might have been corrected upon appeal: *Burlington & M. R. R. Co. v. Hall*, 37-620.

195. Defense must be shown: Where it was sought to defeat the enforcement of a judgment on the ground that it was rendered in pursuance of a compromise without authority, *held*, that it must be alleged that there was no valid and subsisting indebtedness: *Crawford v. White*, 17-560.

196. A judgment will not be set aside and proceedings thereon enjoined in equity if the owner of the judgment has a valid claim to which there is no defense: *Gerrish v. Hunt*, 66-682.

197. Tender: A court of equity will not set aside a judgment on the ground that it is void for want of jurisdiction, where it appears that the indebtedness sued on was a valid one and no offer is made to pay the amount justly due: *Parsons v. Nutting*, 45-404.

198. Before bringing suit to set aside a judgment obtained without notice and by unauthorized appearance, the better practice is for the defendant to tender any amount justly due. But, without the tender, when there has been delay in bringing such action, and some sum appears due, the court will retain and continue the lien of the original judgment for the payment of such judgment as may ultimately be rendered in the case: *Bryant v. Williams*, 21-329.

199. Void judgment alleged to be absolutely sary to allege that plain to the cause of action on purports to be based:

682; *Arnold v. Hawley*, 67-313.

200. A void judgment evidence of indebtedness

Further as to setting JUDGMENTS, II, a.

201. Bill of review: this state have no power review for errors apparent decree affirmed or rendered: *McGregor v. Gar*

202. A party cannot, set up separate, distinct ar in his behalf against a co purpose of securing relief against himself: *Barnes*.

203. New trial: In ge proper for a court of la trial, if the application is court has power to do so, for a court of equity to gr the application be made after the court of law has power: *Hoskins v. Hatten*

204. So *held* where it a was material evidence in l asking a new trial, which procured by him in time f

205. A court of equity v injunction to restrain th judgment on the ground c evidence unless it is set court may judge of its m *McGuire*, Mor., 150; *Blan* 530.

206. The plaintiff in a court of equity to obtain judgment at law must, t such a case as would ha the causes relied on, to a main action: *Dixon v. G*

207. Chancery will dir action at law in cases wh have been ordered by the judgment was rendered, i had been made, provided shown why such applicati the grounds upon which

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chancery is claimed arose after the courts of law were deprived of power to grant such relief: *Bowen v. Troy Portable Mill Co.*, 31-460; *District T'p v. White*, 42-608.

208. A new trial will not be granted in equity for causes which might have been urged as a ground for new trial at law: *Hintrager v. Sumbargo*, 54-604.

And further, see NEW TRIALS.

d. *Marshaling assets.*

209. When required: Where one party has a lien upon two funds as security for his debt, and another has a lien upon but one of such funds, the former should be required to resort first to the fund upon which the latter has no lien: *Miller v. Clarke*, 37-325; *Smith v. Grimes*, 48-356.

210. A person who has a claim upon two funds as security cannot be required to exhaust one in preference to the other, except where it can be done without injustice to himself: *Cutler v. Ammon*, 65-281.

211. If a judgment creditor levies upon land which is subject to the lien of his judgment, but has been subsequently sold or mortgaged by the debtor, equity will, upon proper application by the vendee or mortgagee thereof, direct the judgment to be made from lands of the debtor remaining unsold, if they are sufficient for that purpose, and if not sufficient they are nevertheless first to be sold and the proceeds applied so far as they will go: *Massie v. Wilson*, 16-890.

212. The general practice of marshaling assets recognized, and held that a ward who had come of age and might recover from his guardian and bondsman money due him must resort to that remedy, and not insist upon a trust deed made for his benefit but covering land not purchased with his money and on which creditors were endeavoring to enforce a lien: *Thomas v. Pyne*, 55-348.

213. It seems that if a person holding a junior lien upon personal property should commence proceedings to compel the holder of a senior lien to satisfy his claim out of property which was subject to that lien alone, such senior lien-holder would not be allowed, by purchasing and paying for the property subject to his lien alone, to defeat

the proceedings: *Connolly v. Dillrance*, 50-92.

214. While the general rule is that if the creditor has two funds out of which to make his debt, he may be required to resort to that fund upon which another creditor has no lien, yet this rule is not to be taken without some qualifications. It is never applied unless it can be done without injustice to the creditor or other party in interest, having title to the double fund, and also without any injustice to the common debtor: *Dickson v. Chorn*, 6-19.

215. Therefore, held, that where a creditor had security by a mortgage upon a debtor's homestead, he might take his *pro rata* share under a general assignment for the benefit of creditors, and hold his mortgage security only as to the balance of his claim, and that the other general creditors could not be subrogated to his rights as to the portion of the mortgage not yet exhausted: *Ibid.*

216. The rule as to marshaling assets does not apply unless it can be enforced without injustice to the creditor. Therefore, held, also, that a creditor to whom numerous notes had been assigned as collateral security for an indebtedness which was also secured by a mortgage could not be compelled by other creditors having a claim upon the mortgaged premises, to first resort to the collateral security for payment: *Wolf v. Smith*, 36-454.

217. The rule as to marshaling assets does not apply where a party has a remedy against each of two parties, either of whom he may hold: *Barhydt v. Burgess*, 46-476.

218. Where one creditor has a claim against one debtor individually and another claim against such debtor and another jointly, and holds two mortgages upon the same property from the first-mentioned debtor to secure two claims, he may satisfy the first claim out of the property and look to the joint debtor for any balance unpaid on the second claim, and will not be compelled to apply the amount released from the property *pro rata* upon the second claim: *Small v. Older*, 57-326.

219. The doctrine as to the marshaling of assets does not apply as between two mortgagees, under a mortgage covering but a single fund or tract. The rights of the prior mortgagee as to any particular portion of the

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tract of land cannot be impaired by the act of the junior mortgagee: *Hutchinson v. Wells*, 67-430.

e. Quieting title.

220. Who may bring action: By statutory provision (Code, § 3273) action to quiet title may be brought by a party out of possession against one in possession. Plaintiff is not required to resort to action for possession: *Lewis v. Soule*, 52-11; *Lees v. Wetmore*, 58-170.

221. And plaintiff may, in such case, also ask the recovery of possession: *Lees v. Wetmore*, 58-170.

222. But aside from statutory provision, a party not in possession cannot maintain an action to remove a cloud from his title: *Harrington v. Cabbage*, 3 G. Gr., 307.

223. While an action to recover real property is the appropriate and most effectual remedy where defendant is in possession, yet in such cases an action to quiet title may be maintained: *Lewis v. Soule*, 52-11.

224. In the federal courts a party out of possession, having the legal title, cannot have such equitable relief, his remedy at law being sufficient: *Whitehead v. Entwistle*, 27 Fed. Rep., 778; *Newman v. Westcott*, 29 Fed. Rep., 49.

225. A party who has sold and conveyed all his interest in the title to land cannot thereafter maintain an action to quiet the title of the same: *Adams County v. Burlington & M. R. R. Co.*, 39-507.

226. One who has an equitable title to land may maintain an action to quiet title against one who has no right thereto, without first having his legal title perfected, as, for instance, by having the reformation of his deed in equity. But the purchaser of a void title has no equity as against a rightful claimant of the property: *Rankin v. Miller*, 43-11.

227. Executors entitled to the possession and control of land for the purpose of carrying out the provisions of a will have sufficient interest to support this action: *Lavery v. Sexton*, 41-435.

228. If a tax deed upon unoccupied land has been recorded, either the tax purchaser or the original owner may bring action against the other to quiet title within the five years' limitation provided by statute: *Barrett v. Love*, 48-103.

229. One who does not have title in himself cannot bring an action to quiet title as against another, although the statute allows an action by a party in possession against an action by another to assert his rights in the title: *Shuler*, 69-92.

230. When action to quiet title. An owner and possessor of land may go into equity to quiet title against one who lays claim there to, although he has claims that he has title to: *Shuler*, 69-92.

231. Where plaintiff is in possession under claim and color of title, and defendant acquired a void title, plaintiff could recover against defendant his title, and be restored in possession notwithstanding defect in title: *Keokuk & D. M. R. R. Co. v. Keokuk*, 48-11.

232. Where a bond for the execution of a deed has been executed, and afterward rescinded but the deed is held up, held, that an action against the holder of the title is barred: *Smith v. Van Campen*, 48-11.

233. The owner of land in possession thereof for more than five years after the issuance of a tax deed by the holder of the tax deed, session is barred, may maintain an action against the holder of such tax deed to quiet title, cloud caused by the tax deed will not be barred by the tax deed, an action for the recovery of the land sold for the non-payment of taxes: *Sexton*, 41-566.

234. Where defendant is in possession and plaintiff, in reply, denies defendant's rights thereunder, that this did not amount to a denial of plaintiff of defendant's title, and will prevent a decree for plaintiff: *Lanan*, 49-362.

235. The fact of a cloud on title to property sold cannot be a bar to an action for quieting title, but may perhaps be a bar to the enforcement of the title: *Dietz v. Mock*, 48-103.

236. This action can be brought by a party in possession against one who lays claim there to, although he has claims that he has title to: *Shuler*, 69-92.

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chancery is claimed arose after the courts of law were deprived of power to grant such relief: *Bowen v. Troy Portable Mill Co.*, 31-46; *District T'p v. White*, 42-608.

208. A new trial will not be granted in equity for causes which might have been urged as a ground for new trial at law: *Trager v. Sumbargo*, 54-604.

And further, see NEW TRIALS.

d. Marshaling.

209. When required: If a party has a lien upon two funds, one statutory debt, and another equitable debt, and such funds, the party must resort first to the statutory debt: *Paton* (unreported).

210. A party may be asked in equity to marshal his funds: *Grimes*, 43-110. A party may be asked in equity to marshal his funds: *Stu County v. Bau*, 49-657.

211. A party has jurisdiction to set aside those having added defects and irregularities, and the law will not be cured: *Harlan*, 30-396.

212. A case stood upon a cross-bill and a defense of an oral contract, held, that it was of equity to set aside, and a motion to transfer it to the law was properly overruled: *Harlan*, 30-110.

213. Unless it appears that the cloud upon title cannot be removed by an action of right or an action of ejectment, or the title could not be settled so as to prevent a multiplicity of suits without the aid of equity, complainant will be left to his remedy at law: *Harrington v. Cabbage*, 3 G. Ch., 507.

214. As the right of possession to property is something distinct from the title, it does not follow that, upon judgment for defendant for costs in an equitable action to set aside defendant's title, the defendant is entitled to the right of possession: *Lombard v. Atwater*, 48-599.

215. The proceedings under statutory provisions for quieting title are not special proceedings: *Miller v. Davison*, 31-435.

216. An action to quiet title under the statute, in effect, an equity suit and must be tried and determined as such: *Balmear v. Dillon*, 558.

217. The provisions of statute that, in an action to recover real property, plaintiff must rely on the strength of his own title (Code, § 3247), and in regard to new trials in such actions (Code, § 3268), are not applicable in actions to quiet title: *Russell v. Nelson*, 32-215.

f. Miscellaneous cases.

247. Mutual accounts: Equity has jurisdiction of a bill of account, both on the ground that a discovery may be had in such cases, and that the remedy is more complete and adequate than at law because a multiplicity of suits may be avoided: *White v. Hampton*, 10-238.

248. Cases of mutual account are of equitable jurisdiction. Although the court of equity may not have jurisdiction of every action for goods, wares and merchandise sold and delivered, or for money advanced where partial payments have been made, or for every contract, expressed or implied, consisting of various items on which sums of money have become due and different payments have been made, yet where there is a great complexity in the accounts between the parties and an examination of them by the jury is impracticable, the court of chancery will exercise jurisdiction: *Burt v. Harrah*, 65-643.

249. Where parties to transactions stand upon equal ground, plaintiff being a borrower and receiving proceeds of notes discounted for him by defendant, the case is not of such character as to impose on defendant the duty of accounting, and there rests upon him the burden of proving the receipt by plaintiff of the different sums claimed to have been paid him by defendant: *Davenport v. Schutt*, 46-510.

250. Where the items of account are all on one side and no great complexity exists, and no discovery is sought, the defendant pleading payment, denial, etc., has a right to trial by jury, and equity cannot take cognizance of such action: *McMartin v. Bingham*, 27-234.

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251. An action to recover from defendant money received by him and converted to his own use, where plaintiff has only to establish, in order to recover, the amount of money received by defendant and his failure to account therefor, is not within equitable jurisdiction. *District Tp v. Bulles*, 69-525.

252. Discovery: Equity will not take jurisdiction of a case on the ground of discovery, if it be not shown that the practice of the law courts and the rules of evidence prevailing over it are such that the party can obtain the evidence necessary to establish the amount of recovery: *Richmond v. Dubuque & S. C. R. Co.*, 33-422, 484.

253. The fact that plaintiff prays that defendant be required to produce the note sued on and attach a copy of it to his answer does not bring the case within equitable cognizance. Under the provisions of Code, § 2523, an action solely for discovery cannot be brought in equity: *Searcy v. Miller*, 57-613.

254. Lost instrument; accident: In order that a bill may be maintained in equity to recover on a lost instrument, the bill must state that without the desired discovery the party has not sufficient evidence to maintain a suit at law. If the instrument is not lost, or if complainant has sufficient evidence to establish its contents, his remedy is at law: *Temple v. Gove*, 8-511.

255. Accident is an established ground of relief in equity, and covers not merely unavoidable casualties, but unforeseen events, losses, etc., such as are not the result of negligence or misconduct in the party, and the usual instance of such relief is where a bond or other security has been lost, burned or accidentally canceled: *Butch v. Lash*, 4-215.

256. Contribution: A judgment creditor cannot be enjoined from selling a piece of property aliened subsequently to the lien of his judgment until the right of contribution is adjusted between the several alienees. He has the right to subject any of his property to his claim without reference to the contributive obligations: *Massie v. Wilson*, 16-390.

257. Where property subject to an incumbrance is sold to different persons at different times subsequently to the incumbrance, the property assigned must contribute ratably and not in the inverse order of alienation: *Ibid.*; *Bates v. Ruddick*, 2-423.

258. Multiplicity avoidance of a multiplicity of a multiplicity of grounds for relief in equity, the doctrine is applied in cases where the division of the subject-matter of other cases requiring cases, the party will not sue in the law courts which he matter, but the case will be that all rights relating thereto are joined. But the mere diversity of causes of action is not a foundation of as many causes between the parties thereupon which equity may exercise jurisdiction to settle all suits: *Richmond v. Dubuque*, 33-422, 487.

259. A forfeiture will not be a ground of equity: *Doolin v. G. Gr.*, 265.

260. Courts of equity will divest of an estate for a long time: *Marshalltown v. G. Gr.*, 265.

261. Dower: A claim for account of rents and profits in which dower is claimed is not cognizable: *Gano v. G. Gr.*, 265.

262. Set-off: The rule is that they follow the law of the case unless there is some going beyond the statute. Natural equity arises where credits between the parties and an existing debt on one side constitute a ground of credit where there is an understanding that mutual satisfaction or set-off of parties. Mutual credit is a ground of set-off in equity: *burn*, 3-163.

263. Courts of equity have jurisdiction of matters which have been an obstacle to proceeding at law, by or to the like: *Ibid.*

264. Defective execution though the defective execution may be corrected or equity in a proper case execution cannot be

 Quieting title.—Miscellaneous cases.

against a person *claiming title* (decided under Code of 1851 and Revision): *Fejervary v. Langer*, 9-159; *Eldridge v. Kuehl*, 27-160, 176.

237. Notice by publication: The action may, by statutory provision, be brought against a non-resident defendant on notice by publication: *Miller v. Davison*, 31-435. But a judgment in such case will not bar the non-resident who has made no appearance, from afterward asserting his right to the property in a federal court: *Pitts v. Clay*, 27 Fed. Rep., 635.

238. A petition substantially embodying the averments mentioned by the statutory provision, with a general prayer for equitable relief, will justify the granting of this relief, though it be not specifically asked: *Paton v. Lancaster*, 38-494.

239. Relief: Other equitable relief, as well as a decree quieting title, may be asked in the same petition: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 49-657.

240. A court of equity has jurisdiction to quiet title and to restrain those having adverse titles from setting them up against the paramount title, but defects and irregularities in the title arising out of the official acts of the ministers of the law will not be cured: *Stevenson v. Bonesteel*, 30-236.

241. Where a case stood upon a cross-bill to quiet title and a defense of an oral contract to convey, held, that it was of equity jurisdiction, and a motion to transfer it to the law docket was properly overruled: *Harlan v. Porter*, 50-446.

242. Unless it appears that the cloud upon plaintiff's title cannot be removed by an action of right or an action of ejectment, or that the title could not be settled so as to prevent a multiplicity of suits without the aid of chancery, complainant will be left to his remedy at law: *Harrington v. Cabbage*, 3 G. Gr., 307.

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264. Defective execution: though the defective execution may be corrected or equity in a proper case, execution cannot be set aside.

Pleading and procedure.

press requirements of statute as to methods of executing a particular instrument be dispensed with. So held in case of failure of a person to execute an instrument of adoption of a child: *Long v. Hewitt*, 44-363.

265. Establishment of lien: It being provided by statutory provisions regarding the sale of intoxicating liquors that a judgment for damages against a person illegally selling shall be a lien against the building in which the sales are made with consent and knowledge of the owner, held, that the question whether the premises were used for such illegal sales with consent and knowledge of the owner was one of law in which defendant had a right to a jury trial, and that the proceeding was not an equitable action for the establishment of a lien, the lien being established by statute when proper facts were found: *Loan v. Hiney*, 53-89.

III. PLEADING AND PROCEDURE.¹

266. Parties: An assignment, voluntary or involuntary, by plaintiff, will not constitute a bar to the prosecution of the suit, but the assignee may be required to be made a party by a supplemental bill: *Wright v. Meek*, 3 G. Gr., 472.

267. Where there is unity in interest in the object to be determined by the bill, parties seeking redress may join in the same complaint and bring their action together: *Powell v. Spaulding*, 3 G. Gr., 443.

268. Thus an administrator may join in an action with parties jointly interested with his intestate, seeking to set aside a judgment of partition of lands: *Ibid.*

269. Multifariousness: A bill is not to be treated as multifarious because it joins two good causes of complaint growing out of the same cause of action, when all of the defendants are interested in the same claim of right, and the relief asked for in relation to each is of the same general character: *Bowers v. Keesecher*, 9-422.

270. Demurrer: The sufficiency of a plea in the nature of a bill of review may be questioned by demurrer: *De Louis v. Meek*, 2 G. Gr., 55.

271. If the demurrer is sustained and no motion made for leave to amend, judgment may properly be entered on the demurrer: *Ibid.*

272. The fact that complainant has a plain and adequate remedy at law is a ground of demurrer in equity: *Preston v. Daniels*, 2 G. Gr., 536.

273. If any of the charges or specifications contained in the bill are good and such as would entitle the plaintiff to relief, a demurrer which goes to the whole bill cannot be sustained: *Powell v. Spaulding*, 3 G. Gr., 443.

274. Substantial defects in the bill which might be raised by demurrer may be taken advantage of on the hearing, although not raised by demurrer: *Dinwiddie v. Roberts*, 1 G. Gr., 363; *Cheuvete v. Mason*, 4 G. Gr., 281; *Kriechbaum v. Bridges*, 1-14; *Cowles v. Shaw*, 2-496.

275. Where a defect in a pleading is one of form, and the case is such that the court can properly proceed to a decree, the defect cannot be raised on final hearing: *Moore v. Pierson*, 6-279.

276. A plea in bar should never be sustained if it is based on facts which have transpired since the filing of the bill: *Wright v. Meek*, 3 G. Gr., 472.

277. Cross-bill: A respondent cannot pray anything in his answer except to be dismissed the court, and if he seeks any relief, he must do so by cross-bill: *Compton v. Comer*, 4-577; *Armstrong v. Pierson*, 5-817; *MacGregor v. MacGregor*, 9-65.

278. Replication: The general practice in this country is to treat the case as fully at issue on the filing of the replication: *State ex rel. v. Tilghman*, 6-496.

General prayer for relief: Under a general prayer for relief in an equitable action, plaintiff is entitled to any relief to which he is entitled in equity under the facts pleaded: See PLEADINGS, §§ 432-438.

279. Decree pro confesso: In an equitable action upon proof of service, if defendant makes default, a decree *pro confesso* may be entered without establishing by proof the allegations in the bill: *Humphreys v. Darlington*, 3 G. Gr., 588.

¹ The provisions of the Code as to civil procedure are applicable in equity as well as at law, and the cases relating thereto are collected under PLEADING and PROCEDURE respectively. The following cases relate to peculiar doctrines of equity procedure which are now, for the most part, superseded in this state.

Pleading and procedure.

280. While a bill not denied is to be taken as confessed, yet the extent of such confession is frequently measured by the exhibits attached to the bill, and though there be no answer, if proof is introduced which destroys the case made by the bill, relief should be denied: *Cook v. Woodbury County*, 13-21.

281. Decree should conform to pleadings: The decree must be predicated upon the allegations of the pleadings: *Simplot v. Simplot*, 14-449.

282. Evidence limited by pleadings: Although a defendant may answer as to fraud generally, yet if he states a particular state of fraud only, he will be confined in his evidence to that: *Brink v. Morton*, 2-411.

283. Effect of sworn answer: The allegations of the bill being explicitly denied by the answer, complainant must sustain his allegations by proof, or fail: *Jones v. Jones*, 13-276.

284. To overcome a sworn answer in equity requires the testimony of two credible witnesses or other evidence of equal weight and force: *Pierce v. Wilson*, 2-20.

285. The testimony of one witness is not sufficient to overcome such answer: *Davis v. Stevens*, 3-158.

286. A sworn answer or replication in equity when required by the opposite party is conclusive evidence as to matters about which the opposite party seeks disclosure, unless it is overcome by the evidence of two witnesses corroborated by other circumstances; but a party cannot give his pleading such effect by swearing to it when a sworn pleading is not called for: *Bacon v. Lee*, 4-490.

287. The rule as to the effect of a sworn answer does not apply to so much of the answer as sets up new matter in avoidance of the allegations confessed: *White v. Hampton*, 10-238.

288. It is the right of defendant in an equitable action to answer under oath, and plaintiff cannot deprive him of the advantage of such an answer by waiving in his bill the requirement of an answer under oath: *Armstrong v. Scott*, 3 G. Gr., 433.

A sworn answer is no longer of any effect as evidence: See PLEADING, §§ 219, 220.

289. Submission of issue to jury: The reference of a question of fact to a jury is a matter resting entirely in the chancellor's discretion: *White v. Hampton*, 10-238.

290. Where the court finds a fact to be submitted to a jury, it is not required to ask questions of fact in the pleadings: *Chamberlain*.

291. Where a question is submitted to a jury, the verdict is binding to the same extent as a suit at law. But if the issue is submitted without objection, submitted to a jury, and there has been no objection of the circumstances in the mind of the court, the case will be solved in favor of the plaintiff: *v. Marygold*, 2-500.

292. It is not proper in equity to submit an issue to a jury: *Hobart v. Hobart*.

293. Record: On a bill in chancery on the ground of fraud, the court is to be treated as including all other proceedings, and they may all be looked upon as determining whether fraud exists: *Saum v. Stirling*.

294. Hearing and decree in chancery suit is called a hearing, and is technically considered, this includes the introduction of the evidence, the arguments of the solicitors, but not the decree by the chancellor: *Wolfe*, 70—.

ESTATES OF DECEDENTS.

I. APPOINTMENT OF ADMINISTRATORS AND EXECUTORS.

II. ASSETS; POWERS OF EXECUTORS AND ADMINISTRATORS.

- a. What deemed assets.
- b. Allowance to widow.
- c. Powers of executors and administrators.

III. SUITS BY AND AGAINST ADMINISTRATORS.

IV. CLAIMS; PRESENTATION OF CLAIMS.

V. SALES OF REAL PROPERTY BY EXECUTORS OR ADMINISTRATORS.

Appointment of administrators and executors.

VI. DISTRIBUTION; WIDOW'S SHARE; DESCENT.

- a. *Distribution of personal property.*
- b. *Share of widow in personal property.*
- c. *Share of surviving husband or wife in real property; dower.*
- d. *Descent.*

VII. REPORTS OF EXECUTOR OR ADMINISTRATOR; ACCOUNTING; LIABILITY.

I. APPOINTMENT OF ADMINISTRATORS AND EXECUTORS.

1. **Where to be appointed:** Administration upon the estate of a non-resident may be granted in any county in which real property of decedent is situated, provided there are debts of decedent, and it does not appear that there is personalty, or sufficient personalty, to satisfy them: *Little v. Sinnett*, 7-324; *Lees v. Wetmore*, 58-170.

2. As the administrator has nothing to do with the real property of decedent unless it be found that it is necessary for the payment of debts, an application for the grant of letters of administration upon real estate alone should show that such debts exist: *Little v. Sinnett*, 7-324.

3. Where a court assumes jurisdiction to appoint an administrator, such appointment cannot be collaterally attacked by showing that there was no property upon which administration could be granted: *Murphy v. Creighton*, 45-179.

4. **Limitation of time for granting administration:** Under the statutory provision (Code, § 2367) that original administration shall not be granted after the lapse of five years from the death of decedent, or in case he died out of the state, from the time his death was known, *held*, that where it appeared that administration on the estate of a person dying out of the state was granted after five years from the time of his death, it would be presumed that it was shown to the court that such grant of administration was within five years from the time his death was known: *Lees v. Wetmore*, 58-170.

5. An administrator *de bonis non* may be appointed after the lapse of five years from the death of decedent. The above provision refers to the first assumption of management

of the estate by the probate court in the appointment of the first administrator: *Crossan v. McCrary*, 37-684.

6. Ancillary administration in this state may be granted after the expiration of five years to an administrator appointed in another state: *Woodruff v. Schultz*, 49-490; *Dolton v. Nelson*, 3 Dillon, 469.

7. A judgment creditor who has failed to have administration granted within the time specified cannot afterwards maintain an action to revive his judgment against the heirs or others holding property which belonged to such decedent. Whether any equitable circumstance would warrant the granting of original administration after the expiration of five years, *quære*: *Bridgman v. Miller*, 50-392.

As to title to property in case administration is not granted, see *infra*, §§ 274, 275.

8. **Who to be appointed:** The fact that there was an agreement of separation between husband and wife will not deprive the latter of her preference in the matter of administering on the estate of her deceased husband: *Read v. Howe*, 13-50.

9. After the lapse of the time allowed to relatives of different degrees to apply for administration, the court may appoint any proper person even though not next of kin nor a creditor: *Crossan v. McCrary*, 37-684.

10. **Non-residence:** The fact that a person who is within the degrees of relationship specified by the statute is a non-resident will be sufficient ground for refusing his appointment: *In re Estate of O'Brien*, 63-622.

11. The mere fact of non-residence will not necessarily disqualify a person from being appointed as an administrator. But it should be considered in determining the qualifications of an applicant: *Chicago, B. & Q. R. Co. v. Gould*, 64-343.

12. The statutory provision (Code, § 2347) declaring that the removal from the state of an administrator shall create a vacancy does not disqualify a non-resident for holding the office, but simply enables the court to take into account the fact of non-residence occurring after the original appointment, and the administrator who has become a non-resident may, nevertheless, be reappointed, if deemed advisable: *Ibid*.

Appointment of administrators and executors.

13. Adjudication of heirship: The grant of letters of administration to a person is not in itself an adjudication that such person is an heir, and that there are no other heirs having a better right to administer: *Anson v. Stein*, 6-150.

14. Where the will designates an executor, the court has no jurisdiction to appoint a general administrator. It can only appoint a special administrator, to serve until the will is proved and the executor is authorized to act: *Pickering v. Weiting*, 47-242.

15. Additional administrator: An appointment of an additional administrator (even against the objection of the one first appointed) will not be disturbed on appeal unless an abuse of the discretion of the court in such matters can be shown: *Read v. Howe*, 13-50.

16. Resignation; filling vacancy: An executor may surrender his trust by resignation, and after a reasonable time for filling his place he will be released from the duty of participating in the settlement of the estate without any formal order accepting such resignation, and a service of notice upon him thereafter as executor will not be good: *United States Rolling Stock Co. v. Potter*, 48-56.

17. In case of a vacancy by resignation the person appointed succeeds to the duties and obligations as well as the powers of the first executor, and can discharge such duties and obligations without delay or interruption: *Shawhan v. Loffer*, 24-217.

18. An administrator with the will annexed, appointed in accordance with Code, §§ 2348, 2349, cannot exercise a power given the executor by the will to sell real property: *Hodgin v. Toler*, 70—.

19. Special administrator: A special administrator does not represent the estate in such manner that the statute of limitations will commence to run against claims from the time of his appointment: *Pickering v. Weiting*, 47-242.

20. A special administrator need not give notice of his appointment: *Ibid.*

21. The court has no authority to order a sale of real estate upon the petition of a special administrator, and such sale would be without jurisdiction and absolutely void: *Long v. Burnett*, 13-28.

22. A special administrator is not appointed as plaintiff in a suit by one of the deceased, and same: *Masterson v. Brown*.

23. In the absence of appeal or otherwise, of a suit in court in appointing a special administrator, it will be presumed that no objection existed for his appointment.

24. Qualification: The special administrator's bond is not required before his appointment, and the validity of the appointment is not affected: *R. I. & P. R. Co.*, 65-72.

25. Evidence of appointment: The record of the appointment of a special administrator was not given, but was mentioned through the court as the executor, and was not a sale as executor, and finally held, that this was *prima facie* evidence to satisfy the court on appeal that the executor in fact: *Shawhan v. Loffer*.

26. Appointment by clerk: The clerk will not show that the administrator was appointed by the clerk. Such letters are not the administrator's appointment, but are to be issued in that form. The appointment was made by the clerk: *Citizens' Bank v. Shawhan*, 316.

27. Letters: If the court is giving greater power to the executor by law, the grant of such letters is void: *Pickering v. Weiting*.

28. Letters to foreign administrator: A foreign administrator cannot be appointed without taking out letters: *McClure v. Bates*, 12-77. *Ex'rs*, 4 G. Gr., 144.

29. The appointment in another state will be regular: *Woodruff v. Schultz*.

30. Notice: The provision is directory, and if notice does not have the effect of appointment, or prevent the executor from discharging the duties thereto: *Johnson v. Bar*.

31. Under Code, § 30 the executor is competent to sue.

Assets.— What deemed.— Allowance to widow.

of his having posted notice of his appointment: *Brownell v. Williams*, 54-353.

82. An administrator *de bonis non* at common law derived title from the deceased and not from the former administrator, and was entitled only to the goods and personal property remaining in specie, but in this state the powers and duties of a substituted administrator are determined by statute (Code, §§ 2348-9): *Stewart v. Phenice*, 65-475.

83. A substituted administrator may sue his predecessor on his bond for funds received by him and not applied to the payment of debts of the estate, where there are such debts. It is not necessary that the action be brought by the creditors entitled to such funds: *Ibid.*

84. But if there are no claims against the estate, then the parties entitled to share in the assets and not the administrator *de bonis non* must sue: *Ibid.*; *Kelley v. Mann*, 56-625.

II. ASSETS; POWERS OF ADMINISTRATOR OVER.

a. What deemed assets; exempt property; life insurance.

85. Debt due from executor: The old common law rule that a debtor who has been made executor of his creditor's estate is released from his debt, when it does not appear that the assets of the estate are insufficient to pay the debts, is not in force: but where there is a person other than the executor authorized to collect the debts of the estate, a suit or judgment against the executor for a debt due by him to the estate should be against him individually and not as executor: *Kaster v. Pierson*, 27-90.

86. Exempt property: The administrator cannot maintain replevin against the widow or her vendees for the recovery of chattels exempt from administration. He has no power to control her disposition of such property: *Wilmington v. Sutton*, 6-44.

Further as to the right of the widow to the exempt property of the deceased husband, see *infra*, §§ 276-281.

87. Life insurance: The administrator is charged with the duty of collecting life insurance and distributing it to the proper persons, and is liable on his bond for failure to do so: *Kelley v. Mann*, 56-625.

88. The proceeds of a policy of life insurance inure to the separate use of the husband or wife and children, if any (Code, § 2372), and are not to be distributed in such case among the heirs generally, as other personal property: *Rhode v. Bank*, 52-375.

89. The above provision contemplates a case where the policy is payable to deceased or his legal representative. If payable to another person for the use and benefit of such person, it cannot be otherwise disposed of by will: *McClure v. Johnson*, 56-620.

40. The facts in a particular case held not sufficient to establish an agreement that the avails of life insurance should be subject to a debt: *Herriman v. McKee*, 49-185.

41. Proceeds of life insurance in the hands of the beneficiary are subject to his debts: *Murray v. Wells*, 53-256.

b. Allowance to widow.

42. When proper: There is no statutory provision authorizing an allowance to be made to the widow for her support for any period except for the year subsequent to the death of her husband as provided in Code, § 2375. The probate court has no authority to make an allowance for this purpose by virtue of the terms of an ante-nuptial contract: *In re Estate of Collins*, 66-79.

43. A court in equity may have jurisdiction to carry out the terms of an ante-nuptial contract and make an allowance in accordance therewith for the support of the widow, but a court of probate cannot grant such relief: *Ibid.*

44. The allowance provided therein for temporary support where necessary is no part of the widow's dower or inheritance, but something entirely distinct, and the right thereto is not relinquished by an ante-nuptial release of all rights of dower and inheritance as the widow and heir of deceased: *Mahaffy v. Mahaffy*, 61-679.

45. Payment: While the primary idea of the statute is that specific property must be set off, yet, in case it is not possible, the court may charge the executor with making money payments, and that, too, regardless of the question as to whether he has the requisite amount of money in his hands at that time, if there is property which the executor may convert into money for the purpose of

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making such payments: *Estate of McReynolds*, 61-585.

46. It is improper for the court to postpone the payment of the allowance made to the widow by ordering that an allowance made to a creditor shall first be paid. The administrator cannot by any agreement or contract with such creditor deprive the widow of her right to priority as to her allowance: *In re Estate of Dennis*, 67-110.

47. Under former statutory provisions, *held*, that if the estate was insolvent so that after the payment of debts there would be nothing for distribution, there was no authority for directing the executor to pay an allowance to the widow for the support of herself and minor children: *In re Application of Hieschler*, 13-597.

48. Reduction of allowance; review: The statute (Code, § 2377) contemplates that the allowance may, upon a proper application and showing, be reduced. It should not ordinarily be paid in advance, but a reasonable opportunity should be left to modify and reduce the allowance in case it should be found necessary to do so: *Estate of McReynolds*, 61-585.

49. In such matter the court must be allowed the exercise of a considerable discretion. In a particular case, *held*, that the refusal of the lower court to make any allowance would not be reversed on appeal: *Caldwell v. Caldwell's Estate*, 54-456.

50. A reduction of the allowance can only operate upon an unexpended balance thereof. The widow cannot be required to account for or pay back any portion already expended: *Harshman v. Slonaker*, 53-467.

c. Powers of executors and administrators; administrator *de son tort*.

51. Real estate: The administrator has no title in the real property of decedent which is subject to sale under a judgment against such administrator: *Lepage v. McNamara*, 5-124.

52. The administrator has nothing whatever to do with the real estate unless it be necessary to be sold for the payment of debts: *Little v. Sinnett*, 7-324; *Gray v. Myers*, 45-158; *Hodgin v. Toler*, 70—.

53. In the absence of statutory provision

(which is found, however, the administrator cannot of forcible entry and delivery of decedent: *Beez*

54. The administrator to receive the rents account of decedent from his real property: *Lepage*, 6-123; *Kin*

55. Nor has he authority for repairs, improvements of such property: *Foteaux*

56. Under statutory provisions the administrator may, if provided for, sue for rent in doing so it must be shown that the heir or devisee present take: *Shawhan v. Long*,

57. Whether under this administrator might bring action to quiet title, *quære*. Whatever trustee, not simply in his capacity as administrator, and he must authorize him to act: *Kin* 154.

58. Where by the terms of the will the executor is authorized to convey the real property of decedent or dispose of the same in accordance with the provisions, etc., he may sue to quiet the title: *Lavert*

59. To give an administrator authority to bring action to remove a lien from land belonging to decedent prior to the payment of his debts by a full statement of the estate and a like account made of the personal property of decedent is necessary to the payment of debts. If, however, it was no personal property of decedent the existence of debts was not a bar: *Gladson v. Whitney*, 9-24.

60. In such a proceeding the administrator is a necessary party: *Ibid*.

61. Where growing crops upon land set apart to the executor they pass with the land: *Ralston v* 533.

62. A lease made by an administrator is not validly approved by the court and cannot be enforced against the estate: *Sibley*, 65-754.

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court of equity, unless plaintiff was guilty of a fraudulent concealment of a material fact of which defendant was excusably ignorant, or unless the judgment was obtained by some fraudulent practice in the conduct of the case. The mere fact that the judgment plaintiff had knowledge that the claim was invalid would not be ground for such relief: *Merrill v. Bowe*, 67-686.

179. So a third person who is under obligation to indemnify defendant against such judgment cannot have relief against the judgment upon a mere averment that the judgment plaintiff had knowledge of the invalidity of his claim, such third person having had notice of the action: *Ibid*.

180. **Setting aside:** The statutory provision (Code, § 2522) that judgments in ordinary proceedings shall not be annulled or modified in an action by equitable proceedings except for a defense afterward arising or discovered, does not prevent the issuance of an injunction against the collection of a judgment which is being enforced contrary to the agreement of parties: *Baker v. Redd*, 44-179.

181. Matters which might have been set up as a ground for new trial cannot be interposed in equity as a ground for setting aside the judgment: *Hintrager v. Sumbargo*, 54-604.

182. Judgment in garnishment proceedings, although rendered for an amount in excess of garnishee's liability to the judgment debtor, cannot be modified in an action in equity: *Burlington & M. R. R. Co. v. Hall*, 37-620.

183. Where an action was, without the knowledge of one of the parties, consolidated with another action between the same parties and transferred to another court, and allowed to remain there for three years without any action being taken, and then a decree was procured against the party, who had no knowledge of such transfer, *held*, that on a petition in equity to set aside such decree, he was properly granted relief: *Rivers v. Olmsted*, 66-186.

184. Where judgment was obtained by default on the representation that the plaintiff therein did not wish to recover of the defendant but desired the judgment to more readily recover from another party, *held*, that a subsequent effort to enforce such judg-

ment in violation of the agreement could be enjoined in equity, notwithstanding the statutory provision above referred to: *Baker v. Redd*, 44-179.

185. Where by an agreement for the settlement of a suit defendant was to pay the costs, no definite time therefor being specified, but when the next term of court arrived, the costs not yet being paid, plaintiff took judgment, *held*, that there was not sufficient ground for setting the judgment aside in an action in equity for that purpose: *Bigelow v. Church*, 48-175.

186. A party is not entitled to have a decree and sale set aside if the effect of so doing would be grossly unjust and inequitable: *Strong v. Burdick*, 52-630.

187. **Correction of mistake:** A mistake of plaintiff's attorney in calculating the amount due on a note for which judgment is recovered, if occurring without the want of ordinary care and diligence, may be ground for correcting the judgment in equity: *Barthell v. Roderick*, 34-517.

188. Relief in equity by way of reformation of judgment to correct a mistake will not be granted where no prejudice has resulted or can result to the party complaining: *Crenshaw v. Wickersham*, 15-154.

189. **What sufficient showing; burden of proof:** In order to justify a court of equity in interfering with a judgment at law, the evidence should make it appear clearly and unequivocally that such judgment was wrongfully and fraudulently obtained. The burden of proof is with the party attacking the judgment, and before he can be entitled to relief he must fully establish his allegations: *Johnson v. Lyon*, 14-431.

190. **Objection not raised at proper time:** A party cannot in equity have a judgment canceled or enjoined because of failure to affix a revenue stamp to the original notice in the action, when with full knowledge of the defect he appeared to the action and failed to avail himself of it, was not taken by surprise, had full time to prepare his defense and subsequently stayed the judgment: *Wilsey v. Maynard*, 21-107.

191. Action to set aside a judgment cannot be maintained for a cause which might have been set up as a defense in the original action: *Ebersole v. Lattimer*, 65-164.

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192. Where it appeared that a party had dismissed his petition for new trial filed in proper time under the statute, and no good cause for his not obtaining relief in that method appeared, *held*, that he could not afterward have the judgment set aside in equity: *Dalhoff v. Keenan*, 66-679.

193. Equity will grant relief from a judgment after the expiration of the period of one year allowed by statute for filing a petition to set it aside has expired, only when proper grounds are shown: *Bond v. Epley*, 48-600.

And see JUDGMENTS, II, a.

194. To entitle a party to relief against a judgment at law it must appear that it is against conscience to execute the judgment, and that the party applying for relief has been guilty of no fault or negligence. Such relief will not be granted against a judgment for error therein which might have been corrected upon appeal: *Burlington & M. R. R. Co. v. Hall*, 37-620.

195. Defense must be shown: Where it was sought to defeat the enforcement of a judgment on the ground that it was rendered in pursuance of a compromise without authority, *held*, that it must be alleged that there was no valid and subsisting indebtedness: *Crawford v. White*, 17-560.

196. A judgment will not be set aside and proceedings thereon enjoined in equity if the owner of the judgment has a valid claim to which there is no defense: *Gerrish v. Hunt*, 66-682.

197. Tender: A court of equity will not set aside a judgment on the ground that it is void for want of jurisdiction, where it appears that the indebtedness sued on was a valid one and no offer is made to pay the amount justly due: *Parsons v. Nutting*, 45-404.

198. Before bringing suit to set aside a judgment obtained without notice and by unauthorized appearance, the better practice is for the defendant to tender any amount justly due. But, without the tender, when there has been delay in bringing such action, and some sum appears due, the court will retain and continue the lien of the original judgment for the payment of such judgment as may ultimately be rendered in the case: *Bryant v. Williams*, 21-329.

199. Void judgments: alleged to be absolutely void, it is necessary to allege that plaintiff to the cause of action on purports to be based: *G* 682; *Arnold v. Hawley*, 1

200. A void judgment: evidence of indebtedness: 67-313.

Further as to setting aside JUDGMENTS, II, a.

201. Bill of review: This state have no power to review for errors apparent decree affirmed or rendered by court: *McGregor v. Gardner*

202. A party cannot, in setting up separate, distinct and in his behalf against a co-party, purpose of securing relief against himself: *Barnes v.*

203. New trial: In general proper for a court of law trial, if the application is by a court has power to do so, it for a court of equity to grant the application be made only after the court of law has exercised power: *Hoskins v. Hattenb*

204. So *held* where it appears was material evidence in being asked a new trial, which was procured by him in time for

205. A court of equity will grant injunction to restrain the judgment on the ground of evidence unless it is set aside by a court may judge of its materiality: *McGuire*, Mor., 150; *Blanc* 530.

206. The plaintiff in a court of equity to obtain a judgment at law must, at such a case as would have the causes relied on, to a main action: *Dixon v. Gra*

207. Chancery will direct action at law in cases where have been ordered by the court judgment was rendered, if had been made, provided it is shown why such application to the grounds upon which it

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chancery is claimed arose after the courts of law were deprived of power to grant such relief: *Bowen v. Troy Portable Mill Co.*, 31-460; *District T'p v. White*, 42-608.

208. A new trial will not be granted in equity for causes which might have been urged as a ground for new trial at law: *Hintrager v. Sumbargo*, 54-804.

And further, see NEW TRIALS.

d. Marshaling assets.

209. When required: Where one party has a lien upon two funds as security for his debt, and another has a lien upon but one of such funds, the former should be required to resort first to the fund upon which the latter has no lien: *Miller v. Clarke*, 37-325; *Smith v. Grimes*, 48-356.

210. A person who has a claim upon two funds as security cannot be required to exhaust one in preference to the other, except where it can be done without injustice to himself: *Cutler v. Ammon*, 65-281.

211. If a judgment creditor levies upon land which is subject to the lien of his judgment, but has been subsequently sold or mortgaged by the debtor, equity will, upon proper application by the vendee or mortgagee thereof, direct the judgment to be made from lands of the debtor remaining unsold, if they are sufficient for that purpose, and if not sufficient they are nevertheless first to be sold and the proceeds applied so far as they will go: *Massie v. Wilson*, 16-390.

212. The general practice of marshaling assets recognized, and held that a ward who had come of age and might recover from his guardian and bondsman money due him must resort to that remedy, and not insist upon a trust deed made for his benefit but covering land not purchased with his money and on which creditors were endeavoring to enforce a lien: *Thomas v. Pyne*, 55-348.

213. It seems that if a person holding a junior lien upon personal property should commence proceedings to compel the holder of a senior lien to satisfy his claim out of property which was subject to that lien alone, such senior lien-holder would not be allowed, by purchasing and paying for the property subject to his lien alone, to defeat

the proceedings: *Connolly v. Dillrance*, 50-92.

214. While the general rule is that if the creditor has two funds out of which to make his debt, he may be required to resort to that fund upon which another creditor has no lien, yet this rule is not to be taken without some qualifications. It is never applied unless it can be done without injustice to the creditor or other party in interest, having title to the double fund, and also without any injustice to the common debtor: *Dickson v. Chorn*, 6-19.

215. Therefore, held, that where a creditor had security by a mortgage upon a debtor's homestead, he might take his *pro rata* share under a general assignment for the benefit of creditors, and hold his mortgage security only as to the balance of his claim, and that the other general creditors could not be subrogated to his rights as to the portion of the mortgage not yet exhausted: *Ibid.*

216. The rule as to marshaling assets does not apply unless it can be enforced without injustice to the creditor. Therefore, held, also, that a creditor to whom numerous notes had been assigned as collateral security for an indebtedness which was also secured by a mortgage could not be compelled by other creditors having a claim upon the mortgaged premises, to first resort to the collateral security for payment: *Wolf v. Smith*, 36-454.

217. The rule as to marshaling assets does not apply where a party has a remedy against each of two parties, either of whom he may hold: *Barhydt v. Burgess*, 46-476.

218. Where one creditor has a claim against one debtor individually and another claim against such debtor and another jointly, and holds two mortgages upon the same property from the first-mentioned debtor to secure two claims, he may satisfy the first claim out of the property and look to the joint debtor for any balance unpaid on the second claim, and will not be compelled to apply the amount released from the property *pro rata* upon the second claim: *Small v. Older*, 57-826.

219. The doctrine as to the marshaling of assets does not apply as between two mortgagees, under a mortgage covering but a single fund or tract. The rights of the prior mortgagee as to any particular portion of the

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tract of land cannot be impaired by the act of the junior mortgagee: *Hutchinson v. Wells*, 67-430.

e. Quieting title.

220. Who may bring action: By statutory provision (Code, § 3273) action to quiet title may be brought by a party out of possession against one in possession. Plaintiff is not required to resort to action for possession: *Lewis v. Soule*, 52-11; *Lees v. Wetmore*, 58-170.

221. And plaintiff may, in such case, also ask the recovery of possession: *Lees v. Wetmore*, 58-170.

222. But aside from statutory provision, a party not in possession cannot maintain an action to remove a cloud from his title: *Harington v. Cabbage*, 3 G. Gr., 307.

223. While an action to recover real property is the appropriate and most effectual remedy where defendant is in possession, yet in such cases an action to quiet title may be maintained: *Lewis v. Soule*, 52-11.

224. In the federal courts a party out of possession, having the legal title, cannot have such equitable relief, his remedy at law being sufficient: *Whitehead v. Entwistle*, 27 Fed. Rep., 778; *Newman v. Westcott*, 29 Fed. Rep., 49.

225. A party who has sold and conveyed all his interest in the title to land cannot thereafter maintain an action to quiet the title of the same: *Adams County v. Burlington & M. R. R. Co.*, 39-507.

226. One who has an equitable title to land may maintain an action to quiet title against one who has no right thereto, without first having his legal title perfected, as, for instance, by having the reformation of his deed in equity. But the purchaser of a void title has no equity as against a rightful claimant of the property: *Rankin v. Miller*, 43-11.

227. Executors entitled to the possession and control of land for the purpose of carrying out the provisions of a will have sufficient interest to support this action: *Laverty v. Sexton*, 41-435.

228. If a tax deed upon unoccupied land has been recorded, either the tax purchaser or the original owner may bring action against the other to quiet title within the five years' limitation provided by statute: *Barrett v. Love*, 48-103.

229. One who does title in himself cannot be quietly asserted against as against title, although the statute against an action by a party to assert his rights in the title: *Shuler*, 69-92.

230. When action owner and possessor of to go into equity to quiet who lays claim thereto claims that he has title: *21-363*.

231. Where plaintiff under claim and color of title, defendant acquired a void title, plaintiff could recover against defendant hold title, and be restored in notwithstanding defect title: *Keokuk & D. M.*, 48-11.

232. Where a bond for execution, and afterwards been rescinded but the bond is held up, held, that an action against the holder of the bond: *Smith v. Van Campen*, 40-48-11.

233. The owner of land in possession thereof for after the issuance of a tax deed by the holder of the tax deed session is barred, may maintain an action against the holder of such tax deed cloud caused by the tax deed will not be barred by the tax deed an action for the recovery of the land sold for the non-payment of taxes: *Sexton*, 41-566.

234. Where defendant and plaintiff, in reply, a party's rights thereunder that this did not amount to a quieting of plaintiff of defendant's title: *Plananan*, 49-362.

235. The fact of a cloud on property sold cannot be asserted against an action for title but may perhaps be asserted in the enforcement of the title: *Dietz v. Mock*, 49-362.

236. This action can

Quieting title.—Miscellaneous cases.

against a person *claiming title* (decided under Code of 1851 and Revision): *Fejervary v. Langer*, 9-159; *Eldridge v. Kuehl*, 27-160, 176.

237. Notice by publication: The action may, by statutory provision, be brought against a non-resident defendant on notice by publication: *Miller v. Davison*, 81-495. But a judgment in such case will not bar the non-resident who has made no appearance, from afterward asserting his right to the property in a federal court: *Pitts v. Clay*, 27 Fed. Rep., 635.

238. A petition substantially embodying the averments mentioned by the statutory provision, with a general prayer for equitable relief, will justify the granting of this relief, though it be not specifically asked: *Paton v. Lancaster*, 38-494.

239. Relief: Other equitable relief, as well as a decree quieting title, may be asked in the same petition: *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 49-657.

240. A court of equity has jurisdiction to quiet title and to restrain those having adverse titles from setting them up against the paramount title, but defects and irregularities in the title arising out of the official acts of the ministers of the law will not be cured: *Stevenson v. Bonesteel*, 30-286.

241. Where a case stood upon a cross-bill to quiet title and a defense of an oral contract to convey, held, that it was of equity jurisdiction, and a motion to transfer it to the law docket was properly overruled: *Harlan v. Porter*, 50-446.

242. Unless it appears that the cloud upon plaintiff's title cannot be removed by an action of right or an action of ejectment, or that the title could not be settled so as to prevent a multiplicity of suits without the aid of chancery, complainant will be left to his remedy at law: *Harrington v. Cubbage*, 3 G. Cr., 307.

243. As the right of possession to property is something distinct from the title, it does not follow that, upon judgment for defendant for costs in an equitable action to set aside defendant's title, the defendant is entitled to the right of possession: *Lombard v. Atwater*, 43-599.

244. The proceedings under statutory provisions for quieting title are not special proceedings: *Miller v. Davison*, 81-435.

245. An action to quiet title under the statute is, in effect, an equity suit and must be brought and determined as such: *Balmear v. Otis*, 4 Dillon, 538.

246. The provisions of statute that, in an action to recover real property, plaintiff must rely solely on the strength of his own title (Code, § 3247), and in regard to new trials in such actions (Code, § 3268), are not applicable in actions to quiet title: *Russell v. Nelson*, 32-215.

f. *Miscellaneous cases.*

247. Mutual accounts: Equity has jurisdiction of a bill of account, both on the ground that a discovery may be had in such cases, and that the remedy is more complete and adequate than at law because a multiplicity of suits may be avoided: *White v. Hampton*, 10-238.

248. Cases of mutual account are of equitable jurisdiction. Although the court of equity may not have jurisdiction of every action for goods, wares and merchandise sold and delivered, or for money advanced where partial payments have been made, or for every contract, expressed or implied, consisting of various items on which sums of money have become due and different payments have been made, yet where there is a great complexity in the accounts between the parties and an examination of them by the jury is impracticable, the court of chancery will exercise jurisdiction: *Burt v. Harrah*, 65-643.

249. Where parties to transactions stand upon equal ground, plaintiff being a borrower and receiving proceeds of notes discounted for him by defendant, the case is not of such character as to impose on defendant the duty of accounting, and there rests upon him the burden of proving the receipt by plaintiff of the different sums claimed to have been paid him by defendant: *Davenport v. Schutt*, 46-510.

250. Where the items of account are all on one side and no great complexity exists, and no discovery is sought, the defendant pleading payment, denial, etc., has a right to trial by jury, and equity cannot take cognizance of such action: *McMartin v. Bingham*, 27-234.

Miscellaneous cases.

251. An action to recover from defendant money received by him and converted to his own use, where plaintiff has only to establish, in order to recover, the amount of money received by defendant and his failure to account therefor, is not within equitable jurisdiction: *District Tp v. Bulles*, 69-525.

252. Discovery: Equity will not take jurisdiction of a case on the ground of discovery, if it be not shown that the practice of the law courts and the rules of evidence prevailing over it are such that the party can obtain the evidence necessary to establish the amount of recovery: *Richmond v. Dubuque & S. C. R. Co.*, 33-422, 484.

253. The fact that plaintiff prays that defendant be required to produce the note sued on and attach a copy of it to his answer does not bring the case within equitable cognizance. Under the provisions of Code, § 2523, an action solely for discovery cannot be brought in equity: *Searcy v. Miller*, 57-613.

254. Lost instrument; accident: In order that a bill may be maintained in equity to recover on a lost instrument, the bill must state that without the desired discovery the party has not sufficient evidence to maintain a suit at law. If the instrument is not lost, or if complainant has sufficient evidence to establish its contents, his remedy is at law: *Temple v. Gove*, 8-511.

255. Accident is an established ground of relief in equity, and covers not merely unavoidable casualties, but unforeseen events, losses, etc., such as are not the result of negligence or misconduct in the party, and the usual instance of such relief is where a bond or other security has been lost, burned or accidentally canceled: *Butch v. Lash*, 4-215.

256. Contribution: A judgment creditor cannot be enjoined from selling a piece of property aliened subsequently to the lien of his judgment until the right of contribution is adjusted between the several alienees. He has the right to subject any of his property to his claim without reference to the contributive obligations: *Massie v. Wilson*, 16-390.

257. Where property subject to an incumbrance is sold to different persons at different times subsequently to the incumbrance, the property assigned must contribute ratably and not in the inverse order of alienation: *Ibid.*; *Bates v. Ruddick*, 2-423.

258. Multiplicity avoidance of a multiplicity of times a ground for litigation in equity, the doctrine is applied in cases where the subject-matter of the subject-matter of other cases requiring equity, the party will not sue in the law courts which have jurisdiction of the matter, but the case will be heard in equity that all rights relating to the matter be settled. But the mere diversity of causes of action is not a foundation of as many causes of action between the parties as there are upon which equity may exercise jurisdiction to settle a suit: *Richmond v. Dul*, 33-422, 487.

259. A forfeiture within the jurisdiction of a court of equity: *Dool*, G. Gr., 265.

260. Courts of equity divesting of an estate for a long time: *Marshalltown v.*

261. Dower: A claim for dower in an account of rents and profits in which dower is claimed is not in equity cognizance: *Gano v. Gi*.

262. Set-off: The rule is that they follow the law in setting off unless there is something going beyond the statute. A set-off in natural equity arises where there are mutual credits between the parties. It is not an existing debt on one side, but a ground of credit on the other where there is an understanding that mutual satisfaction or set-off is intended between the parties. Mutual credits are not a ground for the right of set-off in equity: *burn*, 3-163.

263. Courts of equity have jurisdiction of matters which have been an obstacle to the proceeding at law, by or for the like: *Ibid.*

264. Defective execution: Though the defective execution may be corrected or the matter may be done in equity in a proper case, execution cannot be s

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otherwise it is deemed denied (Code, § 2410). But before the court can obtain any jurisdiction or power to decide as to the correctness of the claim, notice must be served on the administrator. The allowance by the administrator, after filing and before notice, of a part of the claim, is not an adjudication as to the balance, and is not binding on claimant, and he may prosecute his demand as to the balance: *Smith v. McFadden*, 56-482.

155. That the claim is not properly sworn to does not render the filing thereof void: *Goodrich v. Conrad*, 24-254.

156. The provision in that respect is directory, and the oath may be administered after filing: *Wile v. Wright*, 32-451.

157. If the claim is filed in due time, though not sworn to, it will be sufficient. The omission of the oath will not render the filing void: *McCrary v. Deming*, 38-527.

158. If the claim is such that action thereon may be brought against the administrator in some other court, it need not be first filed, etc., in the probate court: *Linu County v. Day*, 16-158.

159. The jurisdiction of the circuit court is not exclusive. After the claim is filed the action may be taken to the district court by consent of parties, and that court will have jurisdiction: *McCrary v. Deming*, 38-527.

160. So under Rev., § 2395, which prohibited the prosecution of claims for a mere money demand in the district court, except with the approbation of the county (probate) court, *held*, that such provision did not deprive the district court of jurisdiction, but was merely an inhibition upon plaintiff, which must be taken advantage of by way of defense, or it would be considered waived, and the district court would have jurisdiction by consent: *Sterritt v. Robinson*, 17-61; *Cooley v. Smith*, 17-99.

161. And under the same section (which is omitted in the Code) it was held that a matter of equitable nature was originally cognizable in the district court, without leave of the county court: *Waples v. Marsh*, 19-381.

162. Also, *held*, that such a proceeding in the district court, the approbation of the county court not being shown, was properly dismissed: *Crane v. Malony*, 39-39.

163. But where an action was brought in the district court against the heirs and ad-

ministrator of decedent to foreclose a mortgage, and a judgment was rendered for the amount due, *held*, that this was an establishment of the claim against the administrator, and that it was not necessary that such claim be established in the circuit court (succeeding to the county court): *Crane v. Guthrie*, 47-542.

164. Where the claim against the estate grew out of a contract upon which the testator was jointly liable with another, and action was brought against the survivor and the executors of decedent jointly, in the same court in which the claim against the surety might have been filed, *held*, that the bringing of such action was a sufficient filing of the claim against the estate: *Moore v. McKinley*, 60-367.

165. Notice of filing: The administrator or executor cannot be held to take notice of the filing of a claim against the estate so as to take it into account in the distribution of the assets until he has been notified thereof in the manner required by statute (Code, § 2408): *Ashton v. Miles*, 49-564.

166. Classes of claims: The filing of a claim within such time as to bring it within the third class of claims mentioned in Code, § 2421, entitles it to precedence in payment, although it is not admitted by the administrator or allowed by the court until after the time has expired: *Chandler v. Hockett's Adm'r*, 12-269.

167. It is the filing of the claim within such time which fixes its character as a claim of the third class, and gives it precedence over claims filed after the expiration of the six months: *Noble v. Morrey*, 19-509.

168. Under the provisions of the Revision, *held*, that a claim upon which action was properly brought in the district court within six months was entitled to be treated as a claim of the third class upon the filing of the judgment in the county court, although such judgment was not filed for more than eighteen months after administration was granted: *Cooley v. Smith*, 17-99.

169. Limitation of time for filing: The statutory provision (Code, § 2421) that claims of the fourth class therein mentioned not filed and approved within twelve months of the giving of notice by the administrator of his appointment, are barred unless the claim is pending in the district court or circuit

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court, or unless peculiar circumstances entitle claimant to equitable relief, refers to claims sought to be enforced against the personal assets of decedent, but not to a claim secured by mortgage upon which the creditor relies for satisfaction: *Allen v. Moer*, 16-307.

170. Where action on a claim is pending in the district court at the time administration is granted, a failure to file it as a claim against the estate will not cause it to be barred under this section: *O'Donnell v. Hermann*, 42-60.

171. Where the administrator fails to give notice of his appointment, the time for filing claims does not run, nor does the time for payment of claims become fixed: *Stewart v. Phenice*, 65-475.

172. The limitation of such section begins to run from the time of giving notice by the general administrator. Notice by the special administrator is not contemplated: *Pickering v. Weiting*, 47-242.

173. The limitation does not apply to claims not existing at the time of decedent's death, but arising thereafter: *Savery v. Sypher*, 39-675.

174. Where a widow's right to a share of the real property of decedent was not established within the twelve months following the giving of notice by the administrator, held, that a claim by her for rents and profits on such share, filed after the expiration of that time, was not barred: *Senat v. Findley*, 51-20.

175. Claims of the third class may be approved after the expiration of the time fixed by the foregoing statutory provision for the filing and proving of claims of the fourth class: *Goodrich v. Conrad*, 24-254; *Smith v. McFadden*, 56-482.

176. Mere delay in bringing a claim of the third class on for hearing will not estop the claimant from proving it up where it does not appear that the estate is in any manner damaged or injured by the delay except that during the delay the co-obligors of deceased have become bankrupt: *Smith v. McFadden*, 56-482.

177. Claims of the fourth class are to be both filed and approved within the time limited. Mere filing is not sufficient to prevent a claim being barred: *Noble v. Morrey*, 19-

509; *Willecox v. Jackson*, 54-853.

178. Equitable relief barred: The mere fact of the twelve months period at such time that it is expected that it can be paid, will not entitle claimant to equitable relief against the bar: *Allen v. Jackson*, 51-296; 372.

179. Where it appears that a non-resident of the state was a non-resident of the state at the time he filed his claim, and that he was late, it appearing that he was unpaid and that the estate was solvent, held, that the claim was not barred against the statutory bar: *Cook*, 11-267.

180. Where the claimant at such time that there was no reason for believing that it was not within the time limit, and he proved up in time, such claim entitles claimant to equitable relief: *Wright*, 32-451.

181. Where the attorney delayed filing the claim against the administrator, who was the administrator, and the settlement of the same was delayed, it also appeared that the claim was settled and that there was no reason to pay all indebtedness: *Wright*, 32-451.

182. As to whether a claim is barred is entitled to equitable relief upon the peculiar facts of the case: *Johnston*, 36-608.

183. The controlling question is whether equitable relief is afforded in case of delay within the time provided for filing remains unsettled: *Allen v. Jackson*, 51-296.

184. Notwithstanding that a claim is closed, a creditor may be allowed to have the claim allowed. Such claim is allowed upon various circumstances:

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of inexcusable neglect upon plaintiff's part, solvency of the estate, etc.; but in a particular case, *held*, that a showing of equitable grounds was not sufficient: *Hazlett v. Burge*, 22-531.

185. Where a claim was left with attorneys more than six months before the expiration of the time for filing the same, and failure to file resulted from accident or mistake on the part of such attorneys, *held*, that there was a sufficient ground for equitable relief from the bar of the statute: *Wilcox v. Jackson*, 57-278.

186. Where the claim is filed in time to have it properly allowed within the year, the fact that its allowance is postponed beyond the year, by a continuance granted to defendant to enable defense to be made, will be a ground of equitable relief from the bar of the statute: *Ingham v. Dudley*, 60-16.

187. Where the holder of a claim, at the request of the administrator and on promise of payment, was induced to delay the filing of his claim beyond the proper time, *held*, that he would be relieved from the bar of the statute: *Burroughs v. McLain*, 87-189.

188. Where it appeared that a claim against the estate was placed in the hands of attorneys in due time for filing, and that they delayed filing upon request of an attorney who had been acting for the administratrix, upon representation by him that he would see the administratrix with a view to an adjustment of the matter, and was then filed three months before the expiration of the limitation, but at such time that the term of court, in which it would come up for allowance, did not commence until a few days after the expiration of the year, *held*, that in view of the fact that the estate remained unsettled and was solvent, a sufficient excuse was shown for the slight delay, and that the court erred in rejecting the claim: *Pettus v. Farrell*, 59-296.

189. Where a creditor agreed to allow an account against his decedent as a payment or set-off against certain promissory notes in his hands against the owner of said account, and the latter, relying on the special agreement, did not present said account for probate as he otherwise would have done, *held*, that the facts did not constitute such peculiar circumstances as to entitle the owner of the ac-

count to equitable relief from fraud as against his failure to file the claim in time: *Preston v. Day*, 19-127.

190. A mere promise of an administrator to pay a claim is not sufficient to excuse the failure of the claimant to file it within the time required: *Colby v. King*, 67-458.

191. The fact that the county judge (then judge of the probate court) kept no books of record in his office in which to file a claim, and that a prior administrator had promised to pay the claim, and that the estate was still unsettled, *held* not sufficient to entitle the claimant to equitable relief: *Davis v. Shawhan*, 84-91.

192. Whether the claim was originally legal or equitable in its nature should make but little difference, if any, in determining what peculiar circumstances are sufficient to excuse the delay in filing: *Brewster v. Kendrick*, 17-479.

193. As to whether, when the peculiar circumstances are found sufficient to entitle a party to equitable relief, his claim should be admitted to the class to which it would equitably and properly belong, or should under all circumstances be regarded as a fourth-class claim, the court was equally divided: *Ibid*.

194. Equitable relief will not be extended to a party who has been negligent in presenting his claim: *Ferrall v. Irvine*, 12-52; *Lacey v. Loughridge*, 51-629.

195. Where a claimant filed his claim but failed to prosecute it and have it allowed, and after eight years commenced action thereon against the administrator, who in the meantime had obtained a final discharge, *held*, that plaintiff had been negligent in prosecuting such claim, and was not entitled to equitable relief: *Phelps v. Thompson*, 48-641.

196. A party attempting to show equitable circumstances to excuse failure to file his claim within the time required should be held to very strict proof when he comes in after final settlement and seeks to interfere with payments already made, or subject other property to the payment of his debt. The fact of final settlement, and especially when made years after the grant of administration, is a most controlling circumstance under the statute: *Shomo v. Bissell*, 30-68.

Claims; presentation and allowance.

197. Limitation need not be pleaded:

The limitation of the time for filing claims against the estate need not be pleaded to be made available. No denial of a claim is necessary, and whenever it appears to the court, by inspection of the claim or otherwise, that it has not been filed or proved as required, it is the duty of the court, independently of any pleading on the part of the executor or administrator, to reject it: *Brownell v. Williams*, 54-353.

198. Failure of an administrator to employ an attorney to defend against a claim on the ground that it is barred cannot constitute fraud in itself: *Trimble v. Marshall*, 66-233.

199. Abandonment: Where a note having been filed as a claim against an estate was afterwards withdrawn from the files for the purpose of bringing action against the surety thereon, and there was no record of any dismissal of the proceedings, held, that the claim was not abandoned: *Brought v. Griffith*, 16-26.

200. Allowance: The administrator cannot make any arrangement with the creditor by which the court will be authorized to order an allowance to such creditor to have priority over the allowance made to the widow: *In re Estate of Dennis*, 67-110.

201. Whether, when the administrator admits the correctness of a claim, the court may hear further proof, *quære*: *Karr v. Stivers*, 34-123.

202. Jury trial: Either party is, under Code, § 2411, providing for trial as to the allowance of contested claims, entitled to a jury trial upon demand. If the parties waive a jury, the trial may be by the court: *Ingham v. Dudley*, 60-16.

203. Presumption: Where the probate court orders a claim to be paid which has been duly sworn to and filed, and it is so paid, this is sufficient evidence that it was admitted by the administrator with the approbation of the court: *Marlow v. Marlow*, 48-639.

204. Setting aside for fraud: The allowance by the administrator of a claim against the estate is not an adjudication binding upon the court when the action of such administrator is properly called in question, and it will be set aside if fraudulent: *Riordan v. White*, 42-432.

205. Where an administrator obtains an allowance of a claim, the court should, in a proper case, set the allowance aside, but upon a mere exception would seem that an administrator is not bound to do so for that purpose: *Ashe v. Benson*, 11-276.

206. Setting aside an allowance: An allowance made by an administrator, and the clerk made in vacation, is not binding for the next term by the court: *Willet v. Jewett*, 11-276.

207. Conclusiveness: An allowance made by the court in its character is conclusive on appeal or in some other case: *Hart v. Jewett*, 11-276.

208. An allowance of a claim binding upon a creditor who is not represented by him, but who has a claim against the grantee of a conveyance when the land thus conveyed is the subject of such claim: *Willet v. Jewett*, 11-276.

209. Not a judgment: An allowance of a claim by the probate court is not a judgment in such sense as to be subject to a writ of error under the statute of limitations: *Willet v. Jewett*, 11-276.

210. The court should not set aside an allowance upon a claim filed after the payment by the court of the amount allowed: *Little v. Shawhan*, 37-533.

211. Where a judgment is entered against an estate, the executor or administrator is not bound to pay it in his individual capacity: *Eubank*, 6-275.

212. Pro rata payment: An allowance of a claim *pro rata* is not binding upon the court in the event that there are assets enough to pay all the claims: *Hart v. Jewett*, 11-276.

213. Payment by the court: Under the act of 1892, claims filed under the act of 1892 may be proved

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estate is solvent the administrator may proceed to pay the claims against that estate in full, unless it is made to appear that the principal estate is insolvent: *Miner v. Austin*, 45-221.

214. Until it is shown that the principal estate is insolvent the ancillary administrator should proceed with the payment of the claims properly filed before him and the settlement of his affairs without reference to the principal estate: *Ashton v. Miles*, 49-564.

215. The allowance of a claim before a foreign administrator is not binding on an administrator appointed in this state. There is no privity between such administrators, and the allowance of the claim in the foreign jurisdiction is not evidence as against the administrator here: *Creswell v. Slack*, 68-110.

216. Appeals: Where a claim has been allowed in favor of an administrator of an estate against the estate, the heirs interested may apply for and prosecute an appeal from such action in their own name, even though such appeal might have been prosecuted in the name of the administrator temporarily appointed to defend against the claim: *Burns v. Keas*, 20-16.

217. Under a statute requiring that appeals from the allowance of claims must be allowed by the court within one year from the action complained of, *held*, that where it appeared that a party applied for the appeal within the year, and was without fault either in making application or prosecuting the same, he was not to be defeated in his right to appeal although the order allowing the appeal was not made until after the expiration of the year: *Ibid*.

V. SALES OF REAL PROPERTY BY EXECUTOR OR ADMINISTRATOR.

218. By executor: Where the provisions of a will required the sale of real property upon the marriage of the widow without reference to the condition of the assets of the estate, *held*, that it was of no importance whether the executor made a proper showing of indebtedness, or whether he acted in good or bad faith in the management of the estate, as far as the validity of the sale was concerned: *Urban v. Hopkins*, 17-105.

219. Application for leave to sell: The statutory provision (Code, § 2388) that appli-

cation for leave to sell real estate can be made only after a full statement of all the claims against the estate and rendering a full account of the disposition made of the personal estate does not imply that the claims must have been already proven: *Little v. Sinnett*, 7-324.

220. The fact that the petition does not state all the claims against the estate will not render the proceedings void: *Myers v. Davis*, 47-325.

221. Allegations in a petition that no personal estate had come into the hands of the administrator, and that there were debts remaining unpaid, *held* sufficient to sustain the jurisdiction of the court in ordering a sale: *Stanley v. Noble*, 59-666.

222. In the absence of a contrary showing, it will be presumed, in the case of a sale of the whole, that such sale was ordered for good reason: *Cowins v. Tool*, 36-82, 86.

223. Where the records show that claims were filed against the estate, proceedings for sale of property will be upheld against collateral attack, although it does not appear that such claims were ever paid: *Lees v. Wetmore*, 58-170.

224. Sale of real estate cannot be ordered upon the application of a special administrator: *Long v. Burnett*, 13-28.

225. The fact that the personal property is insufficient to pay the debts, by reason of the misapplication thereof by the administrator, will not be a ground of objection to the application for leave to sell: *Conger v. Cook*, 56-117.

226. The adjudication of the court, in an order for the sale of real property by the administrator, to the effect that such sale is necessary, is to be deemed sufficient as to that fact: *Little v. Sinnett*, 7-324.

227. Defects in the application will not defeat the jurisdiction of the court, and the validity of proceedings thereunder cannot be attacked collaterally: *Read v. Howe*, 39-533.

228. Time for application: The application will not be sustained if not made within the time limited for the filing and allowance of claims against the estate unless the peculiar circumstances of the case are of such a character as to make it the duty of a court of equity to depart from this general rule, and under such circumstances the application

In pais.

erly and unlawfully taxed certain land which in fact belonged to the county, and it was sold at tax sale, and the tax purchaser thereafter for several years paid the taxes thereon, *held*, that the county was not estopped by the unauthorized acts of its officers from asserting title against the tax purchaser: *Howard County v. Bullis*, 49-519.

75. After having treated property as belonging to a private owner by assessing it to him and receiving the taxes from him thereon, a city is estopped from setting up title in itself as against such owner: *Simplot v. Dubuque*, 49-630; *S. C.*, 56-639.

76. The fact that after conveying land to a purchaser the county brings action to have such conveyance set aside will not render taxes levied on the property after the conveyance void: *American Emigrant Co. v. Iowa R. Land Co.*, 52-323.

77. Where a municipal corporation sells a tract of land, and its authorized agents represent that there are no municipal taxes assessed against the same, neither the municipality nor its officers can collect from the grantees taxes for preceding years if assessed subsequent to the conveyance. Omissions resulting from the mistake or inadvertence of the assessor may be corrected and such amounts may be collected, but good faith forbids an assessment made in violation of a written agreement and of an explicit understanding between the parties in the adjustment of a pending controversy: *Calhoun County v. American Emigrant Co.*, 93 U. S., 124.

78. As to tax titles: While the acceptance from the clerk of the court of money paid to him to redeem land from a tax sale might estop the person so receiving from setting up his tax title or from denying the right of redemption, it does not estop him from setting up against the redemptioner a title derived under an independent transaction: *Terrell v. Grinnell*, 20-393.

79. Official acts: In an action based upon a tax deed executed by defendant as county treasurer, which deed was void because showing that the sale was *en masse* and not in parcels, *held*, that the fact that the tax certificate on which the deed was based showed a sale in parcels could not be relied upon to defeat defendant's title as an individual.

The fact that defendant executed an erroneous deed to him individually from *v. Cook*, 21-392.

80. Questioning

Where it appeared that the defendant, although not serving in the active capacity, did appear in the judgment soon after taking no steps to have the judgment set aside, he was estopped from asserting title against a person who had purchased the property in the belief that the judgment was valid and binding: *Id.*, 351.

81. A party who has purchased property against a foreign judgment that it was void for want of jurisdiction, not, in an action by the original indebtedness, the judgment was valid and the debt was merged therein: *Id.*, 44-570.

82. By procuring an order of judgment is void for want of jurisdiction, a party estops himself from setting up on any rights under the judgment: *Sweezy v. Stetson*, 67-4.

83. Where a party has purchased property as a defense in another action, he is estopped from claiming that he is bound by the judgment, and cannot afterwards, when the judgment is set aside, seek to enforce such judgment: *District Twp v. ...*, 69-88.

84. Where a party takes title under a judgment affecting his property, he is not afterwards to insist upon the judgment being inconsistent with the void judgment induced by the judgment. He is not to induce others to take title under the assumption that the judgment is declared void by the action of the United States to set aside the judgment, if it was removed from the tax purchaser induced by the void judgment and asked relief from the void judgment on that ground, he is not afterwards to insist upon the judgment being void. The said court did not affect title: *Bowen v. Duffie*, ...

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improper place was adopted for the sale, the defect in the notice was insufficient to render the sale void: *Ibid.*

246. Terms of sale: An administrator has no authority, in the absence of express order of the court, to accept notes and mortgage in part payment for real property sold, and should be charged with the sum for which the property was sold as money received, nor can he be credited with expenses of foreclosing a mortgage so taken: *Richards v. Adamson's Estate*, 48-248.

247. Purchase by administrator: A purchase of land at administrator's sale by the attorney or any other agent of the administration, and for his benefit, cannot be upheld, and if the property has passed into the possession of an innocent purchaser the administrator will be accountable for its value: *Read v. Howe*, 39-558.

248. A purchase at such sale by the administrator is voidable at the election of the parties interested, but valid as to others: *Harshman v. Slonaker*, 53-467; *Welch v. McGrath*, 59-519.

249. Setting aside sale: Under the evidence in a particular case, *held*, that a claim against the estate for the payment of which real property of decedent had been sold, was not fraudulent, and that the sale should not be set aside: *Trimble v. Marshall*, 66-238.

250. Setting up widow's dower right: A widow properly notified must set up her claim to dower in this proceeding or be thereafter barred from any claim on the property sold in pursuance thereof: *Olmsted v. Blair*, 45-42.

251. And where the widow appeared and resisted the sale, but it was ordered without making any reservation of her dower interest, held, that she was precluded from subjecting the land so sold to any claim for dower in a subsequent proceeding: *Garvin v. Hatcher*, 39-685.

252. Where the administrator, for the purpose of paying a mortgage debt, sells the property covered by the mortgage, after proper proceedings to which the widow is made a party, the dower right of such widow is thereby extinguished as fully as if the property had been sold in pursuance of a foreclosure of the mortgage: *Mead v. Mead*, 39-28.

253. It is only the interest of the estate in the property owned by decedent and not the interest vested in the widow which may be subjected to the payment of debts: *Mock v. Watson*, 41-241.

254. Sale of equitable interest: Where an administrator obtained leave to sell an equitable interest of the estate in certain property which was incumbered, and such interest was sold, and subsequently the incumbrance was, in an action for that purpose, found to be void, *held*, that a purchaser of the equitable interest did not take the legal title free from such incumbrance and nothing passed by the sale: *Crane v. Guthrie*, 47-542.

255. Subject to lien: Where an administrator sells land which is subject to liens, the liens remain upon the land and do not attach to the fund in the hands of the administrator: *Sullivan v. Leekie*, 60-326.

256. Caveat emptor; covenants: The rule *caveat emptor* applies to a judicial sale of land by order of court on an application of an administrator unless there is fraud, and the estate will not be bound by covenants of warranty inserted in the deed by the administrator: *Hale v. Marquette*, 69-376.

257. Presumptions in favor of sale: Where it did not appear of record that there was any publication, notice, sale, etc., as required, *held*, that a deed purporting to be made as a result of such proceeding was invalid: *Thornton v. Mulquinne*, 12-549.

258. Where the court has jurisdiction of the matter its action in ordering and confirming the sale cannot be impeached by showing that the requirements of the statute in regard to appraisement or sale were not complied with as to matters of form: *Cowins v. Tool*, 86-82.

259. Where an order of sale is made in a proper proceeding after due notice, and the deed is approved, an error in the proceedings can be corrected only upon appeal and not by collateral attack: *Hutton v. Laws*, 55-710.

260. Limitation of action; attack: The statutory provision (Code, § 2401) limiting an action for the recovery of real estate sold by an executor, brought by any person claiming under the deceased, to five years from the time of sale, does not apply to a case where the proceedings of the court granting leave to sell were absolutely void for want of

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notice or other cause: *Good v. Norley*, 28-188; *Boyles v. Boyles*, 37-592.

261. This statutory provision does not bar an action to set aside the sale on the ground of fraud within five years after the discovery of such fraud: *Cowin v. Toole*, 31-513.

VI. DISTRIBUTION; WIDOW'S SHARE; DESCENT.

a. Distribution of personal property.

262. The estate of a deceased person may consist of both real and personal property, and the final distribution of the estate relates to the one as well as to the other: *Rogers v. Gillett*, 56-266.

263. Right to share vests, when: The right to a distributive share of personal property vests in the persons entitled thereto, whether widow or next of kin, *instantly*, upon the death of the intestate, and not from the time of the actual distribution. Upon the death of the distributee before distribution is made, his share goes to his legal representative or legatee: *Moore v. Gordon*, 24-158.

264. Alien: Under statutes prohibiting an alien from inheriting real estate, *held*, that he might nevertheless take a distributive share in personal property: *Greenheld v. Morrison*, 21-538.

265. A contract between the surviving husband and the heirs of the wife's estate as to distribution of the assets thereof, construed, and *held* that any claim of the husband for deficiencies in property taken by him in lieu of his distributive share should be paid *pro rata* with the claims of the heirs: *Sloan v. Moffatt*, 41-271.

266. Order as to distribution: Where the administrator of an estate reported to the court that one of the children of decedent was supposed to be dead, giving reasons therefor, and subsequently asked that the money in his hands, a portion of which would have been the share of such child if alive, might be ordered to be distributed among the other heirs, and such distribution was made and the administrator discharged, *held*, that there was no adjudication thereby as to the death of such child which would preclude his creditors from garnishing the heirs to whom such

distribution was made their debtor would have proof overcoming the *Crosley v. Calhoun*, 45

267. Payment of in the legatee at the time of the testator, but it is not such time as the executor. And where a legatee who was indebted to the testator, *held*, that the debt was deemed paid by the legatee's death, but the legacy could properly be paid: *Evans*, 70—.

268. An advancement gift made by a parent to a child, or the portion of such child's future estate, *In re Estate of Lyon*, 71

269. The rule that an heir is to be brought into the estate is applicable to a case where the heir is not the legatee; the rule applies to a partially intestate, *est*

270. A contract during the life of the decedent made by his prospective legatee of present advancement by which they release all claims should he die without issue, agree in no case to claim his estate, will be binding on the distribution of his estate varied by parol evidence: 466.

271. In a particular case where the evidence established an advancement such as to defeat their claim of the intestate's real property: 508-512.

272. Declarations made by the decedent have the effect that a conveyance made by way of a settlement of evidence in an action against the other heirs of the decedent in the estate of the decedent, 31-151.

Further as to advancements, §§ 130-132; and (

273. Gifts: Property having been given to him by his father, while he was a minor, his father, in compensation

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dered, cannot be held by such heir as against the creditors of the estate: *Madison v. Shockley*, 41-451.

Further as to GIFTS, see that title.

274. Rights of heirs in the absence of administration: Where the period fixed for granting letters of administration has not expired, no action can be maintained by the heirs of deceased upon a promissory note, the property of decedent at the time of his death: *Haynes v. Harris*, 33-516; *Baird v. Brooks*, 65-40.

275. Where the statutory period for the granting of letters of administration has expired without the appointment of an administrator, and it appears that there are no debts against the estate, the title to personal property vests in the heirs jointly, and in such case an action by the heirs upon a promissory note belonging to decedent may be maintained: *Phinny v. Warren*, 52-332.

b. *Share of widow in personal property.*

Allowance to widow: As to the allowance which may be made for the support of the widow and children, see *supra*, II, b.

276. Exempt property: Under the statutory provision (Code, § 2371) that all personal property which was exempt in the hands of the deceased husband as head of the family shall be set apart to the widow in her own right and remain exempt in her hands, *held*, that a failure to inventory and appraise the personal property thus to be set apart to the widow, as required by statute, will not defeat her absolute ownership thereof, nor its exemption in her hands: *Adkinson v. Breeding*, 56-26.

277. As to who is to be deemed head of a family in such sense that upon his decease his widow may claim property as exempt, see *Linton v. Crosby*, 56-386.

Also on this point, see EXECUTIONS, §§ 153-157.

278. It is doubtful whether the husband can by will deprive his widow of personal property which in his hands has been exempt from execution: *Linton v. Crosby*, 61-293.

279. It is not provided by statute that the property of the wife, exempt in her hands, shall upon her death vest in the husband.

The statute making provisions as to the widow of deceased husband applicable to the husband of a deceased wife applies only to provisions relating exclusively to real estate. The personal property of the wife at her death goes into the hands of her administrator for distribution: *Wilson v. Breeding*, 50-629.

280. Under a former statute, which did not give the exempt property absolutely to the widow, but provided that it should remain in her possession until disposed of as provided by law, it was held that she could not sell such property and receive the proceeds for her own use: *Meyer v. Meyer*, 23-359, 377.

281. Also, *held*, that when such property was no longer needed by the widow it did not become liable to administration or to be taken to pay debts, but was to be distributed according to law: *Ellsworth v. Ellsworth*, 33-164; *Paup v. Sylvester*, 22-371.

282. Distributive share: The widow's distributive share of personal property under Code, § 2436, which provides that personal property of the deceased not necessary for the payment of debts, nor otherwise disposed of as provided by statute, shall be distributed to the same persons and in the same proportion as though it were real estate, cannot be affected by will. (Overruling *In re Estate of Davis*, 36-24): *Ward v. Wolf*, 56-465; *Linton v. Crosby*, 61-293; *In re Estate of Lyon*, 70—.

283. The fact that a widow entitled to a share of personal property, notwithstanding the will of her husband making other disposition of it, made no claim thereto until the executor had paid out a large portion of the personal estate in legacies, *held* not to estop her from afterward insisting on her distributive share in opposition to the will: *Linton v. Crosby*, 61-293; *Linton v. Crosby*, 61-401.

284. In case there is no will and decedent leaves no children, the wife becomes entitled to one-half of his personal property the same as in case of real estate: *Dodds v. Dodds*, 23-306.

285. The persons who are entitled to a distributive share of the personal property, and their proportions, are governed by the rule applicable to real estate, but the character of the title or interest is not so governed. There-

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fore, *held*, under a law which made the widow's dower a life estate only, that such widow would nevertheless take an absolute title to her share of the personal property: *Moore v. Gordon*, 24-158; *Hale v. Hunter*, 24-181.

286. The widow has only a distributive share in the personal property of which the husband dies seized. During his life-time she has no inchoate right in such property, and he may make such distribution of it in his life-time as he sees fit: *Samson v. Samson*, 67-253.

287. In a particular case, *held*, that the action of the court in ordering the payment to the widow of a sum to apply on the amount to which she might be afterward found entitled as her share of the personal estate, was not erroneous in not ordering payment of a larger sum or allowing interest on the amount paid, the estate being still unsettled: *Linton v. Crosby*, 61-401.

How affected by will in general, see *infra*, §§ 341-367.

c. *Share of surviving husband or wife in real property*; ¹ *dower*.

288. **Dower abolished:** While our statute expressly abolishes the estate of dower and creates another estate to take its place, yet the use of the word has not been dispensed with, and in some of its essential characteristics the interest of the wife under the statute has the same character as the estate of dower: *Mock v. Watson*, 41-241.

289. The widow's interest in the real property of her deceased husband, designated by the statute as a distributive share, is a materially different estate from that derived by descent: *Rausch v. Moore*, 48-611.

290. While the statute abolishes the estate of dower, and the interest in the lands of the deceased husband given by law to the widow is designated by other terms used in the statute, the profession continues to use the word "dower" to designate such interest, and no confusion or misunderstanding arises from

such use of the word, *the* standing its meaning in state prescribed by the *Daugherty*, 69-677.

291. **Inchoate right;**

The interest of the wife husband, so long as it is be enlarged, abridged or by the legislature. The est is measured by the time of her husband's death, 17-517; *Moore v. Ken Small*, 55-732; *Foley v. ningham v. Wilde*, 56-369.

292. But her interest is alienated by her husband, not relinquished her right be increased by legislative such alienation: *Moore v. c. O'Ferrall*, 4 G. Gr., 16 cott, 1-174; *Craven v. Win. v. O'Brien*, 29 Fed. Rep., 40.

293. Under the act of 186 the provisions of the statute was a life estate and change, *held*, that the dower favor of the wife in property the repeal of the prior served: *Moore v. Kent*, 37-

294. That act did not take of dower theretofore existing enlarged it: *Ibid.*; *Kendall*.

295. That statute did not mon law rule previously in dower right is assigned in execution or attachment in: Whether this rule is change tory provisions, *quære*: 48-611.

296. Where property of which the wife had not relinquished dower was sold at judicial sale, and the husband at judicial sale, and the change of the statute, by in such property was bar widow could not claim do so sold: *Sturdevant v. No*

¹ Code, § 3440. One-third in value of all the legal or equitable estates in real property band at any time during the marriage, which have not been sold on execution or any c to which the wife has made no relinquishment of her right, shall be set apart as her pr she survive him. The same share of the real estate of a deceased wife shall be set apa band. All provisions made in this chapter in regard to the widow of a deceased husband the surviving husband of a deceased wife. The estates of dower and curtesy are hereby

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297. When vested: Upon the death of the husband the interest of the wife becomes vested and cannot be affected by subsequent legislation: *Burke v. Barron*, 8-132.

298. Priority of lien or mortgage for purchase money: The widow cannot claim dower in property to which her husband acquired an equitable title by a contract to convey as against the vendor's claim for the purchase money: *Barnes v. Gay*, 7-26.

299. The widow's dower right is subject to a mortgage for purchase money, although she did not join therein to release her dower: *Thomas v. Hanson*, 44-651.

300. In what property dowerable: The widow has no interest in a pre-emption right: *Bowers v. Keesecker*, 14-301; *Langworthy v. Heeb*, 46-64.

301. Where the husband acquired title to public lands in trust for another, *held*, that his widow was not entitled to dower therein: *Langworthy v. Heeb*, 46-64.

302. The widow, of one holding property in trust has no right to dower therein. So *held* where a person received and held a patent from the government for land, which he had previously conveyed, and to which he thus held the legal title by arrangement merely as trustee: *McDaniel v. Large*, 55-312.

303. A widow is endowable of lands to which the husband has an equitable estate: *McReynolds v. Anderson*, 69-208.

304. Where a guardian of minor heirs without authority invested the money of his wards in real property, causing title to the same to be taken in the name of his son as trustee, *held*, that having no power to thus invest the trust funds, the ownership thereof did not vest in his wards, and that he therefore had an equitable interest in such property to which the dower right of his wife would attach: *Ibid*.

305. In such case, *held*, that under the particular facts the purchaser from the trustee took his title with notice of the equitable interest of the guardian, and therefore subject to the dower rights of the wife: *Ibid*.

306. Release of dower by conveyance: A joint deed of husband and wife will operate as a release of the wife's dower interest, although it contain no express relinquishment thereof: *Edwards v. Sullivan*, 20-502; *Jones v. Des Moines*, 43-209.

307. Under former statutory provisions, *held*, that a conveyance not expressly releasing dower and not acknowledged by the wife would not bar her dower right: *Westfall v. Lee*, 7-12.

308. The execution of a deed by one holding a power of attorney from the husband and wife, in the name of the husband alone, will not pass the wife's dower, nor will any amount of intention aid the defective execution of the power: *Wilkinson v. Getty*, 13-157.

309. An instrument relinquishing dower may be valid without being acknowledged or recorded: *Lake v. Gray*, 30-415.

310. A wife accepting money as consideration for a valid promise not to assert her dower right as against property conveyed by her husband, in the conveyance of which she does not join to relinquish her dower, is estopped thereby from afterwards setting up any dower interest in such land, and the estoppel also operates as against her heirs: *Dunlap v. Thomas*, 69-358.

311. It seems that the wife may, at the time of conveyance of property by the husband, make a separate contract for the sale of her inchoate right of dower therein: *Ibid*.

312. Purchaser without notice: It is no defense in an action for dower that defendant is a purchaser in good faith without notice: *Cruise v. Billmire*, 69-397.

313. Nor will the fact that the parties have lived separately and apart from each other for a long time create an estoppel as against the claim of the wife for dower: *Ibid*.

314. Where a purchaser of land held under patent from the school fund had no knowledge of the fact that such patent was issued in pursuance of a contract of purchase by another person than the patentee, nor that any one was entitled to a dower interest in the land, *held*, that the dower right of the wife of a person who took a contract for the purchase and assigned the same without the wife's joining to release her dower, could not be asserted as against such innocent purchaser. While, if the purchaser had had knowledge, actual or constructive, of the interest of the first purchaser from the school fund, he might have been put on inquiry as to the dower interest of the wife of such purchaser, if any he had, it cannot be considered

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that he would be put on inquiry in regard to the possible dower right of some wife of whose husband he had no knowledge, actual or constructive: *Robinson v. Hague*, 63-273.

315. Where a man against whom a decree of divorce had previously been rendered at the suit of a woman claiming to be his wife, made an exchange of land with another who knew the fact of such divorce and believed that the party against whom it was rendered was therefore unmarried, and the transaction of exchange was effected through a son by a former marriage of the party against whom the divorce was rendered, such son and agent remaining silent as to the fact that his mother was yet living, *held*, that such son was estopped from claiming, against the party with whom the exchange of property was made, that his mother was living in another state at the time that such exchange was made, and that she survived his father and became entitled to a dower interest in such property, which descended to him as her surviving heir: *Williams v. Wells*, 62-740.

316. Conveyance in trust: Where a husband had conveyed property in trust for the benefit of his wife, and upon her death to her heirs, subject to a life estate in himself, *held*, that he was entitled upon her death to one-third in fee in addition to his life estate: *Conrad v. Starr*, 50-470.

317. Limitations: The husband's right to dower to which he has made no relinquishment cannot be barred as against the purchaser from the wife by the statute of limitations during the life-time of the wife: *Hurleman v. Hazlett*, 55-256.

And further as to limitation of action to recover dower, see *infra*, §§ 387-389.

318. Relinquishment by wife to husband: Under the statutory provision (Code, § 2203) that neither husband nor wife has any interest in the property of the other which can be the subject of contract between them, *held*, that a release of dower by the wife in a contract with her husband with reference to a separation was not valid: *Linton v. Crosby*, 54-478.

319. But in the absence of such statutory provision it was held that a relinquishment of dower in an agreement to separate would be binding: *Robertson v. Robertson*, 25-350.

320. But aside from separate, the contingency not become the subject of conveyance between *McKee v. Reynolds*, 26-

321. Relinquishment: Where, previously to the husband and wife had exchanged, by which they were other's real estate, *held*, the husband the wife could: *Jacobs v. Jacobs*, 42-600.

322. Divorce bars dower: If a woman obtains a divorce from a husband upon whom she loses all claim to a dower, she should survive him: *Boyles v. Latham*, 59-699.

323. A wife cannot claim dower where a decree of divorce was granted after the death of the husband: *McCraney v. McCraney*, 61-604.

324. If the sentence of divorce is obtained by fraud or duress, it should be set aside *toto*. But until such reversal, the wife is entitled only as to the portion of her dower rights but as to the remainder cannot be allowed: *Ibid.*

325. A legislative divorce granted by a court, will bar the dower right: *Levins v. ...*, 604.

326. The mere fact that a husband has remarried does not constitute an estoppel as to render him liable for dower unless a divorce has been granted to the other party claiming. It is shown to have been cognate to raise a presumption of dower: *58-720*.

327. In the absence of a divorce it will not be an estoppel as to the mere fact of long separation and wife so as to defeat dower: *Cruise v. Billmire*, 58-720.

328. In an action for dower, the burden of proof to establish the dower right is on the plaintiff denying such right: *In re ...*, 58-431.

329. Adultery: The fact of adultery, under 2, 13 Edward I, ch. 1, does not bar a claim for dower in case of adulterous elopement a

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having been adopted in Iowa, is not a part of the law of the state. Its provisions are inconsistent with the legislation of the state on the subject of dower, and the mode in which such right may be barred or relinquished, and also with the statutory provisions in respect to divorce on the ground of adultery: *Smith v. Woodward*, 4 Dillon, 584.

830. Foreclosure as a bar: If a mortgage against the husband in which the wife did not join is not foreclosed before the death of the husband, the foreclosure thereof will not bar dower unless her dower right is put in issue therein, even though the wife is made party to the foreclosure: *Moomey v. Maas*, 22-380.

831. But a foreclosure after the husband's death of a mortgage in which the wife has joined with the husband will bar her dower: *Ibid.*; *Mead v. Mead*, 39-28.

832. And a sale of the property by her husband's administrator in pursuance of proper proceedings to which she is a party, for the purpose of paying a mortgage thereon in which she joined, will equally defeat her dower right: *Mead v. Mead*, 39-28.

833. Sale by administrator: A widow who is notified and made a proper party to proceedings by an administrator to sell real property of her deceased husband for payment of his debts, and does not set up dower right in the land in such proceeding, cannot afterwards claim any dower interest therein: *Garvin v. Hatcher*, 39-685; *Olmsted v. Blair*, 45-42.

834. Judgment against husband: Where the wife's interest in property has once attached, and the question is as to whether it has been divested or otherwise affected, a party seeking affirmative relief on the theory that it has, should make her a party to the action brought to determine such question. But where a verdict or decree against the husband shows that he never had any interest in which the wife could have dower or a distributive share, the wife is bound thereby, although not made a party: *Lea v. Woods*, 67-304.

835. The fact that the husband has held the legal title to the property is only *prima facie* evidence that he had an interest in which his wife is dowerable, and the wife may be bound by an adjudication against him to

which he is not a party, determining that he never had such interest: *Ibid.*

836. Judicial sale: Prior to the enactment of Code of '51, there had not been, either in the state or territory of Iowa, any limitation of the common law rule as to the wife's dower interest in the real property of her husband, and up to that time the dower right of a wife could not be extinguished by a sale under execution against the husband: *Pense v. Hixon*, 8-402.

837. Under the present statutory provision (Code, § 2440), by which the wife's dower right is barred by judicial sale of the property of the husband, held, that where the husband purchased property subject to a mortgage which he agreed to pay, and which the property was during his life-time sold to satisfy, his widow's dower right was barred: *Kemerer v. Bournes*, 53-172.

838. Under the provisions of Code of '51, authorizing a short foreclosure of mortgages by notice and sale, held, that such a proceeding was a judicial sale in such sense as to bar the widow's dower right: *Sturdevant v. Norris*, 80-65.

839. A sale of real property by an assignee under an assignment for benefit of creditors is a judicial sale within such statutory provision, and bars any contingent right of dower in the property: *Stidger v. Evans*, 64-91.

840. A sale by an assignee in bankruptcy is a judicial sale in such sense as to defeat the widow's dower right under the same statutory provision: *Taylor v. Highberger*, 65-184.

841. How barred by will: The statutory provision (Code, § 2452) that the widow's share cannot be affected by any will of her husband without her consent entered of record within six months after notice to her of the provisions of the will, applies as well to a will executed before marriage as to one executed after that time: *Ward v. Wolf*, 56-465.

That this statutory provision applies also to the provisions of a will with reference to personal property, see *supra*, §§ 282-287.

842. The widow's consent must be made of record within the six months. She will not be bound or estopped by a writing not so made of record: *Baldozier v. Haynes*, 57-683.

843. The heirs have no right to rely upon such an agreement: *Ibid.*

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344. It is not proper for the court, upon proof that the surviving husband or wife had knowledge of the will from the first, and that it was in accordance with the wish of such survivor, to enter an order, making of record the fact of consent, more than six months after the death of the party whose consent is thus established, to take under the will. Consent alone, without entry of that fact of record within six months after notice of the provisions of the will, does not defeat the party's rights: *Houston v. Lane*, 62-291.

345. The fact that the widow, without objection, allows the executor to pay out upon legacies such amounts as not to leave enough remaining in his hands to pay her distributive share of the personal property, will not estop her from claiming such distributive share against the provisions of the will which she has accepted: *Linton v. Crosby*, 61-401.

346. The statutory provision just referred to applies equally to the husband's rights under the will of the wife as to the widow's right under the will of her husband: *Shields v. Keys*, 24-298.

347. Under previous statutory provisions which required objection by the surviving husband or wife to prevent the dower interest being barred by other provisions made in the will, *held*, that as the will passed the title of the property devised to the devisee, subject to be divested by the objection of the husband or wife, if such party did not object, he acquired no interest to which the lien of a judgment creditor could attach, and the creditor could not in equity control the election of the surviving husband or wife with reference to abiding by or objecting to the will: *Ibid*.

348. Under such statutory provision, *held*, that silence and failure to perform an act of relinquishment authorized the conclusion that the survivor accepted the provisions of the will, and a subsequent will made by such survivor could not act as a relinquishment of such provisions: *Kyne v. Kyne*, 48-21.

349. Election to accept under will: The election, when once made, fixes the widow's relation to the estate, and such relation cannot be afterwards changed: *Ashlock v. Ashlock*, 52-319.

350. But where the consent to the will was given in pursuance of an agreement

whereby the heirs were to take certain other property, such election was not concurred in: *Richart*, *held*, that her consent:

351. The acceptance of the will does not bar the widow where such provision is consistent with her dower: *Richart*, 57-66.

352. Where there is no election in the will that a devise is to be in lieu of dower, the claim can be deduced by clear and convincing evidence from the will, founded on the claim of dower would not disturb or defeat it: 552.

353. The widow may stand as a devisee under the will. There must be an express provision to the contrary, or the claim of dower consistent with, and will not defeat the provisions of, the will: *Iderty*, 69-677.

354. A devise to the widow is considered as in lieu of her dower, so by express words or otherwise. If there is any doubt she must elect: *Clark v. Gr*.

355. Where there is no election in the will, barring the intention that the provision in lieu of dower must be manifestly inconsistent and manifestly implicative of itself, founded on the claim of dower would not disturb the will, or so repugnantly inconsistent as to defeat the will: 34-214.

356. Therefore, *held*, that where the provisions of a will disposing of a testator's real and personal property were disposed of, was given in life, to be divided among the children at death, did not bar dower: 34-214.

357. Where a testator has disposed of property, real and personal, during her natural life, or so that she remain unmarried, and that in the event of her death her interest should be rest

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dower right, *held*, that such provision was not inconsistent with the right of the widow to assert her claim of dower in property conveyed by the husband before his death, and to which she did not relinquish her dower right: *Corriell v. Ham*, 2-552.

358. The election of the widow to take under a will, which gives her a life estate, so long as she remains a widow, in all testator's property, with provision that at her death or marriage it is to be equally divided between his heirs, will not defeat her right of dower: *Sully v. Nebergall*, 30-339.

359. The acceptance by the widow of a bequest of a life estate in her husband's lands does not bar her right of dower: *McGuire v. Brown*, 41-650; *Blair v. Wilson*, 57-177; *Daugherty v. Daugherty*, 69-677.

360. Therefore, *held*, that a bequest to the widow of all testator's real property not otherwise disposed of, during the period of her widowhood, and in the event of her remarriage to take the course prescribed by law, did not defeat her dower right, and upon remarriage she might still claim such interest as she would have had without the will: *McGuire v. Brown*, 41-650.

361. A will giving the wife one-third of testator's real estate, and directing the distribution of the remainder among heirs named, is not inconsistent with the widow's right to dower: *Watrous v. Winn*, 37-72.

362. Where a wife entered into an agreement, upon consideration to be paid, to release the dower interest in certain lands of her husband, and received a portion of such consideration before his death, and afterwards filed a claim against his estate for the balance, *held*, that she thereby elected to accept the provisions of her husband's will based upon such agreement, and could not claim dower interest in the lands released: *Stoddard v. Cutcompt*, 41-329.

363. Under certain facts, the provisions of a will were held to be inconsistent with widow's dower right: *Cain v. Cain*, 23-31.

364. A devise of the property to the wife in trust for the children and not for her own benefit is not inconsistent with her right of dower: *Rittgers v. Rittgers*, 56-218.

365. Where the will gave to the wife certain real property to be held by her in trust for minor children, the proceeds arising

therefrom to be appropriated for their care and benefit, and each of them to have an equal share on arriving at majority, other property being given to the wife, *held*, that the provision as to the disposition of the property left in trust for the children indicated the intention that dower should not be allowed out of such property, and that therefore the provisions of the will must be considered as in lieu of dower, and the wife having accepted the provisions of the will and elected to retain them could not claim dower: *Van Guilder v. Justice*, 56-669.

366. Where a will gave certain specific property to the widow and made distribution of the entire remaining property of testator, *held*, that the provision for the widow must be considered in lieu of dower: *Snyder v. Miller*, 67-261.

367. Under the provisions of a particular will, *held*, that a devise to the wife must be considered as in lieu of dower: *Severson v. Severson*, 68-656.

368. Conveyance to wife in lieu of dower: The conveyance of property to a wife by her husband *held* not to have been made in lieu of dower so as to deprive her of her dower right: *Trowbridge v. Sypher*, 55-352.

369. Not subject to decedent's debts: The widow's dower right attaches upon the concurrence of seizin of the husband and coverture of the wife, and is not subject to the debts of the husband as is the interest of an heir: *Mock v. Watson*, 41-241; *Kendall v. Kendall*, 42-464.

370. Distributive share in absence of issue: But the distributive share which may thus be held free from debts is limited to one-third. The additional interest making the one-half which the surviving husband or wife may take as heir in the absence of issue is not exempt from indebtedness of decedent: *Smith v. Zuckmeyer*, 58-14.

371. The excess over one-third which the surviving husband or wife may take, in the absence of issue, is subject to other disposition of the property made by will: *Ibid.*; *Clark v. Griffith*, 4-405; *Dobson v. Dobson*, 30-410; *Linton v. Crosby*, 54-478.

372. The one-half interest which the surviving husband or wife may take as heir, in the absence of issue, includes the one-third dower interest: *Burns v. Keas*, 21-257; *Nich-*

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olas v. Purezell, 21-265; *McGuire v. Brown*, 41-650.

373. Recovery of dower interest by heirs:

If a widow, entitled to dower, fails to have her interest defined and set apart in her lifetime, her heirs may recover the same after her death: *Potter v. Worley*, 57-66.

374. Rights of creditor: The creditor of a widow cannot maintain an action in equity to have her share in specific land of decedent set apart to enforce his claim against such share: *Getchell v. McGuire*, 70—.

375. Setting off dower; growing crops:

Where property is set off to the widow as dower, growing crops thereon pass with the land set off and do not become the property of the executor: *Ralston v. Ralston*, 3 G. Gr., 533.

376. Assignment of inchoate right: The inchoate right of dower is not subject to grant or to assignment: *Craven v. Winter*, 88-471.

377. The inchoate right of dower does not pass by an assignment in bankruptcy, and a purchaser thereof from the assignee acquires no rights upon the dower interest becoming vested: *Lucas v. Bennett*, 42-703.

378. Right of way: The widow cannot, before her dower is assigned, maintain an action against a railway company for the value of her one-third interest in property conveyed by the husband for right of way. Whether the widow can claim any interest in the right of way so conveyed, *quære*: *Tuttle v. Burlington & M. R. R. Co.*, 49-134.

379. Action to protect inchoate right:

Although during the life-time of the husband the dower right is inchoate and contingent, yet it possesses the elements of property and may be protected from fraudulent alienation through the connivance of the husband: *Buzick v. Buzick*, 44-259.

380. Therefore, where the husband of plaintiff allowed a son by a former marriage to acquire a sheriff's deed upon property for much less than its value, a fraudulent intent on the part of such son being shown, held, that the title of the son under the sheriff's deed, so far as the property exceeded the amount paid at the sheriff's sale, should be subject to plaintiff's contingent right of dower: *Ibid.*

381. Where the wife, after the conveyance of real property, has made a mortgage, and the proceeds are invested in other real property, the title of the mortgage is in the name of a third person, and an action for the protection of the mortgage is maintainable: *Beck v. Beck*, 64-155.

382. Action to recover dower: A widow may, as against her husband, recover her dower if she has not relinquished her right, made demand thereof, and profits for the time being: *O'Ferris v. O'Ferris*, 64-155.

383. The dower right is not lost by the fact that it may be recovered by a third person: *Rice v. Nelson*, 27-148 and 183, 197.

384. Increase of value of property:

In an action by a widow for her husband under a dower deed, if she did not join to release her dower interest, she can only recover her dower interest in the property without improvement thereon by the grantor if the value of the property had increased thereon at the time of the conveyance, and she should estimate in favor of the husband the amount to which it increased, not exceeding the amount expended. (Decided under the Code): *Felch v. Finch*, 64-155.

385. There is nothing in the Code indicating an intention to apply the equitable rule announced in *Beck v. Beck*, cited. When an alienation of property by a husband without the wife's consent, her right is to one-third of the property owned and possessed by the husband, not a right to one-third, of the improvements put thereon by the husband: *Pierce v. O'Brien*, 29 Feb. 1884.

386. Action in equity to recover dower: A widow will exercise a general action with courts of law to recover her dower, and the widow's remedy is by the method provided by statute.

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ment: *Starry v. Starry*, 21-254; *Phares v. Walters*, 6-106.

387. Limitation: The statute of limitations does not apply to an action in equity or for the recovery of real property, to recover a dower interest. The statute does not commence to run until the heir or his assignee denies the right to dower: *Starry v. Starry*, 21-254; *Rice v. Nelson*, 27-148; *Felch v. Finch*, 52-563; *Berry v. Furhman*, 30-482.

388. The statutory limitation as to proceedings for the admeasurement of dower applies only to proceedings in the probate court and not to an action to recover dower: *Sully v. Nebergall*, 30-330.

389. The statute of limitations does not run against an unrelinquished right of dower before it becomes vested by the death of the husband or wife: *Hurleman v. Hazlett*, 55-256.

390. Unassigned dower cannot be interposed as a defense to an action by the heirs for the possession of property. Recovery of possession by the heirs, however, will not defeat the widow's claim for dower: *Cavender v. Smith*, 8-360.

391. Damages; rents and profits: No action for damages by a widow claiming dower can be maintained against a person in possession of property receiving the rents and profits, when such dower has not been assigned or demand therefor made: *Huston v. Seeley*, 27-183.

392. The widow has no right to sue in respect to the rents before dower assigned: *Laverty v. Woodward*, 16-1.

393. Assignment of dower: Where the widow's interest exists in several tracts, her share may be assigned in a body. She cannot be compelled to take one-third of each tract: *Montgomery v. Horn*, 46-285; *Jones v. Jones*, 47-337.

394. The court cannot compel the widow to accept dower in one of several tracts conveyed by her husband in which conveyance she did not join: *O'Ferrall v. Simplot*, 4-331.

395. Dower should be set off in specific portions of real property. It is not proper to determine simply the value of the dower interest with a view to its being paid out of the assets of the estate: *Corriell v. Bronson*, 6-471.

396. Proceedings for admeasurement: In an action under the statutory provision for

setting off of dower by referees, where it appears that there was a notice, though it be defective or the service thereof imperfect, if the court determines in favor of its sufficiency, which fact is shown by the record, the judgment will not be held void in a collateral proceeding. An error of the court as to the sufficiency of notice can only be attacked on appeal: *Shawhan v. Loffer*, 24-217.

397. The statute contemplates that there shall be more than one referee appointed for the assignment of the widow's dower, and the decision of the referees should be the concurrent judgment of more than one. And where it appeared that a portion of the property was examined by only one referee, *held*, that their report would be set aside, or at least would not be entitled to the same respect or presumption in its favor as a report made upon examination by all the referees: *Jones v. Jones*, 47-337.

398. Homestead: Under the statute requiring that the widow's dower shall be so set apart as to include the homestead, *held*, that the guardian of an insane widow had no authority to make an election for her to have her dower interest set apart from other property than that constituting the homestead: *Ratcliff v. Davis*, 64-467.

399. The widow's distributive share is to be set off so as to include the homestead, or the homestead may be retained for life in lieu of such distributive share, but the distributive share is not to be set off in addition to the homestead right: *Whitehead v. Conklin*, 48-478.

400. Where the surviving husband occupied the homestead, which was greater in value than the dower interest which he might have claimed, *held*, that this amounted to an election to hold the homestead in lieu of dower: *Stevens v. Stevens*, 50-491.

401. Where the surviving husband or wife becomes entitled to one-half the property in the absence of issue, a relinquishment of the dower interest by retaining the homestead in lieu thereof will not operate as a relinquishment of the remaining one-sixth to which the survivor is entitled as heir: *Smith v. Zuckmeyer*, 53-14.

402. Where the widow takes her third in fee out of the homestead, her share still has the homestead character, and a judgment ex-

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isting against her will not become a lien thereon: *Briggs v. Briggs*, 45-318; *Nye v. Walliker*, 46-306; *Knox v. Hanlon*, 48-252.

403. When a widow elects to take her distributive share and has it so set off as to include the homestead, she has the right to have the portion of the property not included in the homestead first exhausted in the payment of a mortgage lien upon the whole premises: *Wilson v. Hardesty*, 48-515.

Further as to survivor's right in the homestead, see HOMESTEAD, IV.

404. Apportionment of mortgage liens: The widow's share in property other than the homestead should bear its proportion of mortgage indebtedness to which she has assented by joining in the execution of the mortgage, and she can only claim, in such case, her distributive share of the proceeds of the property after the mortgage indebtedness has been satisfied therefrom: *Trowbridge v. Sypher*, 55-352; *McGlothlen v. Hite*, 55-392; *Cottrell v. Smith*, 63-181.

405. Likewise the widow's dower interest, when it is not taken out of the homestead, is subject to a *pro rata* proportion of the taxes upon the whole property: *Ibid.*

406. Where the portion set off to the widow for dower includes the homestead, such homestead is not to be subjected to the payment of a mortgage covering it together with other property, though the widow joined in such mortgage, until such other property is exhausted: *Wilson v. Hardesty*, 48-515; *McGlothlen v. Hite*, 55-392; *Wells v. Wells*, 57-410.

407. Where mechanics' liens and taxes on decedent's real property have been paid with money provided from the personal estate, such liens and taxes should not be deducted from the widow's share of the real estate: *Conger v. Cook*, 57-49; *Linton v. Crosby*, 61-293.

408. The widow's share in real property is subject to a *pro rata* liability for mortgages, in which she joined, upon the whole of the property. In case of a homestead her share therein should only be subjected to a *pro rata* liability for the mortgages upon it alone: *Conger v. Cook*, 57-49.

409. The widow is under no obligation to pay any part of the taxes upon property in which she has a dower interest, before as-

signment, and then cover dower from the her interest should refunding of any tax at least before demand of dower: *Felch v. J*

d. J

410. Rights of he the death of the an scends at once to his the same, subject to ment of debts. The taxes, and are entitle rents and profits, and receive them he is i them to the heirs or th v. *Woodward*, 16-1.

411. The heirs take t in common: *Peters v.*

412. The possession that of the ancestor, a maintain trespass agai the land and carries aw purchased from the *Corbin*, 21-117.

413. Proof of heirs claims as heir, he must tively his relation with negatively, that no oth to impede the descen: *Stein*, 6-150.

414. During the brie tween an injury, and a from, an injured perso itance. If a person wa involved in the same ca his life by the same n: the absence of proof: presume that he surv: vidual and during th with a perfect right to: will be disposed of a: *Sherman v. Western S* *low v. Central Iowa R*

415. Inheritable e by a deed covenanti uses, where the use is inheritable estate: *Pu* 282.

416. Realty coi: Where, under a will, :

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direction and personalty another, it may be that land directed to be sold is to be regarded as personalty in the sense that the proceeds of it when sold are to take the direction of personalty, but where there is no such provision the party whose interest attaches to the land at the death of the testator, and who is not divested until he parts with it by his own act, is considered as owner of the realty: *Hadley v. Stuart*, 62-267.

417. Degrees of relationship are to be computed according to the rule of the civil law (Code, § 45, ¶ 24): *Martindale v. Kendrick*, 4 G. Gr., 307.

418. Rules of descent:¹ Under the statutory provision by which the share which would have gone to a deceased child passes to such persons as would have taken as his heirs, had he died after the descent was cast upon him, who would, in the absence of issue, be his parents, the widow of a deceased husband cannot inherit through their child, who has died before the death of the husband, property of his, or which would have vested in him had he lived. So held as to property of a deceased husband: *McMenomy v. McMenomy*, 22-148; *Journell v. Leighton*, 49-601.

419. So held, also, as to a devise to the husband before the death of the testator under the statute providing, in such cases (Code, § 2387), that on the death of devisee before testator, the heirs of such devisee shall inherit the share which would have come to him under the will: *Will of Overdieck*, 50-244.

420. So when a devisee dies before the testator, the devise will pass to his brother, but not to his widow, under the statutory

provision just referred to: *Blackman v. Wadsworth*, 65-80.

421. Where, at the time of decedent's death, his son was already deceased, held, that the widow of such son could not claim any interest in the estate by inheritance from a child of herself and such deceased son, said child having survived its father, but having died without issue before the death of its grandfather. The statute only provides for inheritance by the parents of the estate of a child dying without issue: *Leonard v. Lining*, 57-648.

422. If one-third of the real property of decedent has been set apart to his widow as dower, she is, in the absence of issue, further entitled by statute to one-fourth of the remainder: *Ralston v. Ralston*, 3 G. Gr., 535.

The additional share which the surviving husband or wife may inherit, in case there are no issue, over the one-third interest, is subject to the debts of decedent, and cannot be claimed in opposition to other disposition of his property by will: See *supra*, §§ 370-372.

423. The clause of Code, § 2440, making the provisions with relation to the distributive share of the widow in the estate of her husband applicable also to the surviving husband of a deceased wife, relates only to real property, and does not entitle the surviving husband to the same interest in the personal property of the wife which is given to the widow as to the personal property of her deceased husband: *Wilson v. Breeding*, 50-629.

424. Under a previous statute providing that if intestate leave no wife nor issue, the whole estate should go to his father, and if

¹ Code, § 2453. Subject to the rights and charges hereinbefore contemplated, the remaining estate of which the decedent died seized, shall, in the absence of other arrangements by will, descend in equal shares to his children.

§ 2454. If any one of his children be dead, the heirs of such child shall inherit his share, in accordance with the rules herein prescribed, in the same manner as though the child had outlived his parents.

§ 2455. If the intestate leave no issue, the one-half of his estate shall go to his parents and the other half to his wife; if he leaves no wife, the portion which would have gone to her shall go to his parents.

§ 2456. If one of his parents be dead, the portion which would have gone to such deceased parent shall go to the surviving parent, including the portion which would have belonged to the intestate's wife, had she been living.

§ 2457. If both parents be dead, the portion which would have fallen to their share by the above rules shall be disposed of in the same manner as if they had outlived the intestate and died in the possession and ownership of the portion thus falling to their share, and so on through ascending ancestors and their issues.

§ 2458. If heirs are not thus found, the portion uninheritred shall go to the wife of the intestate, or to her heirs if dead, according to like rules; and if he has had more than one wife who either died or survived in lawful wedlock, it shall be equally divided between the one who is living and the heirs of those who are dead, or between the heirs of all, if all are dead, such heirs taking by right of representation.

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his father was dead, the portion which would have fallen to his share should be disposed of in the same manner as though he had outlived intestate and died in the possession and ownership of the portion thus falling to his share, *held*, that the father being dead, the mother was entitled to the one-third share which she would have had upon the death of the father if he had survived the intestate and died in possession of the property: *Rowland v. Rowland*, 4 G. Gr., 183.

425. Under a previous statute providing that where the intestate left no issue and was unmarried and survived the father, his mother took only a life estate in his realty, *held*, that her grantee did not receive a fee-simple title and was entitled to a rescission of a contract of conveyance by her upon equitable terms, or for judgment for the difference in value between the estate purchased and the one actually acquired: *Norris v. McGaffick*, 21-201.

426. Where an owner of property died, leaving neither issue, wife, nor parents living, *held* that his step-mother, surviving him, was entitled to one-sixth of his property: *Moore v. Weaver*, 53-11.

427. Where both parents die before intestate's decease, the property is to descend as though both had outlived the intestate and died already in the possession and ownership of the portion falling to their respective shares: *Bassil v. Loffer*, 38-451; *Neeley v. Wise*, 44-544. And see *McGuire v. Brown*, 41-650.

428. Where intestate dies without issue, and his parents are both dead, it is immaterial which died first, and it is immaterial whether such parents, or either of them, made any disposition of their property by will, other than that which would have been made by law. The persons entitled to distributive shares in decedent's estate take from him directly, and not through the parent, the supposition that such parent died

in possession of the property for the purpose of distribution: *Lash v. Lash*, 57-88.

429. Aliens: Although an alien could not inherit property, yet it was a distributive share in the estate notwithstanding it was property that was to be distributed to persons as though it was: *held v. Morrison*, 21-4.

430. Adopted child inherits from his natural father from his parents by a father adopted his child and then died, *held*, that the child inherit their mother's own shares by way of *Varner*, 50-532.

431. The court does not follow *dictum*, that foster children, from adopted children, heritance directing the children to and through their parents: *Burger v. Frakes*, 53-11.

432. Where, by a statute, the adoption of a child and it was declared that the child inherit from the adoptive father, as if she were his, *held*, that such adopted child become entitled to inherit from the adoptive father, dying in the intestate, left by the surviving such adoptive father: *Sunderland*, 60-732.

As to the method of enabling the adopted child to inherit from the adopting parent, see §§ 32-40.

433. Illegitimate child will inherit from mother by descent, even if mother be dead before the decedent: *v. Brown*, 41-650.

§ 2465. Illegitimate children inherit from the mother, and the mother from the father. § 2466. They shall inherit from the father whenever the paternity is proven during their lives, or they have been recognized by him as his children, but such recognition must have been in writing.

§ 2467. Under such circumstances, if the recognition of relationship has been made by the father, the child shall inherit from his illegitimate children.

§ 2468. But in thus inheriting from an illegitimate child, the rule above established shall not apply. The mother and her heirs take preference of the father and his heirs, the father in heritance in regard to an illegitimate child that the mother has in regard to one that

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434. The recognition in writing required by the statute in order that the legitimate child may inherit from the father need not be a formal avowal executed for the purpose of making known and perpetuating the fact, but any recognition in writing, as by letter or otherwise, is sufficient: *Crane v. Crane*, 81-296.

435. Evidence in a particular case held sufficient to show that decedent was the father of illegitimate children, and that he recognized them in such a general and notorious manner as to entitle them to inherit from him: *Blair v. Howell*, 68-619.

436. A verdict for plaintiff in an action for seduction in which damages are sought by reason of defendant being the father of plaintiff's child, such verdict not being necessarily based upon the paternity of the child, is not sufficient evidence of paternity to entitle the child to inherit from the putative father: *Koon v. Mallett*, 68-205.

437. For the purpose of inheritance, an illegitimate child, when recognized by its father, stands on precisely the same footing as if it were legitimate, and the birth of such a child and its recognition revoke a prior will in the same manner as the subsequent birth of a legitimate child: *Milburn v. Milburn*, 60-411.

438. A recognition made before the adoption in the Code of '51 of the statutory provision above referred to will not entitle the illegitimate child to inherit under that provision: *Hartinger v. Ferring*, 24 Fed. Rep., 15.

Further as to illegitimate children, see PARENT AND CHILD, §§ 29-31.

439. Escheat:¹ Where proceedings were brought by the attorney-general to recover for the state land claimed as an escheat, held, that the legislature had power to order the proceedings abated and to release the interest of the state in the property to the parties claiming adversely: *State ex rel. v. Tilghman*, 14-474.

VII. JURISDICTION OVER EXECUTOR OR ADMINISTRATOR; REPORTS; ACCOUNTING; LIABILITY.

440. Removal: A party against whom an administrator is prosecuting an action for

damages due to the estate has not such interest in the estate as to be entitled to ask for the removal of the administrator. The statute contemplates that the party authorized to ask for such removal is one having a right to a benefit from the estate which will prompt him to act for the preservation of its assets and the increase of its value: *Chicago, B. & Q. R. Co. v. Gould*, 64-343.

441. Jurisdiction over administrator: A court of equity will not review or correct the acts of an administrator while administration is pending in a probate court. The administrator must be held accountable to the court from which his letters issued, and where his bond is, and no other: *Hutton v. Laws*, 55-710.

442. Death of administrator: Where an administrator dies, a new administrator should be appointed in his place and an administrator should be appointed over his estate. The estate of the deceased administrator should be settled by his administrator, and that of the original decedent by the new administrator: *Ibid*.

443. Payment of funds: Under a prior statutory provision relating to the powers of a county judge with reference to estates, held, that such judge had authority to receive money paid by an executor upon claims filed and allowed against the estate, and that upon such payment by the executor to the county judge, the executor was discharged from liability. Also held that no written order for payment need be made by the county judge to authorize such payment to be made to him: *Doogan v. Elliott*, 48-342.

444. Fraud: An allegation that the executor has induced the guardian to make false charges in the guardian's account, of which the executor received the benefit, will not be sufficient ground for setting aside such executor's accounts and holding him liable for such fraudulent charges. His liability, if any, will be individual and not as executor: *Estate of Berryhill*, 61-845.

445. Report; allowance: The proper time to contest the propriety of allowing items of expense by the administrator is when the report is approved, unless it is opened by proper showing within three months: *Ashton v. Miles*, 49-564.

¹ Code, § 2480. If there be property remaining uninherit, it shall escheat to the state.

Relevancy and materiality.—In general

III. PRODUCTION AND EFFECT OF EVIDENCE, Order and method of introduction—continued.

d. Cross-examination.

e. Rebutting evidence.

9. Objections to evidence.

As to the sufficiency of evidence and burden of proof as to particular questions, see the titles under which such questions properly belong.

As to rules of evidence peculiar to criminal cases, see CRIMINAL LAW, III, 13.

As to evidence of MARRIAGE, see that title.

As to the STATUTE OF FRAUDS, see that title.

I. RELEVANCY AND MATERIALITY.

1. In general.

1. Evidence must be pertinent: Evidence should correspond with the allegations and be confined to the points in issue: *Koehler v. Wilson*, 40-183; *Clark v. Reiniger*, 66-507.

2. Therefore, *held*, that a party, suing, as originally owning in her own right the note sued upon, could not recover upon evidence of right thereto as assignee of her husband: *Koehler v. Wilson*, 40-183.

Further as to variance, see PLEADINGS, I, c.

3. Irrelevant evidence may be lawfully rejected unless the party offering it shows that it can be relevant to a fact already established or which he proposes to establish by evidence to be introduced: *Smith v. Bissell*, 2 G. Gr., 379.

4. What deemed relevant: It is not necessary that evidence offered shall bear directly on the case, but it is admissible if it tends to prove the issue, or forms a link in the chain of proof. Therefore, where defendant was on trial for the murder of his wife, *held*, that improper intimacy between him and another woman about the time of the killing was admissible: *State v. Hinkle*, 6-380.

5. Where there is a conflict in the testimony of witnesses, the jury may be allowed to look at the proven circumstances of the case, and consider what disputed fact testified to is, in view of the proven circumstances, the more probable: *Coskery v. Young*, 70—.

6. Insufficiency: Evidence should not be rejected merely for the reason that it alone

would not be sufficient in behalf of the party: *Cock v. Wilson*, 39—.

7. The fact that weight and remote case is not a ground tends to support the finding it: *Hoadley v. 2*

8. Remoteness: To whether the health of plaintiff's residence the erection of a residence of a witness same locality and the sick every fall with material: *Watson v.*

9. Where plaintiff defendant damages the son of its being the defendant's stock, and killed, *held*, that evidence in the same neighborhood been trampled upon the winter, should have: *McGuire*, 43-447.

10. Where the question plaintiff had been near around his stacks of from fire, *held*, that stacks of grain which around were also damaged to show that he had ordinary care in not the: *Lewis v. Chicago, M. & N. W. R. Co.*

11. Evidence as to more than a year before the transaction, *held* not competent existence of the custom transaction: *Hale v. 2*

12. In an action for defective railway crossing admit evidence of fact same place to other place: *Chicago & N. W. R. Co.*

13. In an action for negligence of defendant that evidence of the such engineer by another party, was rejection of his competency: *Coal Co.*, 46-17.

14. In an action rendered defendant liable

Relevancy and materiality; in general.

title to land, *held*, that evidence of cordial relations existing between the parties about the time the contract for services was claimed to have been made was irrelevant: *Ball v. Sykes*, 70—.

15. Where a witness testified as to the condition and appearance of a corner of a building where it was supposed a barrier had been fastened four months before, at the time of the happening of an accident, as was alleged, by reason of the insufficiency of the fastening of such barrier, *held*, that the length of time elapsing before the examination was made, while tending to lessen the value of the testimony, did not render it incompetent: *Cramer v. Burlington*, 49-218.

16. In an action for injuries received from a defective sidewalk, *held*, that the testimony of witnesses as to the condition of the sidewalk after the accident, introduced for the purpose of showing that at the time a photograph was taken which was introduced in evidence it was in the same condition as when the injury occurred, *held* proper: *Barker v. Perry*, 67-146.

17. In an action by a county superintendent for fees for examining teachers during a particular period, *held*, that evidence of the number of days required by plaintiff's successor to examine teachers, etc., was not competent: *Farrell v. Webster County*, 49-245.

18. Where it was sought to show contributory negligence on the part of the person receiving injuries on account of a defective sidewalk, by proof that he was endeavoring to procure impecunious parties as securities for his appearance at court, *held*, that the evidence was too remote to be admissible: *Hubbard v. Mason City*, 60-400.

19. In an action to recover money alleged to have been paid to trustees therein mentioned and by them turned over to defendant, *held*, that a receipt from defendant to said trustees for a sum much less than the entire amount of the subscription was not admissible to prove the payment of the subscription to the trustees: *Sypher v. Savery*, 39-258.

20. In an action for breach of a contract of conveyance, a deed of a part of the premises may, under proper allegations, be introduced in evidence to show that, prior to the time

fixed for the conveyance, defendant had placed it out of his power to convey: *Shaw v. Brown*, 18-508.

21. The fact that a party has effected an insurance on his life is not admissible as evidence of his good health at that time: *Lee v. Cresco*, 47-499.

22. In an action by a parent for injuries to a minor child, plaintiff's own ill-health is not pertinent: *Benton v. Chicago, R. I. & P. R. Co.*, 55-496.

23. In an action by an administrator to recover for injuries causing the death of decedent, evidence of the number of children of decedent is not admissible: *Beems v. Chicago, R. I. & P. R. Co.*, 58-150.

24. But evidence in such case that decedent was a married man or was dependent on his own earnings for support may be shown: *Ibid.*; *Simonson v. Chicago, R. I. & P. R. Co.*, 49-87.

And as to what is admissible in actions for personal injuries, see further, DAMAGES, §§ 221-229.

25. Where, in an action upon notes and an account, defendant's testimony tended to show payment of the notes, *held*, that it was competent for plaintiff to show that the payments made were in fact applied, by agreement of defendant, upon the account and not upon the notes, and that it was error to exclude such proof because plaintiff did not claim that defendant's testimony showed the account as still subsisting: *Thorn v. Moore*, 21-285.

26. Where it was sought to impeach a witness by showing that he made conflicting statements at a previous time, while being shaved, *held*, that it was not proper to show, by way of corroboration of his denial of such previous statements, that he had a brother who was a barber, and with whom he had an arrangement to be shaved for nothing: *State v. Cross*, 68-180.

27. Evidence that shot was found at defendant's house immediately after the commission of the crime of maliciously shooting and killing an animal, which was similar to that found in another animal injured at the same time as the one killed, *held* admissible: *State v. Wholeham*, 22-297.

28. Materiality: Where a party testified as a witness that he paid certain bonds in-

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involved in the transaction in suit, *held*, that the question as to where he got the bonds was immaterial: *Jones v. Hopkins*, 22-503.

29. Testimony as to the location of a certain stake set by a surveyor, *held* properly excluded, where the location of the land was to be determined by a fixed monument called for in the conveyances, and the location could not have been of any effect if shown: *Steyer v. Curran*, 48-580.

30. In a civil action for seduction, *held*, that evidence that the person seduced introduced defendant as her husband was not material upon the question of previously chaste character. Also, *held*, in such case, that evidence of defendant's wife that she and her husband lived in peace and harmony was not competent as rebutting the testimony of the person seduced as to representations made to her by defendant: *Burtis v. Chambers*, 51-645.

31. Where the evidence of the connection of defendants with the crime depended on testimony involving a collateral fact as contemporaneous therewith, *held*, that evidence of co-defendant having made statements as to the collateral fact at a time preceding the commission of the crime was admissible to rebut the evidence connecting defendants with the crime: *State v. Cruise*, 19-312.

32. Where the question is as to whether a person in possession of personal property has title thereto, and he claims to have acquired title from a former owner in consideration of assuming the latter's debts, evidence of that fact is material for the purpose of showing the true extent and character of the transaction: *Wallace v. Wallace*, 62-651.

33. Where it appears that defendant represented that certain posts with reference to which a contract was made with plaintiff were manufactured at several places, *held*, that evidence that they were not manufactured at more than one place was material. Also *held*, that evidence showing that when goods were ordered in pursuance of the contract, defendant responded that they would be furnished for cash at a rate in advance of what was specified in the contract, was competent, as tending to show that the representations under which the contract was made were false: *Porter v. Stone*, 62-442.

34. Where defendant accepted by a draft accepted by the relations between the company in whose interest might be shown, and the history of the case: *v. Duncombe*, 48-48.

35. Materiality question was as to whether for grading included difficult portions of a conflict of evidence competent to show whether main contract, and to determine whether it was that only the cheaper in the subcontract therein: *Ibid*.

36. Where there is evidence of the title to real property, the admissibility may be shown as a circumstance; but is admitted with great weight in its strictly legitimate use: *Harder*, 45-677; and *kofer*, 3-108.

37. In an action on a part payment for the house under contract, that the amount paid was greatly in excess of the work by reason of a difference between plaintiff and defendant, *held*, that the when erected and its contents to be showed in the allegations of fraud: *T'p*, 45-666.

38. Where action on a signee of a contract to what he paid for material, it not being proved that it had been fraudulent, plaintiff was not the winner: *Winch v. Baldwin*, 61-61.

What evidence admitted: see *infra*, §§ 473-505.

39. Distinct testimony. Where it is sought to show that the representations made to the plaintiff were fraudulent representations.

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held, that a purchaser from the grantor without release of dower by grantor's wife was estopped in an action by the wife for her dower from contesting the grantor's title: *Davis v. O'Ferrall*, 4 G. Gr., 358.

6. A recital in a conveyance under which a party claims title cannot operate by way of estoppel so as to prevent him from claiming under an older conveyance or a paramount title: *Baldwin v. Thompson*, 15-504.

7. A party who seeks to have a conveyance set aside as without authority, and asserts title to the property in himself, cannot at the same time insist upon an estoppel arising as against the grantee in such conveyance from the fact of having accepted title thereunder: *Bowers v. Keesecker*, 14-301.

An after-acquired title inures to the grantee under a prior conveyance: See CONVEYANCES, §§ 209-218.

II. IN PAIS.

8. What constitutes; general nature of: There can be no fixed rule of universal application to determine what acts constitute an estoppel *in pais*. It must depend in most cases upon the circumstances: *Lucas v. Hart*, 5-415.

9. Certainty: The law of estoppel is founded upon an obligation which rests upon every man to speak and act according to the truth and the just policy of the law which will not permit men to deny that which they have solemnly acted upon as true. Estoppels must therefore be certain to every intent, for no one shall be denied setting up the truth unless it is in plain and clear contradiction to his former acts and allegations: *Hubbard v. Hartford F. Ins. Co.*, 88-825.

10. Not favored: An estoppel is not favored in law, and must always be clearly proven: *Baldwin v. Lowe*, 22-387.

11. Must be pleaded: Matter in estoppel must be specially pleaded, or it cannot be considered: *Independent Dist. v. Merchants' Nat. Bank*, 68-843; *Folsom v. Star Union, etc., Line*, 54-490.

12. An estoppel must be pleaded and cannot be introduced in evidence under an allegation of contract: *Phillips v. Van Schaick*, 87-229.

13. Evidence to establish an estoppel is in-

admissible when the pleadings contain nothing relative thereto: *Ransom v. Stanberry*, 22-384.

14. A party is not entitled to introduce evidence tending to prove an estoppel, unless he has specially pleaded the facts constituting such estoppel: *Eikenberry v. Edwards*, 67-14.

15. In an action at law upon a policy of insurance, where defendant answered alleging a violation of conditions, and plaintiff sought to show matter of estoppel as against the defense interposed, the plaintiff was held entitled to avoid such defense by showing that defendant was estopped from asserting such condition: *Bartholomew v. Merchants' Ins. Co.*, 25-507.

16. Representations must have been acted upon: Acts or omissions will not operate as an estoppel unless the other party has acted upon them, and then they will only be conclusive upon the party who has so acted and persons claiming under him and not in favor of strangers: *Lucas v. Hart*, 5-415.

17. The doctrine of estoppel cannot apply where the acts or omissions relied on as creating the estoppel have never been acted upon by the party claiming such estoppel: *Morris v. Sargent*, 18-90.

18. It is an essential element of an estoppel that another party has acted or changed his position to his prejudice in reliance upon the alleged conduct in question: *Tufts v. McClure*, 40-817.

19. It is essential to constitute an estoppel *in pais* that the party pleading it, and those under whom he claims, should have so acted with reference to the subject of the representations as that he would suffer injury or damage if the one who made them were permitted to deny their truth: *Jamison v. Miller*, 64-402; *Eikenberry v. Edwards*, 67-14.

20. Therefore where, after the levy of an attachment, a person claiming the property made no assertion of his claim thereto on being advised of the levy, and no further steps were taken under such levy, held, that the person claiming the property was not afterwards estopped: *Jamison v. Miller*, 64-402.

21. The request by a person whose name appears to be signed as one of the makers of a note that the holder thereof shall bring

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action against other makers, and the bringing of suit accordingly, will not estop such person from pleading that the signature of his name is a forgery: *Eikenberry v. Edwards*, 67-14.

22. It is sufficient that an action has been brought in reliance upon a party's claim, to estop such party from asserting a different right: *Crawford v. Nolan*, 70—.

23. Where one of two parties liable on a note might have brought suit thereon against the other, but the payee requested him not to do so and afterward informed him that he was released, *held*, that the payee was thereby estopped from enforcing the note against the party thus released, the forbearance to sue being a sufficient consideration for the release: *Lyon v. Aiken*, 70—.

24. Where acts or declarations have not induced upon a party or caused him in any manner to change his position or condition they will not constitute an estoppel: *Moore v. Church*, 70—.

25. A party cannot be estopped by acts subsequent to the transaction as to which the estoppel is sought to be established: *Gee v. Moss*, 68-318.

26. In order to afford a basis for the just application of the doctrine of estoppel, it is necessary that the party claiming thereunder should have acted in good faith relying upon the estoppel and in the belief of its truth: *Ellsworth v. Ellsworth*, 33-164.

27. Where an administrator knowingly took possession of and sold property which was exempt to decedent, and therefore was not subject to the payment of his debts but passed to his widow, *held*, that the widow was not estopped from setting up that fact in an action against the administrator to recover the proceeds of such sale, although she knew of his taking possession of the property; she not having been aware of her legal rights in the premises until after the sale: *Ibid*.

28. Mere advice: In a case where there was no relation of trust or confidence between the parties, *held*, that the fact that one party advised a course of conduct would not prevent him from afterward taking advantage thereof in his own favor as against the other: *Merrill v. Welsher*, 50-61.

29. Opinion on matter of law: Where the representation is a statement of a matter of law, no estoppel ordinarily can be grounded

upon it: *Cedar Rapids v. Cedar Rapids*, 46-243.

30. The mere fact of reference to a particular position of the soul can take advantage not estop him from the correctness of *Tp v. Independent* 1

31. Mistake of fact: Where a party asserts that he is so for the purpose of influencing another, who acts upon such a statement, the assertion is bound to be the mistake. Then a party set up by way of judgment to which and thereby induced action, he was bound by the statements therein: *Smith v. Crame*

32. A party's ignorance of facts will not estop him if his ignorance is the cause. Therefore, he is not estopped from claiming that he is not the owner of the land without a deed and three years after the date of the deed, as to such a claim, he is not estopped from claiming that he is not the owner thereof: *Sweeney*

33. Plaintiff's agent, charging all liens on the property of the defendant, asked for all the liens presented, and the defendant that he had no liens, thus presented and paid the taxes, the defendant was thereby estopped as against plaintiff's claim for the taxes derived from a tax certificate at the time of the settlement, as to the taxes close or present for payment, no matter whether plaintiff was in fact that the taxes for the year were unpaid: *Davidson*

34. Where a street railway company seeks to lay its track upon the land of a private owner, who has already laid its pipes for water, it may avoid laying its track along the line of such pipes, and by mistake, gives erroneous

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to the location of its pipes, it will be estopped from claiming a right to disturb the track of the railway company, when laid, in order to get access to such pipes: *Davenport Cent. R. Co. v. Davenport Gas Light Co.*, 43-301.

85. Mere silence: An estoppel will not be created by mere silence where there is no evidence that the person whose silence it is claimed created the estoppel had knowledge of the matter in regard to which it is claimed he should have spoken: *Ibid.*

86. Ignorance of fraud: The acts of a party, whatever they may be, will not estop him to deny fraud of which he was at the time ignorant when claims under such fraud are attempted to be enforced by the guilty party or one having notice thereof: *Sinnett v. Moles*, 38-25.

87. Intention: An instruction to the effect that, in order to create an estoppel by conduct, it must be shown that the party intended that the opposite party should act upon such conduct, *held* misleading, for the reason that the acts and language of the party may be a basis for inferring certain intentions: *Tiffany v. Anderson*, 55-405.

88. To constitute an estoppel it is not necessary to prove the truth of the statements relied on. It is only necessary to show that the conduct of the party is such as to preclude him from denying the truth of such statements: *Blake v. Barrett*, 61-79.

89. An estoppel is allowed to prevent fraud and injustice, and exists whenever the party cannot gainsay his own acts or assertions. It is immaterial whether the thing admitted is true or false, it being the fact that it was acted upon that renders it conclusive: *Lucas v. Hart*, 5-415.

40. Every person will be conclusively presumed to intend to be understood according to the reasonable import of his words, and where a person's words are reasonably understood and justly acted upon by another, such person cannot be heard to aver to the contrary against the other. The intention to create an estoppel is not necessary: *Sessions v. Rice*, 70—.

41. Fraudulent intent: Where a party, by his conduct and declarations, induces another to act to the prejudice of the latter, the former shall be estopped to deny matters represented by his conduct, especially if they

are done and made with a fraudulent intent. Therefore, where defendant represented that an acquaintance whom he had with him was his nephew and engaged in business with him, and by such known false representations created a belief in the mind of the other (such representations being calculated to create such belief in the mind of an ordinarily prudent person) that defendant would be responsible for any money advanced to such alleged relative, *held*, that defendant was liable for money thus advanced, although upon a forged order: *Peck v. Lusk*, 38-93.

42. Mere failure to perform an executory agreement cannot give rise to an estoppel: *Starry v. Korab*, 65-287.

43. An oral promise to pay the debt of another, being invalid under the statute of frauds, cannot constitute an estoppel: *Smith v. Tramel*, 68-488.

44. Party inducing certain action cannot complain thereof: Where defendant purchased certain ground of plaintiff, entering into an agreement with sureties that by a certain time he would put improvements upon the property to an amount specified, but afterwards advised defendant not to continue making the improvements, on the ground that he would not be able to pay for the property, *held*, that by such advice plaintiff was estopped from recovering of the sureties for failure to make the improvements as agreed: *Davis v. Williams*, 49-83.

45. Where a mill-owner consulted with a person who proposed to erect a mill-dam at a lower point on the stream, advised such person to do so, and assured him that there was no danger of backing the water up to his mill, and agreed to pay a proportion of the expense, knowing that large expense was being incurred in pursuance of the undertaking, *held*, that he was estopped from recovering damages by reason of the construction of such lower dam: *Wilson v. Vaughn*, 40-179.

46. Not objecting to sale: A person standing by and assisting in making a sale of real property is estopped from claiming any title therein as against that acquired by the grantee: *Jordan v. Brown*, 56-281.

47. Where plaintiff, acting as agent for his father, had negotiated the sale to defendant of land belonging to his father, under the understanding that the father, having been

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years after the execution of a deed to him by his son, failed to assert his title and withheld his deed from record, allowing defendant to purchase the property from his son and make valuable improvements upon it, with full knowledge thereof. *Held*, that plaintiff was estopped from setting up his title: *Foster v. Bigelow*, 24-379.

60. Where the owner of land allows another to improve the same under a claim of right to it, he will thereafter be estopped from asserting ownership thereof: *Campbell v. Mayes*, 38-9.

61. Silence of one during the erection of improvements upon property which he subsequently purchases will not estop him from setting up such title: *Shanks v. Seamonds*, 24-131.

62. Record title: The doctrine of estoppel will not apply to one whose title is properly recorded because he does not take affirmative action to defeat a public sale of his property. The doctrine of *caveat emptor* will apply to the purchaser at such sale: *Gwynn v. Turner*, 18-1.

63. The fact that a party having on record a deed to property stands by and lets it be sold as the property of another, without taking steps by injunction to restrain such sale, does not estop him from setting up his title as against the purchaser: *Jones v. Brandt*, 59-332.

64. Inducing credit to be given to another: If the owner of property holds out another person as owner, or having full power of disposition thereof, and such person assumes to be owner and is given credit as such, the real owner is estopped from asserting ownership as against one who has contracted with the one assuming to be owner: *White v. Morgan*, 42-118.

65. When the legal title to property is allowed to stand in the name of another, who thereby obtains credit, the owner will not be allowed to insist on his title as against the party so misled: *Crouse v. Morse*, 49-332.

66. A party is not estopped from claiming to be the owner of goods which he allows another person to use, control and hold himself out to the world as the owner of, as against one who has notice and knowledge of the facts as to the ownership of the property: *Bray v. Flickinger*, 69-167.

67. As to whether the fact that the wife allows her husband to invest her money in property which he holds in his own name, whereby he is enabled to obtain credit, estops her from asserting her claims as against such creditors, *quære*: *Jones v. Brandt*, 59-332.

68. A wife who by her acts and declarations holds out that her husband is worthy of credit by reason of his ownership of land, thus inducing another to give him credit and render services under a contract with him, is afterwards estopped to deny the truth of the representations made by her words and conduct, and cannot assert an equitable title to such lands: *Hendershott v. Henry*, 63-744.

69. With reference to taxation: A county which refuses to convey swamp land under a contract therefor is estopped from afterwards claiming that during the time it thus refused to convey, the land was subject to taxation: *Iowa R. Land Co. v. Story County*, 36-48.

70. Where a county had levied taxes for several years upon land against a railway company claiming title thereto, and had by compromise accepted the same in payment of such taxes, *held*, that it was thereafter estopped from asserting title to the land as against a claimant to whom it had been taxed: *Adams County v. Burlington & M. R. Co.*, 39-507.

71. Where swamp lands were assessed to one claiming to be owner under a purchase from the county, and the taxes collected from him, *held*, that the county was estopped from maintaining action to set aside the sale: *Audubon County v. American Emigrant Co.*, 40-460.

72. In order that taxation of land may act as an estoppel of the county from claiming title thereto, actual payment of the taxes must be shown. Mere assessment will not be sufficient: *Page County v. Burlington & M. R. Co.*, 40-520.

73. The taxation of land to a purchaser whose title had been obtained from the county by fraud, the taxing officer not being aware of the fraud, *held* not to estop the county from asserting title to said land as against such purchaser: *Bixby v. Adams County*, 49-507.

74. Where the county authorities improp-

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erly and unlawfully taxed certain land which in fact belonged to the county, and it was sold at tax sale, and the tax purchaser thereafter for several years paid the taxes thereon, *held*, that the county was not estopped by the unauthorized acts of its officers from asserting title against the tax purchaser: *Howard County v. Bullis*, 49-519.

75. After having treated property as belonging to a private owner by assessing it to him and receiving the taxes from him thereon, a city is estopped from setting up title in itself as against such owner: *Simplot v. Dubuque*, 49-630; *S. C.*, 56-639.

76. The fact that after conveying land to a purchaser the county brings action to have such conveyance set aside will not render taxes levied on the property after the conveyance void: *American Emigrant Co. v. Iowa R. Land Co.*, 52-323.

77. Where a municipal corporation sells a tract of land, and its authorized agents represent that there are no municipal taxes assessed against the same, neither the municipality nor its officers can collect from the grantees taxes for preceding years if assessed subsequent to the conveyance. Omissions resulting from the mistake or inadvertence of the assessor may be corrected and such amounts may be collected, but good faith forbids an assessment made in violation of a written agreement and of an explicit understanding between the parties in the adjustment of a pending controversy: *Calhoun County v. American Emigrant Co.*, 93 U. S., 124.

78. As to tax titles: While the acceptance from the clerk of the court of money paid to him to redeem land from a tax sale might estop the person so receiving from setting up his tax title or from denying the right of redemption, it does not estop him from setting up against the redemptioner a title derived under an independent transaction: *Terrell v. Grinnell*, 20-393.

79. Official acts: In an action based upon a tax deed executed by defendant as county treasurer, which deed was void because showing that the sale was *en masse* and not in parcels, *held*, that the fact that the tax certificate on which the deed was based showed a sale in parcels could not be relied upon to defeat defendant's title as an individual.

The fact that defendant executed an erroneous him individually from *c. Cook*, 21-392.

80. Questioning Where it appeared that, although not appearing in the active capacity, did appear in a judgment soon after took no steps to have he was estopped from against a person who property in the belief that valid and binding: 351.

81. A party who has against a foreign judgment that it was void for want of, in an action by the original indebtedness, judgment was valid and no merger was merged there: 44-570.

82. By procuring an judgment is void for want of a party estops himself from on any rights under *Sweezy v. Stetson*, 67-48.

83. Where a party has as a defense in another action that he is bound by cannot afterwards, when seeks to enforce such validity: *District Twp v.* 69-88.

84. Where a party takes others to act on a construction of a judgment affecting him, he cannot afterwards insist upon inconsistent with the view induced others to take. Under the assumption that a declared void by the action of the United States to which it was removed from the tax purchaser induced others to void and asked relief from the court on that ground, he cannot afterwards insist that the said court did not affect the title: *Boycen v. Duffie*, 66-8.

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85. Pleading: An allegation in a pleading in another action, signed and filed by the attorney and not sworn to, and on which the parties never come to trial, does not operate as an estoppel: *Shepard v. Pratt*, 32-296.

Further, as to admissions in PLEADINGS, see that title, XIV, a.

86. Inconsistent claims: A party who has set up claim to possession of property under one right cannot, if action is brought against him in reliance upon such claim, assert another inconsistent right thereto: *Crawford v. Nolan*, 70—; *Citizens' Bank v. Dows*, 68-460.

87. An admission in the trial of a case, made for the purpose of securing a supposed advantage therein, estops the party from afterwards changing front and in the same action denying the matter thus admitted: *Hgatt v. Burlington, C. R. & N. R. Co.*, 68-662.

88. Where a person as a witness upon a trial asserts that he has no interest in the cause of action, but that it belongs to plaintiff, and makes such assertion for the purpose of enabling plaintiff to recover upon such cause of action, he thereby precludes himself in the future from denying such statement and seeking to recover on the same cause of action against defendant: *Hoyt v. Hoyt*, 68-703.

89. Sales under execution: A party receiving from the sheriff and retaining surplus money arising from a sale under foreclosure, with full knowledge of how notice has been served, will be held to have ratified the decree, and to be estopped from denying the sufficiency of notice: *Southard v. Perry*, 21-488.

90. Where a debtor, whose homestead was sold under special execution, allowed the sheriff, without objection, to apply the overplus realized by such sale to other executions and pay the same over to the execution creditors, held, that the debtor was estopped from asserting his claim to have such overplus paid to him as exempt and suing to recover the same from the sheriff: *Brumbaugh v. Zollinger*, 59-384.

91. Where one of several judgment debtors procures an assignment of a judgment to himself, and has execution issued thereon under the erroneous belief that he can enforce such judgment against the other parties thereto, the fact that a co-defendant therein allows him to proceed to sell his prop-

erty will not estop the latter from setting up the invalidity of the proceedings to defeat the sale: *Drefuhl v. Tuttle*, 42-177.

92. Payment under protest: The payment of money in redemption from a foreclosure sale of premises, although made under protest, held, in a particular case, to be a voluntary payment in such sense that the party was estopped thereby from any claim to recover it back: *Dawson v. Mann*, 49-596.

And further as to payment under protest, see PAYMENT AND DISCHARGE, §§ 14-20.

93. By contract: Where a district township, claiming by virtue of judgment against another district township to have jurisdiction of certain territory, entered into a contract for services of a teacher to be performed in such territory, held, that upon reversal of the judgment under which such jurisdiction was claimed, it was estopped from denying its liability upon such contract: *Hull v. District T'p*, 41-494.

94. Where an officer of a city was given a salary in lieu of certain fees, and accepted such salary, held, that he was estopped from claiming the fees, even though the city might not have been authorized to deprive him of them: *Bryan v. Des Moines*, 51-590.

95. Accepting benefits: Where the ward of a guardian, after becoming of age, with full knowledge of the facts of the sale, accepts and retains the purchase money from a sale of his lands by the guardian, there being no fraud or mistake, he is equitably estopped to deny the validity of the sale, whether such sale is void or voidable: *Deford v. Mercer*, 24-118.

96. Where a party has asserted rights accruing under the attempted foreclosure of a chattel mortgage by claiming credit on the indebtedness in the amount realized at such foreclosure sale, he cannot afterwards assert that the foreclosure was without right and that the purchaser thereunder is a mere trespasser: *Rump v. Schwartz*, 67-471.

97. Where a wife not joining in a conveyance of land by her husband to relinquish her dower accepted the payment of the proceeds of such property to herself, with a verbal agreement that she would never afterwards claim dower in such property, held, that she was estopped thereby from afterwards asserting any claim for dower. al-

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though the relinquishment was not in writing: *Dunlap v. Thomas*, 69-358.

98. And *held*, in such case, that the heirs of the wife were estopped from asserting any claim against such land in right of the wife: *Ibid*.

99. Adverse possession: The fact that a city allows the owner of property abutting upon a street to inclose such street without objection, while having no color of title or claim of right thereto, does not estop it from afterwards asserting its rights therein, even after such possession is continued for ten years: *Solberg v. Decorah*, 41-501.

100. The termination of the occupancy of land by a person having title thereto, and the failure to pay taxes thereon, will not estop him as against a claimant under another title who enters and holds possession. Nothing but the expiration of the period of limitation will give the subsequent occupant a valid title as against the real owner: *Sanders v. Godding*, 45-468.

101. Where a conveyance of real property is shown by written instrument, parol evidence that the grantor, after such conveyance, continued to take standing timber from the property conveyed is not admissible for the purpose of creating an estoppel by which such grantor is entitled to the privilege of taking such timber: *Davis v. Hull*, 67-479.

102. Estoppel by acts of agents: A party is not estopped by the action of others who have no power to bind him: *First Nat. Bank v. Manning*, 37-610.

103. The fact that a husband has been in the habit of signing his wife's name to deeds will not operate to estop her unless it was done with her knowledge. Before a principal will be bound by acts of another as agent, the principal must know that such other person is so acting: *Morris v. Sargent*, 18-90.

104. Statements of the husband with reference to his wife's connection with his business, tending to render her liable for indebtedness contracted therein, *held* not binding upon the wife: *Barbee v. Hamilton*, 67-417.

105. Representations of an employee of a gas company acting in the capacity of book-keeper and collector, as to the location of the pipes of the company in a particular street, *held* not to be such as to estop the company in case such representations were

erroneous: *Davenport Cent. R. Co. v. Davenport Gas Light Co.*, 48-301.

106. The knowledge of an agent acquired in connection with the business of the agency is the knowledge of the principal, and the latter will be estopped thereby as fully as by personal knowledge. (Point discussed in dissenting opinion): *Crouse v. Morse*, 49-382, 389.

107. The principal is estopped by acts and statements of his agent only where they are made while the agent is engaged in the business of the agency and are in relation to that business: *Hakes v. Myrick*, 69-189.

108. A county cannot be bound by unlawful acts of its officers so as to create an estoppel: *Gill v. Appanoose County*, 66-20.

109. Where the treasurer of a school district, who was also assistant cashier in the bank in which the money of the district was kept on deposit, made a false entry on the books of the bank for the purpose of showing an amount to be on hand at the time of settlement which was not actually on hand, which entry was subsequently erased by him; and the directors, at the time of settlement, asked from the cashier the amount of funds to the credit of the treasurer, which amount, as ascertained by the book-keeper from the books, was given to the directors, including this false entry, *held*, that the bank was not estopped from denying the fact of the amount specified in the false entry being on deposit at the time of such settlement: *Independent Dist. v. Merchants' Nat. Bank*, 68-343.

Further as to how far declarations of agent bind principal, see AGENCY, III, c.

Attorney estopped from taking advantage of his fraud, see ATTORNEYS, § 75.

110. Other cases: The fact that a railroad company allows a passenger to ride several times upon a ticket which has expired by express limitation will not estop it from refusing to accept the same ticket in payment of further transportation: *Sherman v. Chicago & N. W. R. Co.*, 40-45.

111. Under the statute allowing double damages in an action against a railway company for stock killed where the company has failed to fence, upon proof of notice to the company of the damage and its failure to pay the same for thirty days, *held* that the fact that the stock owner in his notice claimed that the

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injury resulted by reason of fencing at a crossing, would estop him from claiming double damages for failure of the company to pay his claim within thirty days after such notice, because the delay beyond thirty days would not render the company liable to double damages under the claim actually made in the notice: *Davis v. Chicago, R. I. & P. R. Co.*, 40-292.

112. Where a railroad aid tax was voted by a township, and the railroad proceeded upon the faith thereof to comply with the conditions upon which it had been voted, and expended money in constructing its road in accordance with such conditions, held, that tax payers in the township, failing to make objections to the validity of the tax until the completion of the road in accordance with the conditions, were estopped from setting up any defect in the election at which the tax was voted: *Burlington, C. R. & M. R. Co. v. Stewart*, 39-287; *Lamb v. Burlington, C. R. & M. R. Co.*, 39-383.

ESTRAYS.

See ANIMALS.

EVIDENCE.

I. RELEVANCY AND MATERIALITY.

1. *In general.*
2. *Hearsay.*
 - a. *In general.*
 - b. *Testimony of witness in another trial.*
 - c. *Proceedings in other cases.*
3. *Admissions, confessions, and declarations.*
 - a. *Admissions of parties and privies; confessions.*
 - b. *Declarations and acts admissible as part of the res gestæ.*
 - c. *Declarations, admissions, and acts of third persons.*
 - d. *Declarations as to title, ownership, possession, etc.*
 - e. *Declarations in the course of official duty.*
 - f. *Declarations or entries made by a person since deceased.*
 - g. *Entries in books of account.*
 - h. *Maps, plats, books of science and general history, etc.*

I. RELEVANCY AND MATERIALITY—con.

4. *Opinions and conclusions; testimony of experts.*
 - a. *Admissibility of opinions in general.*
 - b. *Opinions of experts.*
5. *Evidence as to handwriting.*
6. *Evidence as to value and damages.*
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II. PROOF.

1. *Judicial notice.*
2. *Records and documents; admissibility and proof of.*
3. *Primary and secondary evidence; the best evidence.*
4. *Parol evidence to vary, contradict or explain written instruments.*
5. *Persons or things as evidence; photographs; experiments; examination of person; resemblance.*

III. PRODUCTION AND EFFECT OF EVIDENCE.

1. *Burden of proof; amount and preponderance of evidence.*
2. *Presumptions; prima facie proof.*
3. *Attendance of witnesses.*
4. *Rule for production of books and papers.*
5. *Procuring affidavits.*
6. *Depositions; perpetuating testimony.*
7. *Competency and credibility; impeachment of witnesses.*
 - a. *Competency as affected by interest.*
 - b. *Incompetency of witness with regard to personal transactions or communications with person since deceased or insane.*
 - c. *Competency of husband or wife.*
 - d. *Privileged communications.*
 - e. *Competency of witness depending upon capacity.*
 - f. *Competency of particular testimony.*
 - g. *Credibility.*
 - h. *Impeachment.*
 - i. *Credibility of interested or discredited witness.*
8. *Order and method of introduction.*
 - a. *Introduction.*
 - b. *Number of witnesses.*
 - c. *Examination of witnesses.*

Relevancy and materiality.—In general

III. PRODUCTION AND EFFECT OF EVIDENCE,
Order and method of introduction—continued.

d. *Cross-examination.*

e. *Rebutting evidence.*

9. *Objections to evidence.*

As to the sufficiency of evidence and burden of proof as to particular questions, see the titles under which such questions properly belong.

As to rules of evidence peculiar to criminal cases, see CRIMINAL LAW, III, 13.

As to evidence of MARRIAGE, see that title.

As to the STATUTE OF FRAUDS, see that title.

I. RELEVANCY AND MATERIALITY.

1. *In general.*

1. **Evidence must be pertinent:** Evidence should correspond with the allegations and be confined to the points in issue: *Koehler v. Wilson*, 40-183; *Clark v. Reiniger*, 66-507.

2. Therefore, *held*, that a party, suing, as originally owning in her own right the note sued upon, could not recover upon evidence of right thereto as assignee of her husband: *Koehler v. Wilson*, 40-183.

Further as to variance, see PLEADINGS, I, e.

3. **Irrelevant evidence** may be lawfully rejected unless the party offering it shows that it can be relevant to a fact already established or which he proposes to establish by evidence to be introduced: *Smith v. Bissell*, 2 G. Gr., 379.

4. **What deemed relevant:** It is not necessary that evidence offered shall bear directly on the case, but it is admissible if it tends to prove the issue, or forms a link in the chain of proof. Therefore, where defendant was on trial for the murder of his wife, *held*, that improper intimacy between him and another woman about the time of the killing was admissible: *State v. Hinkle*, 6-380.

5. Where there is a conflict in the testimony of witnesses, the jury may be allowed to look at the proven circumstances of the case, and consider what disputed fact testified to is, in view of the proven circumstances, the more probable: *Coskery v. Young*, 70—.

6. **Insufficiency:** Evidence should not be rejected merely for the reason that it alone

would not be sufficient in behalf of the party: *Cock v. Wilson*, 39—.

7. The fact that weight and remote case is not a ground tends to support the finding it: *Hoadley v. J.*

8. **Remoteness:** to whether the health of plaintiff's residence the erection of a dence of a witness same locality and the sick every fall with material: *Watson v.*

9. Where plaintiff defendant damages son of its being the defendant's stock, and killed, *held*, that evidence in the same neighborhood been trampled upon the winter, should have *McGuire*, 43-447.

10. Where the question plaintiff had been neglected around his stacks of from fire, *held*, that stacks of grain which around were also designed to show that he had ordinary care in not thus *Lewis v. Chicago, M. &*

11. Evidence as to a than a year before the transaction, *held* not competent existence of the custom transaction: *Hale v. G.*

12. In an action for defective railway crossing admit evidence of for same place to other parties: *cago & N. W. R. Co.*, 5—.

13. In an action for negligence of defendant that evidence of the such engineer by defendant another party, was not in question of his competence: *Coal Co.*, 46-17.

14. In an action to rendered defendant by p.

Relevancy and materiality; in general.

title to land, *held*, that evidence of cordial relations existing between the parties about the time the contract for services was claimed to have been made was irrelevant: *Ball v. Sykes*, 70—.

15. Where a witness testified as to the condition and appearance of a corner of a building where it was supposed a barrier had been fastened four months before, at the time of the happening of an accident, as was alleged, by reason of the insufficiency of the fastening of such barrier, *held*, that the length of time elapsing before the examination was made, while tending to lessen the value of the testimony, did not render it incompetent: *Cramer v. Burlington*, 49-213.

16. In an action for injuries received from a defective sidewalk, *held*, that the testimony of witnesses as to the condition of the sidewalk after the accident, introduced for the purpose of showing that at the time a photograph was taken which was introduced in evidence it was in the same condition as when the injury occurred, *held* proper: *Barker v. Perry*, 67-146.

17. In an action by a county superintendent for fees for examining teachers during a particular period, *held*, that evidence of the number of days required by plaintiff's successor to examine teachers, etc., was not competent: *Farrell v. Webster County*, 49-245.

18. Where it was sought to show contributory negligence on the part of the person receiving injuries on account of a defective sidewalk, by proof that he was endeavoring to procure impecunious parties as securities for his appearance at court, *held*, that the evidence was too remote to be admissible: *Hubbard v. Mason City*, 60-400.

19. In an action to recover money alleged to have been paid to trustees therein mentioned and by them turned over to defendant, *held*, that a receipt from defendant to said trustees for a sum much less than the entire amount of the subscription was not admissible to prove the payment of the subscription to the trustees: *Sypher v. Savery*, 39-253.

20. In an action for breach of a contract of conveyance, a deed of a part of the premises may, under proper allegations, be introduced in evidence to show that, prior to the time

fixed for the conveyance, defendant had placed it out of his power to convey: *Shaw v. Brown*, 13-508.

21. The fact that a party has effected an insurance on his life is not admissible as evidence of his good health at that time: *Lee v. Cresco*, 47-499.

22. In an action by a parent for injuries to a minor child, plaintiff's own ill-health is not pertinent: *Benton v. Chicago, R. I. & P. R. Co.*, 55-496.

23. In an action by an administrator to recover for injuries causing the death of decedent, evidence of the number of children of decedent is not admissible: *Beems v. Chicago, R. I. & P. R. Co.*, 58-150.

24. But evidence in such case that decedent was a married man or was dependent on his own earnings for support may be shown: *Ibid.*; *Simonson v. Chicago, R. I. & P. R. Co.*, 49-87.

And as to what is admissible in actions for personal injuries, see further, DAMAGES, §§ 221-229.

25. Where, in an action upon notes and an account, defendant's testimony tended to show payment of the notes, *held*, that it was competent for plaintiff to show that the payments made were in fact applied, by agreement of defendant, upon the account and not upon the notes, and that it was error to exclude such proof because plaintiff did not claim that defendant's testimony showed the account as still subsisting: *Thorn v. Moore*, 21-285.

26. Where it was sought to impeach a witness by showing that he made conflicting statements at a previous time, while being shaved, *held*, that it was not proper to show, by way of corroboration of his denial of such previous statements, that he had a brother who was a barber, and with whom he had an arrangement to be shaved for nothing: *State v. Cross*, 68-180.

27. Evidence that shot was found at defendant's house immediately after the commission of the crime of maliciously shooting and killing an animal, which was similar to that found in another animal injured at the same time as the one killed, *held* admissible: *State v. Wholeham*, 22-297.

28. Materiality: Where a party testified as a witness that he paid certain bonds in-

Relevancy and materiality; in general.

volved in the transaction in suit, *held*, that the question as to where he got the bonds was immaterial: *Jones v. Hopkins*, 22-503.

29. Testimony as to the location of a certain stake set by a surveyor, *held* properly excluded, where the location of the land was to be determined by a fixed monument called for in the conveyances, and the location could not have been of any effect if shown: *Steyer v. Curran*, 48-580.

30. In a civil action for seduction, *held*, that evidence that the person seduced introduced defendant as her husband was not material upon the question of previously chaste character. Also, *held*, in such case, that evidence of defendant's wife that she and her husband lived in peace and harmony was not competent as rebutting the testimony of the person seduced as to representations made to her by defendant: *Burtis v. Chambers*, 51-645.

31. Where the evidence of the connection of defendants with the crime depended on testimony involving a collateral fact as contemporaneous therewith, *held*, that evidence of co-defendant having made statements as to the collateral fact at a time preceding the commission of the crime was admissible to rebut the evidence connecting defendants with the crime: *State v. Cruise*, 19-312.

32. Where the question is as to whether a person in possession of personal property has title thereto, and he claims to have acquired title from a former owner in consideration of assuming the latter's debts, evidence of that fact is material for the purpose of showing the true extent and character of the transaction: *Wallace v. Wallace*, 62-651.

33. Where it appears that defendant represented that certain posts with reference to which a contract was made with plaintiff were manufactured at several places, *held*, that evidence that they were not manufactured at more than one place was material. Also *held*, that evidence showing that when goods were ordered in pursuance of the contract, defendant responded that they would be furnished for cash at a rate in advance of what was specified in the contract, was competent, as tending to show that the representations under which the contract was made were false: *Porter v. Stone*, 62-442.

34. Where defendant resisted payment of a draft accepted by him, claiming that his acceptance was procured by fraud, *held*, that the relations between himself and the company in whose interest he acted in accepting, might be shown, as supplying a part of the history of the case: *Delaware County Bank v. Duncombe*, 48-488.

35. Materiality of value: Where the question was as to whether a subcontract for grading included certain unfinished and difficult portions of the work, and there was a conflict of evidence, *held*, that it was competent to show what was embraced in the main contract, and the price, in order to determine whether it was reasonable to believe that only the cheaper portions were included in the subcontracts at the price named therein: *Ibid*.

36. Where there is a conflict in the direct evidence of the terms of a sale or trade of real property, the actual value of the property may be shown as a slight corroborative circumstance; but such evidence should be admitted with great caution and limited to its strictly legitimate province: *Johnson v. Harder*, 45-677; and see *Waldron v. Zollkofer*, 3-108.

37. In an action on certain orders given in part payment for the erection of a school-house under contract, in which it was alleged that the amount mentioned in the contract was greatly in excess of the value of the work by reason of a fraudulent combination between plaintiff and the school district officers, *held*, that the value of the building when erected and its cost were properly matters to be showed in evidence to rebut such allegations of fraud: *Wormley v. District T'p*, 45-666.

38. Where action was brought by the assignee of a contract, *held*, that evidence as to what he paid for such contract was immaterial, it not being pleaded that the contract had been fraudulently assigned or that plaintiff was not the real party in interest: *Winch v. Baldwin*, 68-764.

What evidence admissible to show value, see *infra*, §§ 473-505.

39. Distinct transactions, acts, etc.: Where it is sought to prove fraudulent representations made to one person, evidence of fraudulent representations made about the

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same time to another is not admissible: *Mather v. Robinson*, 47-403.

40. Evidence that other sales than the one in question were effected by fraudulent representations is not admissible to prove fraudulent representations in the one involved in the case: *Gardner v. Trenary*, 65-646.

41. In an action for false representations, evidence that similar representations to those claimed to have been made to plaintiff were made under similar circumstances by defendant to other parties, although not in the presence of plaintiff, is admissible. Such evidence tends to support evidence of plaintiff that like representations were made to him: *Porter v. Stone*, 62-442.

42. In an action against the seller of a patent-right claimed to have been sold under false representations, held admissible to show that defendant had resorted to certain devices not known to plaintiff, to make the device appear practicable, in transactions other than the one in question, for the purpose of showing that defendant was making false claims in the transaction in question: *Foster v. Trenary*, 65-620.

43. The grantor in an alleged fraudulent conveyance cannot be asked with reference to other distinct transactions for the purpose of showing that he has made other fraudulent conveyances: *Clark v. Reiniger*, 66-507.

44. Evidence tending to identify accused as the person committing the crime charged is admissible, although it tends also to prove a distinct crime, or to show a different motive, from that charged. Therefore, held, that in a prosecution for burglary, where it appeared that the object in view was larceny, it was proper to show that defendant knew of the possession by the occupant of the house of a large sum of money, as tending to identify defendant as the person committing the burglary: *State v. Kepper*, 65-745.

45. Evidence as to the conduct of a party at other times when intoxicated is admissible as giving character to acts relied upon as evidence of the particular intoxication in question: *State v. Huxford*, 47-16.

On the question of insanity it is competent to show that the party has been insane at a prior period: See *infra*, §§ 81-83.

As to proof of other acts as showing intent, knowledge, etc., see CRIMINAL LAW, §§ 1547-1558.

46. Circumstances: All the circumstances surrounding the transaction, such as that a guarantor held a mortgage on the property of the debtor, etc., held properly admissible in evidence in an action against the guarantor to show the nature of the guaranty: *Shadbolt v. Shaw*, 40-583.

47. Where there is conflicting and irreconcilable testimony, inferences drawn from circumstances well established are much more satisfactory than positive testimony which is conflicting: *Cameron v. Hovey*, 38-598.

48. Any competent evidence which tends to prove any material fact of the issue is admissible, and any distinct fact, therefore, in a criminal prosecution which the state is required to establish may be proven by circumstantial evidence, and the state is not limited to proof of such circumstances as tend directly to show defendant's guilt: *State v. Reno*, 67-587.

As to circumstantial evidence in criminal prosecutions, see CRIMINAL LAW, §§ 1416-1422.

As to weight of circumstantial evidence, see *infra*, § 844.

49. Knowledge, intention, etc.: When the knowledge, belief or intention of a party is a material fact, he may testify thereto the same as any other fact. The jury in such cases should be instructed that, in judging of a man's belief, knowledge or intention, they should consider all the evidence, and that the statement of the party in that respect is not conclusive upon them: *Watson v. Chesire*, 18-202.

50. A party to a fraudulent conveyance may be asked to state what his intention or motive in making the conveyance was: *Frost v. Rosecrans*, 66-405.

51. It is a general rule that, where the intention or motive of the witness is a material question, he may state what his intention or motive was: *Ibid.*; *Broune v. Hickie*, 68-330.

52. But where the question to be determined is what were the terms and conditions of the contract into which the parties entered, such question must be determined from the conduct and language of the parties during

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the negotiation, and evidence of motive or intention is immaterial: *Browne v. Hickie*, 68-330.

53. A conversation between a principal and agent may be given in evidence by the principal for the purpose of showing knowledge and ratification of the agent's acts, although such conversation was not in the presence of the other party: *Davenport Savings, etc., Ass'n v. North Am. F. Ins. Co.*, 16-74.

54. Intention cannot well be established by direct testimony. It is most satisfactorily determined from conduct, relations and actions: *Austin v. Walker*, 45-527.

55. Where the question was as to the intention of the parties to the transaction, *held*, that the jury was authorized to find the intention from the course of dealing between them: *Lowe v. Young*, 59-364.

56. In a particular case, *held*, that certain evidence bearing upon plaintiff's understanding of a contract was not receivable, as it did not appear that the fact referred to was known to defendant, and therefore it would not have thrown any light upon the real contract between the parties: *Garretson v. Bitzer*, 57-469.

57. As contracts are to be enforced in accordance with the mutual understanding thereof by the parties, evidence as to the understanding of a party thereto is admissible: *McCormicks v. Fuller*, 56-43.

58. Knowledge of the falsity of representations may be shown by statements made to third persons with reference to the same matter soon after the representations: *Jones v. Hopkins*, 32-503.

59. Malice may be inferred from the acts of a party, if unlawful and injurious and with a wrong motive: *White v. Spangler*, 68-222; *McCord v. High*, 24-336.

As to evidence of criminal intent, malice, etc., in criminal prosecutions, see CRIMINAL LAW, §§ 30-32, 133-140, 1544-1546.

60. Custom, course of business, etc.: Where there is conflicting evidence as to whether a person did a certain act relied upon to fix liability upon him, for instance, whether he verbally accepted a bill of exchange, evidence as to his custom in such matters is admissible: *Smith v. Clark*, 12-32.

61. Where the question was whether the

carrier had proper person as carrier of delivery of prior person, made by the same manner, was tending to show between the parties: §

62. In a prosecution resorted to for the purpose that evidence of a witness himself and others drinks, cigars, etc., *State v. Bishell*, 39-4

63. Evidence of an assigning a reason for business is not admissible question whether, in fact an act was done which has been inconsistent with business: *Walsh v. Aetna*

64. Evidence of the party to a contract in of such contracts is for purpose of raising an issue particular contract in question in accordance with such *McKivitt v. Cone*, 30-4

65. Course of dealing be proven where the question involved: *Lowe v. Young*

66. Evidence of a witness existing more than a year action in question, he evidence of the existence of the time of the transaction 43-380.

67. Where it was sought to prove negligence in a mining case proper machinery, etc., among other companies machinery employed, he must be so general that it is presumed to have knowledge and that evidence of such in one mine in another proper: *Couch v. Watson*

As to the effect of custom §§ 405-422.

68. Rumor and reputation a suit for a penalty for violating liquor law, to permit that it is a matter of common public notoriety that in

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were sold by defendant: *Cobleigh v. McBride*, 45-116.

69. In a prosecution for leasing a house for purposes of prostitution, evidence of the character of the house itself is not admissible; the character of the house in this respect is to be shown by proof as to the character of the inmates thereof and persons resorting thereto: *State v. Lyon*, 39-379; *State v. Hand*, 7-411.

70. A person cannot be held liable to punishment as a keeper of such house upon common reputation as to his character: *State v. Hand*, 7-411.

71. Evidence of rumors or neighborhood reports are not receivable to prove insanity: *Ashcraft v. De Armond*, 44-229.

72. The fact of death cannot be established by evidence of common repute among the relatives and family of the person claimed to be dead: *Ross v. Loomis*, 64-432; *State v. Wright*, 70—.

73. Character: The general character of a party to a civil suit offers such a weak and vague inference as to the truth of the points in issue that it is not usual to offer evidence of it: *Lewis v. Kennedy*, 3 G. Gr., 57.

74. In civil actions, evidence of good character should be confined to cases where the intention is the point in issue and the proof consists of slight circumstances: *Barton v. Thompson*, 56-571.

75. Evidence that defendant is of a peaceful disposition is not admissible in a prosecution for assault and battery: *Quinton v. Van Tuyl*, 30-554.

76. Evidence of good character cannot be considered in a civil action for assault and battery in rebutting malice or in mitigation of damages: *Reddin v. Gates*, 52-210.

77. Whether evidence of good character is admissible at all in such case, *quære*: *Ibid*.

78. Whether evidence of general good character is admissible in an action of tort to repel fraud inferred from mere circumstances, *quære*: *Bays v. Herring*, 51-286.

79. The general rule in civil actions is that the general character of the parties is not involved in the issues, and evidence concerning it is not admissible. There are exceptions to the rule, where the character of the party is the very matter in issue; but, aside from these exceptions, proof of good character

cannot be received, even where the cause of action involves the charge of a criminal act on the part of the person seeking to introduce evidence of good character: *Stone v. Hawk-eye Ins. Co.*, 68-737.

80. In an action for seduction, the general character of defendant for chastity is not involved, and evidence to establish it is inadmissible: *Delvee v. Boardman*, 20-448.

As to evidence of character, see *infra*, §§ 1125, 1142-1155.

As to proof of good character in behalf of defendant in a criminal prosecution, see CRIMINAL LAW, §§ 1559-1578.

81. Evidence of insanity: Where insanity is attempted to be shown to avoid a deed, evidence of condition of grantor's mind and his acts and conduct may be received, covering a period extending from before the execution of the deed to a time long subsequent thereto, where it appears that grantor's insanity subsequently became complete and was of slow growth, running back through a long period, as such facts are a part of the history of the case necessary to form an intelligent judgment as to grantor's condition at the time of executing the deed: *Ashcraft v. De Armond*, 44-229; and see *State v. Feller*, 25-67.

82. Facts connected with the personal history of one claiming to be insane are properly admitted in evidence and considered on the issue of insanity. His deportment, conversation and acts are competent to show his condition of mind. The circumstance that the party, when sane, expressed the opinion that for twenty years past he had been of unsound mind, is competent to prove insanity during that time: *Ross v. McQuiston*, 45-145.

83. Evidence as to declarations of relatives of a person in regard to his mental condition are not competent for the purpose of showing insanity: *State v. Porter*, 34-131.

Further as to evidence of insanity, see CONTRACTS, §§ 171-174.

As to presumption of continuance of insanity, see *infra*, §§ 859-860.

As to opinions of witnesses as to sanity, see *infra*, §§ 384-393.

As to proof of insanity in prosecutions for crime, see CRIMINAL LAW, §§ 8-24.

84. Evidence of death: The character and conduct of the party alleged to be dead, who

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has been missing, may be shown as circumstances tending to prove or disprove his death; yet these facts must have occurred, or the character have been recognized, within such reasonable time prior to the absence that they may justly be supposed to afford some light tending to establish or refute it. It is a question of law for the court to determine whether such conduct or recognized character are sufficiently proximate to entitle them to consideration: *Tisdale v. Connecticut Mut. L. Ins. Co.*, 28-12.

85. Any facts or circumstances relating to the character, habits, condition, affections, prosperity and objects in life which usually control the conduct of men, and their motives for their actions, are competent evidence from which may be inferred the death of one who has been absent and unheard from, whatever has been the duration of such absence: *Tisdale v. Connecticut Mut. L. Ins. Co.*, 26-170.

86. The fact of death is not sufficiently established by evidence of general repute amongst neighbors of the person claimed to be deceased: *Ross v. Loomis*, 64-432; *State v. Wright*, 70—.

87. Where an estate had been divided by an administrator under the authority of the court upon the presumption that one of the children of deceased was dead without issue, and subsequently creditors of such child sought to garnish the heirs to whom distribution had been made for such share as said child would have been entitled to, if living, *held*, that a confession of judgment purporting to have been executed by such child about two years previous to the death of the ancestor was admissible in evidence to overcome the presumption of his death: *Crosley v. Calhoon*, 45-557.

As to presumption of death, see *infra*, §§ 867-871.

88. **Expectancy of life; life-tables:** The Carlisle life-tables are competent evidence as to expectancy of life, being standard tables on that subject: *Donaldson v. Mississippi & M. R. Co.*, 18-280.

Further as to evidence of expectancy of life in cases of personal injuries, see DAMAGES, §§ 214-220.

Pecuniary condition of defendant may be shown in actions for slander to affect the damages: See DAMAGES, §§ 121-125.

Also in an action for DAMAGES, §§ 221-223.

89. **Evidence admissible in receipt of other evidence:** act, declaration or given in evidence by has introduced a part 37-503.

90. The other act receivable by reason of a portion of (under Code, § 3850 which is necessary to subsequent act or deed stood or to explain a party may have said as to a matter in controversy thus introduced: *Douglas*, 88; and see *Williams*.

91. Where a subject examination of a witness facts shown, the opposite as to all the facts on the *v. Hopkins*, 32-503.

92. A letter in reply admitted in evidence as part of the same communication, *C. R. & N. R. Co.*

93. Where a letter of contains distinct and independent statements of fact which understood if read alone in conflict with a former admissible although thus introduced: *Brayley v. Ross*.

94. Parol evidence of lost letter necessary to fully understood is admissible: *Bane*, 34-385, 389.

95. If part of an account book, is relied on, the whole received: *Veiths v. Hagge*.

96. When part of a conversation in evidence by one party, the same subject may be introduced by the other: *Gaddis v. Lord*, 11-307, 58-380.

97. Where a plea of a transaction is admissible in a civil action, proof of statement of entering such transaction received as a part of the conversation: *Root v. State*.

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98. Where, on the trial of a criminal action, one declaration of defendant was admitted, but subsequent declarations were refused, such action was held not erroneous where it did not affirmatively appear that such subsequent declarations were necessary to explain the first or make it fully understood: *State v. Vance*, 17-138.

99. It is not proper, for the purpose of getting the whole of a conversation before the jury, to introduce statements made in such conversation as to what third persons have said, which would be mere hearsay: *Sims v. Moore*, 61-128.

100. The rule that, where only a part of a conversation is introduced, the other party is entitled to the whole of it, so far as it relates to the same subject, does not apply so as to entitle a party to the rest of a conversation, a part of which he has himself introduced: *State v. Elliott*, 15-72.

As to competency of a witness to testify to conversations which he has heard, see *infra*, §§ 1118-1121.

101. A witness may testify as to circumstances by reason of which the facts as to which he testifies were impressed on his mind: *Farmers' Bank v. Young*, 36-44.

102. Where it was testified that a certain transaction took place in the presence of another person, *held* proper to ask such other person, when called as a witness, what he knew about such transaction, and in the interrogatory to ask what he knew concerning the circumstances surrounding the matter: *Childs v. Dobbins*, 61-109.

103. Where the testimony of plaintiff and defendant as witnesses was in conflict as to what happened in a transaction as to which words claimed to be slanderous were spoken by defendant, *held*, that evidence of a witness who was present was competent for the purpose of rebutting one of the parties as against the other: *Dixon v. Stewart*, 33-125.

104. Where evidence which is pertinent to the inquiry is introduced by one party, the opposite party should be allowed to introduce evidence relating to the same point although the inquiry itself is irrelevant: *Stafford v. Oskaloosa*, 64-251.

105. Where the court has allowed immaterial evidence to be introduced under proper objection, it is error to exclude proper evi-

dence to rebut it: *Frost v. Rosecrans*, 66-405.

And see further, *infra*, §§ 1341-1348.

106. In an action by an administrator, portions of the testimony of decedent on a former trial were by defendant introduced in evidence as admissions by such decedent, and thereupon at plaintiff's request other portions of such testimony were allowed to be read as a part of the same explaining or modifying the portion read; *held*, that the portion read at plaintiff's request should not be allowed the effect of original evidence in the case, but only as affecting such admissions: *Conger v. Bean*, 58-321.

2. Hearsay.

a. In general.

107. Not admissible: The law excludes all intermediate or hearsay evidence or mere hearsay declarations by a living witness, who might be reached by process, made to those who are sworn and examined: *Ibbitson v. Brown*, 5-582; *Hutchinson v. Watkins*, 17-475.

108. What deemed hearsay: Statements by a mortgagee to his attorney upon delivering the mortgage for collection are inadmissible to prove the loss of the note secured by such mortgage: *Jones v. Jones*, 20-388.

109. Where the question was as to the ownership of cattle levied upon by the sheriff under execution, *held*, that statements made to the sheriff by the party in possession of the cattle were hearsay: *Pond v. Okey*, 70—.

110. In an action upon a contract of subscription to a railroad company, *held*, that evidence of statements made, by one having a written proposition from the company, to citizens at a meeting for the consideration of such proposition was not admissible in the absence of a showing that such person was authorized by the parties to the writing or by the company to make such statement: *First Nat. Bank v. Hurford*, 29-579.

111. In an action against principal and surety on a bond, *held*, that letters of the principal as to declarations made by the surety were not admissible as against the latter: *Root & Son's Music Co. v. Caldwell*, 54-432.

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112. In an action upon an account against the estate of decedent, where it was in evidence that decedent before his death had given plaintiff permission to take wood from the decedent's land until the account should be satisfied, *held*, that it was not competent for a witness to testify as to declarations of decedent's widow that she had refused plaintiff leave to take more wood on such account: *Canaday v. Johnson*, 40-587.

113. In an action against a common carrier for damages caused by delay in delivering goods to a connecting carrier, statements made by the agent of the connecting carrier as to whether the goods had reached their destination at a particular time when called for are not admissible, they being mere hearsay: *Hewett v. Chicago, B. & Q. R. Co.*, 63-611.

As to when declarations or admissions of a party or his agent are admissible, see *infra*, I, 8.

114. While, in proving admissions of a party to a record, it is competent to prove the whole conversation in which it is claimed such admissions were made, it is not proper in that manner to get before the jury statements made to the party in such conversations as to what was said by third persons, which would be mere hearsay evidence: *Sims v. Moore*, 61-128.

115. Testimony of a witness as to acts of prosecuting witness in pointing out the place where the crime was alleged to have been committed, *held* improper as hearsay: *State v. Stubbs*, 49-203.

116. Evidence admitted in a particular case, *held* to be hearsay and improperly received: *District T'p v. Morehead*, 51-99.

117. A physician's certificate as to insanity, forwarded with the admission papers when a patient is sent to the insane asylum, being made up from information gained from the relatives of the patient and otherwise, is hearsay evidence and therefore not admissible on the question of insanity: *Butler v. St. Louis L. Ins. Co.*, 45-93.

118. A physician's statements as to the cause of death and the nature and cause of the illness from which it results are not objectionable as being hearsay, although his information may have been based upon inquiries made of the patient at the time of the sickness: *Wilkinson v. Connecticut Mut. L. Ins. Co.*, 30-119.

119. The knowledge of an administrator obtained by him as such, with reference to the interest of the estate and rights of the decedent in land, etc., is not to be considered as hearsay: *Stewart v. Chadwick*, 8-468.

120. Letters: Evidence of a wife who subsequently remarried, that, being unable to read, some one read to her a letter purporting to be from a person whom she did not know, stating that her husband was dead, *held* to be hearsay and inadmissible to establish the legality of the second marriage: *State v. Henke*, 58-457.

121. Where it was material to defendant's case to show that a judgment had been paid, and he testified that it had, but on cross-examination it appeared that his only means of information was a letter and a telegram just received, *held*, that his testimony was incompetent as being hearsay: *Vogel v. Mossler*, 51-360.

122. Pedigree: Hearsay evidence in regard to pedigree being the best evidence which the nature of the case admits is admissible, but such statements should be limited to the nearest relatives of blood or marriage, who are generally best acquainted with the facts they state: *Webster v. Reid, Mor.*, 467.

123. Heirship; death of ancestor: The death of an owner of real property, and heirship of persons conveying such property as heirs, cannot be proven by general reputation among the relatives and family of the deceased person and in the place of his former residence: *Ross v. Loomis*, 64-432.

124. Hearsay evidence is uniformly held incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge: *Ibid.*

125. Fact of death: Evidence of general repute in the neighborhood of a person's former residence is not sufficient to establish the fact of death of such person: *Ibid.*; *State v. Wright*, 70—.

126. Information: Where the question is upon what information and under what circumstances an act was done, statements made to a party in consequence of which he acted may be proven and are not hearsay: *Van Tuyl v. Quinton*, 45-459.

Hearsay; testimony in another trial; proceedings in other cases.

127. Interpreter: Where a contract is made between two parties by means of an interpreter, he is to be regarded as the agent of each party in the transaction, and one of them may testify as to the terms of the contract as made with him through such interpreter: *McCormicks v. Fuller*, 56-48.

128. Statements on personal knowledge: Where the answers in a deposition purport to be on personal knowledge, they cannot be rejected on the ground that they are hearsay and are based on entries in books of account: *Overman v. Hibbard*, 80-115.

b. Testimony of witness in another trial.

129. When receivable: The testimony of a witness on a former trial is not admissible where the witness is not dead and it is not shown that he is beyond the reach of a subpoena and that proper diligence has been exercised to procure his attendance or testimony: *Slusser v. Burlington*, 47-300.

130. The testimony of a deceased witness given in a former action between the parties may be proven: *Packard v. McCoy*, 1-530.

131. There is no rule requiring notice to be given of the intention to offer in evidence a deposition taken in a previous cause between the same parties in relation to the same subject-matter, before the commencement of the trial in which it is offered: *Shaul v. Brown*, 28-37.

132. Minutes of the testimony before a grand jury are not receivable as original evidence on the trial of defendant under indictment by such grand jury: *State v. Ostrander*, 18-435.

133. Neither are such minutes admissible for the purpose of impeaching a witness examined before the grand jury: *State v. Hayden*, 45-11.

134. But such minutes may be used by the witness for the purpose of refreshing his recollection: *State v. Miller*, 53-154; *State v. Miller*, 53-209.

135. Statements of defendant upon preliminary examination are not receivable in evidence: *State v. McLaughlin*, 44-82.

136. The transcript of the shorthand reporter's notes of the evidence on a former trial is not admissible in a law action without a

showing of a reason for not producing the witness himself. The transcript cannot be received except under circumstances which would make the deposition of the witness admissible upon statutory grounds: *Baldwin v. St. Louis, K. & N. R. Co.*, 68-87.

137. Proof of former testimony: A witness called to testify as to the testimony of a witness in a preceding trial, who is since deceased, may so testify, if he undertakes and shows himself competent to give the substance of all the testimony of such witness: *Small v. Chicago, R. I. & P. R. Co.*, 55-582; *State v. Fitzgerald*, 63-268.

138. It is not required that a witness testifying as to the testimony given on a former trial by a witness since deceased shall repeat the precise words used by such witness. The substance of the testimony is all that can be required: *Rivereau v. St. Ament*, 3 G. Gr., 118; *Woods v. Gevecke*, 28-561.

139. One called to give the testimony of a deceased witness must be able to state all that was said on the particular subject, not only upon the examination in chief, but upon cross-examination also, and if it appears that he is not able to do so, his testimony should be entirely excluded: *Harrison v. Charlton*, 42-573.

140. Where it appears that the witness testifying as to the former testimony of a deceased witness is not able to state all of such testimony, the testimony so far as given should be excluded from the jury on motion: *Fell v. Burlington C. R. & M. R. Co.*, 43-177.

c. Proceedings in other cases.

141. Not admissible as against persons not parties nor privies: A judgment record is not receivable in evidence as against one who is not a party to the proceeding: *Arnold v. River R. Const. Co.*, 35-99; *Preston v. Turner*, 36-671.

142. Where intervenor was seeking to overthrow plaintiff's attachment lien on the ground that the real property attached belonged to intervenor instead of to defendant, held, that a decree in another state which, as between the intervenor and defendant, established the title in the former, was not admissible in evidence as against plaintiff who was not a party thereto: *McBride v. Harn*, 48-151.

Proceedings in other cases.— Admissions and confessions.

143. In an action by a widow against the administrator of her deceased husband's estate for rents and profits on her dower interest in decedent's land, *held*, that the record in a partition proceeding between her and the heirs of decedent, to which the administrator was not a party, was competent in evidence for the purpose of showing her title: *Senat v. Findley*, 51-20.

As to the conclusiveness of judgments as against parties, privies, etc., see JUDGMENTS, II, d.

The record of the trial of an assault as a criminal offense is not admissible in a civil action for assault: See ASSAULT, § 3.

144. **Testimony in former proceeding:** The deposition of a witness introduced in an action may be used in evidence in a subsequent action between the same parties or their privies, if the circumstances are such as to make the use of the deposition of such witness proper in the subsequent cause: *Atkins v. Anderson*, 63-789.

145. Testimony of a defendant in a proceeding auxiliary to execution, *held* not admissible as against his co-defendant in another proceeding to subject certain property to the payment of the judgment: *Hamilton v. Lightner*, 53-470.

As to when the testimony of a witness on a former trial may be shown, see *supra*, §§ 129-140.

146. **The pleadings in another case** are not admissible as against parties who are not parties to such action: *Hunt v. Daniels*, 15-146.

147. **Part of record:** Where the record of one cause is introduced in evidence in another, any paper pertaining to the first which constitutes a portion of such record is admissible: *Baker v. Mygatt*, 14-131.

148. In an action for malicious prosecution, the recommendation of the jury in the prosecution, that costs should be taxed to the prosecuting witness because the prosecution was malicious, is not admissible in evidence: *Bays v. Herring*, 51-286.

As to what is to be deemed a part of the record, see COUERS, §§ 177-179.

Statements by a party or his attorney in the pleadings or proceedings in a case may be shown in another case, as admissions: See *infra*, §§ 168-178.

3. *Admissions, confessions and declarations; res gestæ.*

a. *Admissions of parties and privies; confessions.*

149. **Weight of admissions:** The law recognizes admissions as weak and unsatisfactory evidence: *Wilmer v. Farris*, 40-309.

150. Such evidence is always received with caution by the court. At least, it is not always the most reliable character of evidence: *Wilhelmi v. Thorington*, 14-587.

151. No species of testimony is more dangerous or received with greater caution than evidence of admissions made by the opposite party: *Cooper v. Skeel*, 14-578.

152. Admissions consisting of loose and random conversations constitute weak and unsatisfactory evidence and should be received with great caution, but if deliberately made and precisely identified, they may become evidence of the most satisfactory nature: *Wallace v. Berger*, 14-183.

153. Evidence of admissions being mere repetition of oral statements, and being therefore subject to much imperfection and mistake through misunderstanding, excitement, or impulse of the party, or want of proper understanding of the words by the hearers and their imperfection of memory, should be cautiously received, but when such admissions are deliberately made or oft repeated and are correctly given, they are often the most satisfactory evidence: *Martin v. Algona*, 40-390.

154. The fact that only a part of the conversation in which an admission is made can be proved will not warrant the instruction that such evidence is entitled to little weight. The weight to be attached to such admission must depend upon the circumstances: *State v. Elliott*, 15-72.

155. **Admissions of insane person:** A man with so little mind that he is not capable of knowing anything about his business cannot bind himself by admissions: *Lines v. Lines*, 54-600.

156. **When admissible:** The statements or admissions of a party to the record are always admissible against him: *Blake v. Barrett*, 61-79.

157. And this applies to all cases where

Admissions of parties and privies; confessions.

the party has any interest, however the interest may appear and whatever may be its relative amount. The only qualification is that the interest must exist at the time the admission is made: *Schmid v. Kreismer*, 81-479.

158. Where it is material to show that a party had knowledge of the falsity of representations made by him, statements with reference to the matter made to third persons soon after the false representations are competent: *Jones v. Hopkins*, 82-508.

159. If the language of a party, whether written or oral, is shown for the purpose of establishing an admission, the party may testify as a witness with reference to his understanding of its import, and state its true meaning in the connection in which it is used: *Mickey v. Burlington Ins. Co.*, 85-174.

160. The admissions of an administrator are therefore admissible in an action against him: *Schmid v. Kreismer*, 81-479.

161. The statutory provision that the administrator shall not admit claims until the claimant has sworn to their correctness (Code, § 2408) is not intended to abrogate the general rule admitting in evidence the declarations or admissions of a party to the record, and does not prevent the admissions of an administrator being shown in a case to which he is a party: *McKenzie v. Kitler*, 27-254.

162. Bank book: A bank book in which the cashier of the bank enters deposits, and which is kept by the depositor as evidence thereof, constitutes evidence of such deposits not lightly to be overcome: *Hall v. Farmers', etc., Savings Bank*, 55-612.

163. Letters: Certain letters of a defendant relating to the cause of action, and tending when unexplained to show his liability, held properly admissible in evidence, although an explanation offered by him, if true, deprived them of any weight: *Hess v. Wilcox*, 58-380.

164. Letters received from a person through the mail are admissible as evidence that he was, at the time of writing, at the place where the letters are dated: *Names v. Names*, 67-383.

165. Account: Proof of an admission of the correctness of an account must be accepted as showing an admission that it was correct in every part: *Keller v. Jackson*, 58-629.

166. Payment of interest may be shown as tending to establish an admission of the validity of the indebtedness upon which the interest is paid: *Floyd County v. Morrison*, 40-188.

167. The delivery of a written memorandum by one party to another constitutes an admission of the matter stated in the memorandum although it is not written or signed by the person delivering it: *Snyder v. Reno*, 88-329.

168. Pleadings: A pleading filed by a party or his attorney in a suit is competent evidence as an admission against him, in a subsequent suit, the presumption being that it was filed by his authority: *Ayres v. Hartford F. Ins. Co.*, 17-176.

169. A party is bound by statements or admissions of the pleadings upon which he tries the cause, and when he withdraws a pleading it may be introduced in evidence against him; but when so introduced, it has only such force and effect as evidence as any other written statement of facts made by him or his authority would have. It is not absolutely binding upon him, but he may show that the admissions contained in it were made inadvertently or by mistake. Its weight, like that of any other instrument of evidence, is to be determined by the jury: *Raridan v. Central Iowa R. Co.*, 69-527.

Further as to admissions in pleadings, see PLEADINGS, XIV, a.

170. Admissions of an attorney in order to bind his client must be distinct and formal, and made for the express purpose of dispensing with formal proof of a fact at the trial. Those which occur in mere conversations, though they relate to matters in issue in the case, cannot be received in evidence against the client: *Treadway v. Sioux City & St. P. R. Co.*, 40-526.

171. Admissions upon the trial of a case before a referee are receivable in evidence as against the party making them in the court in which the referee was appointed: *Jones v. Clark*, 37-586.

172. Admissions made in court by the defendant in a criminal prosecution, that he has no means to employ counsel, may be introduced in evidence as an admission of that fact if it becomes important to any issue in the case: *State v. Fooks*, 65-196.

Admissions of parties and privies; confessions

173. Plea of guilty of a charge of assault and battery may be shown as evidence in a civil action to recover damages for such assault and battery. The entry in the docket of the justice, which is the judicial record of such plea, is competent evidence to prove it. The defendant is not entitled to prove a statement made at the time of entering such plea with reference to the transaction: *Root v. Sturdivant*, 70—.

As to admissions in criminal cases, see CRIMINAL LAW, III, 13, d.

174. Admissions with reference to liability on contract: Where it was sought to establish a contract by virtue of which plaintiff, who had been in the employ of defendant, was to remain unemployed, subject to the call of defendant, and receive the same wages as he had been receiving, *held*, that proof of declarations of defendant when work was stopped, that the time of the employees should go on the same as if they were working, were admissible as corroborating the testimony of plaintiff that defendant agreed to pay him as alleged: *Wiley v. Griswold*, 41-375.

175. In an action upon a contract to be performed from month to month, bills that have been allowed and paid are admissible to show a recognition of liability thereon and the extent of the performance from month to month: *Davenport Gas, etc., Co. v. Davenport*, 13-229.

176. Admissions by making same claim against another: In an action to recover for services alleged to have been rendered by plaintiff to defendant, defendant may show that compensation for such services was claimed by plaintiff in an action against a third person, and the judgment rendered against such third person in favor of plaintiff is admissible in evidence: *De Forrest v. Butter*, 62-78.

177. The fact that a charge for certain goods sold is made against a certain person by the seller in his books of account is properly admissible to show the intention of the seller to give credit to the person against whom the charge is made and not to another: *Hale v. Gibbs*, 43-380.

178. While books of account are admissible in evidence against a person keeping them to show that he did not therein charge

a party sought to missible in his favor tend to hold such par 40-413.

179. Admissions Where it was sought in a note money of land by plaintiff had failed, by defendant consisting in claim upon the land in a former case in such claim, it had been sufficient to defeat any *Dawson v. Graham*,

180. Where defendant his signature to a certificate to require him to test permitted judgments him on other notes of the same transaction, payment of such claims: 50-83.

181. Admission by defendant set up, in notes given for the purchase, a claim for damage warranty, which occurrence of the notes, *held*, that the claim for breach then exist, it was not to be explained: *Aultman*

182. Rules of a railroad mulgated for the control of firemen in handling cases in an action against negligence of the engine train: *Beems v. Chicago* 58-150.

183. Declarations as to In an action against the of deceased during his declarations of plaintiff as to his care worth and value for his services were admissible although such declaration him from recovering money 29-144.

184. Where a party seeks compensation for services alleged rendered under an implication of his declaration about

Admissions of parties and privies; confessions.

to render the services, that he intended to charge therefor, is not admissible in his favor: *Van Sandt v. Cramer*, 60-424.

185. **Offer to arbitrate or settle:** An offer to arbitrate is not an admission of liability: *Mundhenk v. Central Iowa R. Co.*, 57-718.

186. The fact that plaintiff has proposed to settle his demands for a sum less than the claim made in the suit will not preclude him from recovering a greater amount: *Brush v. Sabula, A. & D. R. Co.*, 43-554.

187. Offers or propositions between litigant parties, expressly stated to be made without prejudice, cannot be introduced in evidence. They are excluded on the ground of public policy. But a tacit admission in an action on a note that defendant was liable thereon, and an offer to pay the balance due, after deducting the amount of an alleged payment, held proper to be shown, it being in no sense an offer to pay money to buy peace, but an offer to pay an amount admitted to be due, and containing no suggestion that the offer was confidential: *Bayliss v. Murray*, 69-290.

188. **Offer to compromise criminal prosecution:** Evidence that prosecutrix in a prosecution for rape, and her father, offered to withdraw the charge if defendant would pay a sum of money, held properly refused, where it did not appear that the charge had been wrongly made as a ground for extorting money: *State v. McDevitt*, 69-549.

189. **Declarations in presence of a party:** In an action by an administrator of a deceased party, declarations of a third person in the presence of deceased and assented to by him may be admitted to show a contract on his part: *Clark v. Evarts*, 46-248.

190. Where statements by one of two persons jointly charged with a crime are made in the presence of the other while both are in custody, silence of the latter and failure to deny such statements will not constitute an admission on his part of their truth: *State v. Weaver*, 57-730.

191. **Partnership books of account kept by one partner, but with the knowledge of the other, who has opportunity to see them, are admissible in evidence in an action between the partners, and both are bound thereby unless they are shown to be incorrect or there is evidence that some particular item is wrong:** *Hunter v. Aldrich*, 52-442.

As to admissions by partner, see *infra*, §§ 234-239.

192. **Confessions; corroboration:** Even in a civil case, defendant's confession of an act amounting to a crime will not without corroboration be sufficient evidence as to the commission of the crime: *Georgia v. Keppord*, 45-48, 52.

And further as to confessions and the necessity of corroboration, see CRIMINAL LAW, III, 18, d.

193. **Admissions of party injured, as to cause of injury:** In an action for personal injuries, admissions of the injured party, made immediately after the accident, to the effect that the employees of defendant are not to blame, etc., are to be construed with great care in view of all the circumstances, the sufferings of the person injured, whether he was in condition to speak with mature consideration and due deliberation, and whether he spoke in regard to his lawful rights or referred to and meant that defendant was not to blame for any wilful intent to injure him and cause the accident; and such admissions are to be given such meaning as it appears from all the circumstances the person making them intended them to have. They will not be conclusive as to what he states: *Cooper v. Central R. of Iowa*, 44-184; *Funston v. Chicago, R. I. & P. R. Co.*, 61-452.

194. An instruction that verbal admissions of the person injured, made after the injury, are to be received with caution, if it appears that they were made immediately after the injury and at the time that the person making them was agitated and nervous and suffering great pain, should be given with the direction as to what effect should be given such admissions, if it appears that they were deliberately made and understood at the time: *Hawes v. Burlington, C. R. & N. R. Co.*, 64-815.

195. **Acts, etc., as admissions:** Evidence that defendant in an action for damages for seduction disposed of his property and left the state soon after the act was discovered, held not admissible. It appears that evidence of the flight of defendant on the discovery of a criminal act is only evidence of guilt in a criminal prosecution: *Hopkins v. Mathias*, 66-333.

Further as to what acts shall be deemed ad-

Admissions and confessions.—Declarations admissible as

missions against defendant in a criminal prosecution, see CRIMINAL LAW, III, 13, e.

196. Failure to testify: A statutory provision authorizing the court to take the allegations of a pleading as true in certain cases where the opposite party has been subpoenaed as a witness and fails to appear to give testimony (Code, §§ 3683, 3684) does not authorize the pleading to be taken as true unless the court, upon application, makes an order to that effect: *Hay v. Frazier*, 49-454.

197. Where it appears that plaintiff's mind has been impaired by an accident for which he seeks to recover damages, it is not error to refuse an instruction that his failure to testify raises the presumption that if he should testify his testimony would be unfavorable to his cause: *Cramer v. Burlington*, 49-213.

198. In an action brought by a wife as administratrix of her husband's estate for damages accruing to such estate by the murder of her husband by defendant, *held*, that as to the facts and circumstances within defendant's knowledge, not constituting personal transactions between decedent and defendant, the defendant was competent to testify, and his failure to do so might be considered in evidence against him: *Miller v. Dayton*, 57-423.

199. Failure to introduce evidence: The failure of a party to introduce books in evidence which are within his control, and which in all probability would furnish satisfactory evidence as to a question in dispute, may be considered as a circumstance strongly against him: *Wallace v. Berger*, 14-183.

200. The fact that defendant fails to introduce a witness who, it appears, would testify to a material fact in his favor should not be considered as a fact against him: *Miller v. Dayton*, 57-423.

Further as to failure to produce evidence, see CRIMINAL LAW, §§ 1424-1429.

201. Fabrication of evidence: In an action for damages for the commission of a crime, *held*, that evidence that defendant, in order to avoid a criminal prosecution, fabricated evidence that he had been murdered was improperly admitted: *Miller v. Dayton*, 57-423.

202. Destruction of evidence: The destruction by the vendor of a written contract

for sale of real estate, is not evidence for impeaching him for presumptive evidence by the vendor that the contract was a conditional forfeiture in violation of the statute: *Crew*, 22-315.

203. Declaration of devisee: A declaration of devisee is bound by a pleading made by him, also it appears is not affected by the fact that property arises pendente lite of his grantor: *De 1*

204. Whenever the testator would be admitted to prove that they are admissible under him by descent, whether the ancestor made such admissions was: *Davis v. Melson*, 66-7.

205. Recitals of a deed by a party who are not privies or parties are not adverse to him: *Mc*

b. *Declarations as part of the transaction*

206. Admissibility of declarations: The admissibility of the *res gestæ* is to be determined by the judge in the exercise of his discretion: *Piles v. Hughes*, 10-5.

207. Concurrent declarations: Declarations made contemporaneously with a transaction are not necessary to prove the transaction, but are admissible if they are nearly enough contemporaneous to be so spontaneous and free from concoction as to offer a reliable explanation of the transaction: *State v.*

208. Testimony as to the commission of the offense is not improperly admitted: *State v. Fowler*, 52-1.

209. What deemed declarations: Declarations made contemporaneously with a transaction, expressive of the intention, are regarded as part of the transaction for the purpose of being admissible. They are not *res gestæ*; but where

Declarations and acts admissible as part of the *res gestæ*.

act are inconsistent, if the act goes beyond the declaration or contradicts it, the presumption of intention is to be gathered from the act: *State v. Shelledy*, 8-477, 508.

210. A declaration of intention made at the time of doing an act may be regarded as a part of it and admissible as a part of the *res gestæ*: *Tubbs v. Garrison*, C3-44.

211. Where an act is done and the actor at the time of the act makes a statement explanatory of it, the statement is admissible as a part of the *res gestæ*, unless the circumstances are such as to preclude the supposition that the statement was free from sinister motives. Therefore, *held*, that in a prosecution for murder, statements of defendant made to his wife at the time of leaving home with a loaded revolver in his pocket, when, as it was claimed, he was going to seek a meeting with deceased, as to where he was going and what he was going for, were admissible, the weight of such evidence being for the jury: *State v. Cross*, 68-180.

212. No absolute rule is or can be established in relation to what constitutes the *res gestæ*. Where the action was to recover for injuries received from a railway engine while the plaintiff was crossing the track, *held*, that the statements made by the injured party after he had been carried home, and more than thirty minutes after the accident, were not admissible as part of the *res gestæ*, they not being made on his own motion as explanatory of either his absence or the condition he was in: *Armil v. Chicago, B. & Q. R. Co.*, 70—.

213. Defendant's statements as to what occurred at the time of the commission of an alleged crime are competent for the reason that all that occurred in connection with the commission of the crime is a part of the *res gestæ*: *State v. Gillett*, 56-459.

214. Where the issue was as to the ownership of a stock of goods levied on, *held*, that statements of the judgment debtor in employing a clerk, to the effect that he was employed in the business for a third person, was part of the *res gestæ* and admissible in evidence: *Sweet v. Wright*, 57-510.

215. Where defendant was on trial for the murder of a companion with whom he was traveling by team, *held*, that a witness who had conversed with them on the day

preceding the night when the crime was committed might state as a part of the *res gestæ* what the deceased said about where they had come from and where they were going, although such conversation was not had in the presence of accused: *State v. Vincent*, 24-570.

216. In such case, one theory of the defense being that the person supposed to have been killed was living subsequently to the time charged, *held*, that statements of the alleged deceased before leaving home, that he intended soon to leave and never make himself known or be heard from by his family, were not admissible: *Ibid*.

217. Where a witness in a prosecution for murder testified as to having seen defendant flourish a chair outside of the door of the house of deceased, and that upon entering deceased sprang up and exclaimed, "Now we will see whether I am to be knocked down with a chair in my own house," *held*, that such exclamation and others made by deceased at that time were receivable as a part of the *res gestæ*: *State v. Porter*, 34-131.

218. Statements made by a burglar while in the prosecution of his crime, to the effect that he is the person who is afterward put on trial for the crime, may be proven as part of the *res gestæ*: *State v. Kepper*, 65-745.

219. In an action for malpractice in the setting of a limb, declarations made by the physician at the time of the final examination and discharge of the patient, *held* admissible, it appearing that they were made in the presence of the patient and acquiesced in by him: *Piles v. Hughes*, 10-579.

220. A declaration in regard to the value of land made by the grantor to the grantee, in connection with the delivery of the deed therefor, is admissible in evidence as a part of the *res gestæ*: *Wilson v. Irish*, 62-260.

221. The rule that an entry which is of the *res gestæ*, and is contemporaneous with the particular act done, is admissible, is not applicable where the matter in relation to which the entry is made is the very transaction upon which defendant's liability is based: *Sypher v. Savery*, 89-258.

222. In an action of replevin, where the wife of the party claiming to have purchased the property in controversy was allowed to testify as to a conversation she had with her

Res gestæ. — Declarations, admissions and acts of third persons.

husband regarding the purchase after the contract was made, and in the absence of the party from whom the purchase was made, which conversation tended to prove both the fact of the purchase and the consideration on which it was based, *held*, that such testimony should have been rejected as not having been a part of the *res gestæ* and not within the rule which admits the declarations of one in possession of personal property, explanatory of such possession: *Murray v. Cone*, 26-276.

223. Declarations of a person, made at the time his property is levied upon under execution, are not admissible in evidence as a part of the *res gestæ* in an action by him to recover property sold under such a levy: *Wadsworth v. Harrison*, 14-272.

224. Where the issue is as to the genuineness of a signature to a written instrument, a witness who testifies that such signature was written in his presence by another person cannot testify as to what was said by such other person in connection with the act, as, for instance, that it was not the first time that he had written such signature: *Farmers' Bank v. Young*, 36-44.

225. Defendant seeking to show an *alibi* cannot prove declarations made by himself at a certain time as to where he had been, even though such declarations were made on his return to his place of residence: *State v. McCracken*, 66-569.

226. Declarations of persons not participating in the transaction in question and whose motives or purposes are not involved, but relating merely to what has been observed by them, cannot be shown as evidence of what has taken place. Such evidence would be hearsay: *Huff v. Aultman*, 69-71.

227. In an action against a municipal corporation for injuries resulting from a defective sidewalk, evidence of the condition of the sidewalk at a time subsequent to the injury, tending to show that the condition had been changed by the city, *held* not admissible, for the reason that it tended to show an admission by officers of the city that the sidewalk was previously not sufficient, and was not admissible for that purpose because not contemporaneous with the injury nor a part of the *res gestæ*: *Cramer v. Burlington*, 45-627.

228. Declarations or acts indicating and suffering: Declarations of one suffering as to the cause of his injury, are not competent unless a part of the *res gestæ*. declarations made by such a person as to nature and character of his suffering and illness are admissible if made while in a condition: *Gray v. McLaughlin*, 26-279.

229. In an action for personal injuries, attending physician may testify as to declarations of the party injured with reference to pain and suffering: *Townsend v. Moines*, 42-657.

230. The fact that a person limps, while walking in the discharge of his ordinary duties, is admissible as evidence of lameness and to indicate an injury of the limb and its extent. It is not in the nature of a declaration by the person injured: *Pringle v. Chicago, R. I. & P. R. Co.*, 64-613.

231. Complaint made by the person injured, after the time of the injury and after convalescence, relating to the extent of such injury, in connection with statements of him as to his inability to work, etc., *held*, inadmissible as part of the *res gestæ* in determining the question of his injuries: *Ferguson v. Davis County*, 57-601.

232. Declarations of person injured as to cause of injury, if made at the time of the injury, are admissible in evidence as part of the *res gestæ*: *Frink v. Coe*, 4 G. Gr., 555.

233. But such declarations are not competent unless they are part of the *res gestæ*: *Gray v. McLaughlin*, 26-279.

As to when declarations of an agent are admissible as part of the *res gestæ*, see *infra* §§ 240-254.

c. Declarations, admissions and acts of third persons.

234. Declarations or admissions of partner: Where the fact of partnership is not shown it is not competent, as tending to show that relationship, to allow the statements of one party to be given to the jury as against the other: *Cook v. Robinson*, 42-474.

235. Declarations by one person are not admissible to prove that another is or is not his partner: *Chambers v. Grout*, 63-343.

236. The declarations of a partner, made before difficulty has arisen and under in

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different circumstances, and for the purpose of informing persons with whom the partnership is dealing and the world as to who do and who do not compose the firm, are receivable to show that a person sought to be charged as partner is not such partner: *Danforth v. Carter*, 4-230.

237. An entry on partnership books showing a charge to an individual partner of a firm note given for the purchase of property is not admissible in evidence for the purpose of showing that such property was purchased by such individual partner for his own use: *Farner v. Turner*, 1-53.

238. Where the issue was as to the existence of a partnership between certain parties, *held*, that books of account of a third party containing charges against them as a firm were not admissible as against them to show the partnership, it not appearing that the parties directed the charges to be so made: *Boulton v. First Nat. Bank*, 46-273.

239. The admissions of one partner will not bind the firm of which he is a member, unless after proof of partnership; and such admissions are not evidence against the other members so as to make them liable: *Holmes v. Budd*, 11-186.

240. **Declarations or admissions of agent:** The declarations and admissions of an agent are to be regarded as made by the principal and receivable in evidence against him, only where it is established that the person making them was in fact the agent of the party against whom they are sought to be introduced; that they relate to matters within the scope of his authority as such agent, and that at the time of making them he was engaged in the performance of some duty in reference to the matter to which they relate: *McPherrin v. Jennings*, 66-622.

241. Before the declarations of an agent are admissible the party offering to prove them must at least give some evidence tending to show that he had the power to act for his principal in relation to the matter in hand and that the same was within the scope of his authority: *Armil v. Chicago, B. & Q. R. Co.*, 70—.

242. The authority of a supposed agent cannot be established by his own declarations: *Ibid.*

243. While the authority of a supposed

agent cannot be established by his own declarations, yet if the agency has been otherwise proved, then the declarations of the agent within the scope of his authority, which constitute a part of the transaction or *res gestæ*, are admissible: *Winch v. Baldwin*, 68-764.

244. Declarations of an agent while doing an act in behalf of his principal are part of the *res gestæ*. Whenever the act itself is admissible in evidence it is competent to prove what the agent said while doing it: *Marion v. Chicago, R. I. & P. R. Co.*, 64-568.

245. In an action against a railroad for personal injuries resulting in death, *held*, that evidence that defendant's agents offered to pay the funeral expenses of deceased was not material: *Campbell v. Chicago, R. I. & P. R. Co.*, 45-76.

246. Where letters signed, "Wilson Sewing Machine Company, S," were written to defendant after he was appointed to act as agent for such company and in answer to his letters addressed to it, and it appeared that such letters were written by a special agent of such company in charge of that portion of its business, *held*, that they were admissible in evidence: *Wilson Sewing Machine Co. v. Sloan*, 50-367.

247. An agent authorized to collect a note is not thereby authorized to bind his principal by admissions as to whether a certain word therein constituted an alteration or not: *Van Vechten v. Smith*, 59-173.

248. Where the seller of a patent-right had in company with him at the time of effecting a sale of such right a person who made representations to the buyer with reference to such patent, and in the presence of and without the objection of the seller, *held*, that the seller was bound by such representations: *Foster v. Trenary*, 65-620.

249. To be binding, the declarations of the agent must be within the scope of the agency and constitute a part of the *res gestæ*. Therefore, *held*, that the declarations of a telegraph operator, made from one to three days after the delivery of the message in question, were not competent or admissible in an action against the company: *Sweatland v. Illinois & M. Tel. Co.*, 27-433.

250. Declarations made some time after the injury, by a railway engineer, while still in the employ of the company, as to the cause

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of the injury, are not admissible: *Treadway v. Sioux City & St. P. R. Co.*, 40-526.

251. The fact of subsequent repairs made by a city in a street at a place where an accident happened for which it is sought to hold it liable cannot be shown as an admission of negligence on the part of the city in reference to the condition of the street at the time of the accident. Such acts by officers, in order to bind the corporation as an admission, must be not only within the scope of their authority, but contemporaneous with the injury complained of and part of the *res gestæ*: *Cramer v. Burlington*, 45-627.

252. So held, also, as to subsequent repairs by railway employees made at a railway crossing where an accident had happened for which it was sought to hold the company liable: *Hudson v. Chicago & N. W. R. Co.*, 59-581.

253. Where a levy upon property was made in the absence of the owner, held, that the acts and declarations of his son, not shown to be authorized to act as his agent, were not binding upon him: *Parsons v. Thomas*, 62-319.

254. In an action for a bounty offered by the county for enlistment through a committee, held competent to show that the committee acted, by proving what a member of the committee said, while in the discharge of his duty, though the conversation was after the enlistment: *Keough v. Scott County*, 28-337.

Further as to declarations and admissions of agent, see AGENCY, III, c.

255. Trustee: The admissions of a trustee of a subscription fund, held not binding as against the party receiving the proceeds of such fund under contract with such trustee: *Sypher v. Savery*, 39-258.

256. Statements of co-maker of a note at the time of its delivery in regard to the signature of the other maker are not admissible in evidence as against the latter: *Smith v. Wagaman*, 58-11.

257. Admissions of prosecutor in a prosecution for malicious mischief to property are not receivable in behalf of defendant: *State v. Delong*, 12-453.

258. Declarations of co-conspirators: Where it is sought to introduce the admissions of one person as evidence against an-

other claimed to have been jointly connected in an unlawful enterprise, the foundation must be laid by proving such unlawful connection and that the alleged declarations were made during the pendency of the criminal enterprise: *Forshee v. Abrams*, 2-571.

259. An admission of one conspirator to be binding upon the other must be made during the existence of the conspiracy and in aid of the common design: *Johnson v. Miller*, 63-529.

260. Although declarations of one of two or more parties engaged in a common purpose are admissible, yet the fact that they were united in a common purpose must be made out by other evidence: *De France v. Howard*, 4-524.

261. In order to render the acts and declarations of one party admissible against the other on the ground that they were co-conspirators, such conspiracy must be made out by other evidence than that which shows the act or declaration. The declarations are to be received only upon a conspiracy being first proved: *Wiggins v. Leonard*, 9-194.

262. Where it is sought to introduce acts or admissions of an alleged co-conspirator as against defendant, it is for the court to determine in the first instance whether there is sufficient *prima facie* evidence of a conspiracy to justify a submission to the jury of such acts and declarations, and then it is ultimately for the jury to determine whether upon the whole testimony a conspiracy has been shown. If they find no conspiracy has been established, it is then their duty not to consider such acts and declarations of the supposed co-conspirator: *Müller v. Dayton*, 57-423.

263. Where it was alleged that a third person had conspired with the defendant to commit a crime and prevent suspicion from attaching to defendant and enable him to escape justice, held, that upon sufficient evidence of such conspiracy, the acts and declarations of the co-conspirator after the completion of the crime were receivable in evidence against the defendant: *Ibid.*

264. Where it appeared that there was no evidence tending to show conspiracy on the part of defendants jointly indicted for murder prior to the time of the commission of the homicide, held, that declarations of one of the defendants, made before the commis-

Declarations as to title, ownership, possession, etc.

sion of the crime, were not receivable against the other: *State v. Weaver*, 57-780.

265. Declarations of one of the parties after the completion of the crime contemplated in the alleged conspiracy are not admissible: *Ibid.*

266. Where a declaration or confession made by a prisoner before arrest is confirmed by acts and declarations of his co-defendant, though made after the commission of the alleged offense, such acts and declarations are admissible in evidence against the prisoner as a circumstance tending to prove his confession: *State v. Knight*, 19-94.

d. *Declarations as to title, ownership, possession, etc.*

267. **Party in possession:** The declarations of a party while in possession of personal property, explanatory of such possession, as, for instance, that he holds in his own right or as agent, etc., are competent: *Stephens v. Williams*, 46-540; *Hardy v. Moore*, 62-65; *Blake v. Graves*, 18-312; *Ross v. Hayne*, 3 G. Gr., 211.

268. But such declarations must be made at the time of possession and must be explanatory of it, and not in regard to a contract under which the possession is held: *Taylor v. Lusk*, 9-444.

269. Declarations made not merely as to the right in which the party is holding the property, but as to the nature of an agreement between him and another person under which he holds the property, are not admissible: *Sweet v. Wright*, 57-510.

270. Declarations made by a party in connection with his entry upon land respecting the object for which such entry is made are admissible as part of the *res gestæ*: *Stephens v. McCloy*, 36-659.

271. Declarations of a party in possession of property are admissible for the purpose of showing in what capacity he is in possession. Declarations of persons in possession of property in regard to the origin and nature of such possession are admissible: *Wilson v. Irish*, 62-260.

272. Declarations of a deceased person, made while holding legal title to property, in disparagement of his title or explanatory of the character thereof, are admissible to show

that he held as trustee, as against persons claiming a legal title under him: *Robinson v. Robinson*, 22-427.

273. The declaration of an agent accompanying an act of possession of property may be received as a part of the *res gestæ*, but the mere general admission on the part of the agent that he has purchased certain property for his principal is not a part of the *res gestæ*, and is not admissible in evidence in behalf of the principal to establish title to the property as against one claiming under an attachment against the agent: *Howell v. Price*, 40-548.

274. **Declarations of party after parting with property:** The declarations or admissions of one who has ceased to have title to certain real estate, made in the absence of the holder of the title, are not admissible in evidence to impeach the latter's title: *O'Neil v. Vanderburg*, 25-104.

275. Declarations by a party in possession of property after he has parted with his right are not admissible to affect one claiming under him: *McCormicks v. Fuller*, 56-43.

276. Declarations of the seller of personal property, after the sale and after he has parted with possession, are not admissible against the purchaser to prove that the sale was fraudulent: *Keystone Mfg. Co. v. Johnson*, 50-142.

277. Statements made to a person acquiring possession of property with reference to such possession may be shown by the person acquiring such possession, where he seeks to show that it was lawful: *State v. Jordan*, 69-506.

278. **Grantor or vendor:** The grantee of property is not affected by statements or declarations made by his grantor after the conveyance: *De France v. Howard*, 4-524.

279. Declarations of a vendor not in possession are not admissible to affect the vendee or a person claiming under him: *Benson v. Lundy*, 52-265.

280. It is not sufficient *prima facie* evidence of title to show possession under a conveyance without proving title in the grantor in such conveyance: *Costello v. Burke*, 63-361.

281. Recitals in a deed to the effect that the grantors therein are heirs at law of the holder of the title are not evidence sufficient

Declarations or entries in course of official duty; by person

to establish *prima facie* title in the grantee under such conveyance: *Ibid.*

282. A recital in a deed that the grantors are the widow and heirs of a person in whom the title to the property therein described existed is not competent as against one claiming under a conflicting chain of title, in the absence of evidence that at the time of such conveyance the original owner was dead and that the grantors were his heirs: *Ross v. Loomis*, 64-432.

283. **Fraudulent grantor:** Declarations or admissions made by the fraudulent grantor are not admissible in an action to set aside a conveyance as fraudulent: *Bixby v. Carskadon*, 70—.

e. *Declarations in the course of official duty.*

284. **What admissible:** It being by law the duty of the secretary of a district township to keep a register of all orders drawn on the district treasurer, showing the number, date, etc., such register is receivable in evidence where the amount of indebtedness of the district township is in controversy: *Wormley v. District Tp*, 45-666.

285. The record of the proceedings of a sub-district, duly signed by the chairman and secretary, although not required by law to be kept, are competent evidence as to the action of such meeting: *Rose v. Hindman*, 36-160.

286. Where the issue was as to whether the execution upon a pretended judgment before a justice of the peace was legally issued, the docket of the justice, not showing the rendition of any judgment in the case, is admissible in evidence as tending to show that no judgment was rendered: *Dupont v. Downing*, 6-172.

287. As a general rule, corporate books are evidence of the acts or proceedings of the corporate body, where it appears that the same are kept by the proper officer or some one authorized to keep the books in his temporary absence: *St. Louis & C. R. R. Co. v. Eakins*, 30-279.

288. The records of a hospital for the insane, kept by an assistant physician, and not shown to be kept in pursuance of any authority or in the performance of any duty,

held not admissible in an action for the insanity of a patient: *Ins. Co.*, 45-93.

289. Statements of the return of execution part of his official duty are not evidence of such acts: 1-413.

290. The books of a person introduced as evidence of the duty, at the time of the assessment, to whom it is assessed: 55-632.

f. *Declarations or entries in the course of person's business.*

291. **Against interest:** Declarations of one deceased, against the estate, in relation to facts directly and personally under circumstances under circumstances motive to falsify, are not admissible in an action against the estate: *County v. Ingalls*, 16-4.

292. Entries in books of a person who is deceased are not admissible when clearly against his interest: they must be made at the time of the transactions entered, inadmissible to prove the entries, when the only person able to the party making them is deceased: *Woodard*, 20-541.

293. Where entries are made against the interest of a person, such interest should be shown: *Ibid.*

294. The jury may not be influenced by this kind, though right of cross-examination is not highly favored by the law.

295. **Declarations against interest:** Declarations against his interest are not admissible: *Scott County v. Ins. Co.*

296. Therefore in an action against a county treasurer, held an assistant employed by him, and for whom he was responsible, to the effect that the appropriation of funds was not made, were admissible: 1-413.

297. But declarations

 Entries in books of account.

not against his interest are not receivable, although they directly tend to contradict declarations made by him against his interest: *Wilson v. Patrick*, 34-362.

298. Entries in books of account made by third persons are only admissible where it is shown that the party making them is dead and that the entries are against his interest: *Sypher v. Savery*, 89-258.

299. Dying declarations are admissible as such only in case of homicide, where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the declaration. They are not admissible in an action by an heir to prove that property conveyed to him by the ancestor making the declarations was not by way of advancement: *Middleton v. Middleton*, 81-151.

As to dying declarations, see CRIMINAL LAW, III, 13, g.

300. Declarations of a living witness who is competent and within the reach of process are hearsay and not admissible: *Hutchinson v. Watkins*, 17-475.

301. Family records: An entry by a deceased parent in the family Bible as to the date of birth or death of an individual is admissible as the declaration of the parent making the entry, but it must appear that such parent is dead: *Greenleaf v. Dubuque & S. C. R. Co.*, 30-301.

g. Entries in books of account.

302. To prove charges in ordinary course of business: Books of account are admissible to prove charges by one party against the other, made in the ordinary course of business, and for no other purpose: *Veiths v. Hagge*, 8-163.

303. The party offering the books must prove what his ordinary course of business is: *Ibid.*; *Karr v. Stivers*, 34-123.

304. And in a particular case, *held*, that in the absence of any explanation as to what the ordinary course of dealing of the parties was, certain entries did not appear to be made in the usual course of business: *Karr v. Stivers*, 34-123.

305. Books of original entry are not admissible for the purpose of proving payments or loans of money unless that comes within the

ordinary business of the party in whose behalf the books are kept: *Veiths v. Hagge*, 8-163; *Young v. Jones*, 8-219; *Sloan v. Ault*, 8-229; *Snell v. Eckerson*, 8-284; *Cummins v. Hull's Adm'r*, 35-253.

306. Such books are therefore inadmissible to prove a special agreement, or delivery of goods under such agreement, or to prove delivery of goods to a third person, or an agreement to pay a balance due from other parties: *Lyman v. Bechtel*, 55-437.

307. But if the payment or loan of money constitutes, in any just sense, the ordinary business of the party, and the charges are made in the ordinary course of business, they may be proved by the books of account: *Veiths v. Hagge*, 8-163; *Young v. Jones*, 8-219.

308. The business of keeping a retail store is not generally such business as to justify the introduction of the books of account kept therein to prove charges for money loaned: *Veiths v. Hagge*, 8-163; *Sloan v. Ault*, 8-229.

309. Proof of a course of business between the parties, of lending and charging in a book of account, will not be sufficient to make such book admissible in evidence: *Veiths v. Hagge*, 8-163.

310. Admissible in other cases: Books of account are admissible in behalf of a party who made the entries therein, upon the ground of necessity, and upon the presumption that unless they be received there will be a total failure of proof. They are receivable, therefore, as to the daily sale and barter of merchandise and other commodities, the performance of services and the letting of articles to hire, circumstances so frequent in succession, and generally so trivial in their individual amount, that the procuring of formal proof would not compensate for the time bestowed: *Karr v. Stivers*, 34-123.

311. Where charges for stone purchased from plaintiff were not made at the time the stone was taken, but were made as soon as defendant notified him how many had been taken, *held*, that a satisfactory reason was thus shown for not making the entries at the time of the transaction: *Anderson v. Ames*, 6-486.

312. Whole account admissible: However, when a defendant avails himself of

Entries in books of account.

credits shown by a book account in his favor, he cannot object to the account being used to show charges against him. The whole account must be taken together: *Veiths v. Hagge*, 8-163.

313. Parol evidence not admissible to vary: Parol evidence of the party making the entries is not admissible for the purpose of explaining the language used by him. The book of account when admitted becomes written evidence and speaks for itself: *Cummins v. Hull's Adm'r*, 35-253.

314. Where the cause of action is founded upon transactions embraced in books of account of one of the parties, the adverse party is not bound to rely upon such books of account, but may introduce other evidence as to the transaction, and such other evidence, although entirely oral, will not be secondary: *Richmond v. Dubuque & S. C. R. Co.*, 40-264.

315. It is not permissible to substitute evidence as to the contents of the book for the book itself: *Churchill v. Fulliam*, 8-45.

316. Copies: The books of account must themselves be produced on the trial, and it is not competent to prove their contents by attaching copies to a deposition: *Peck v. Parchen*, 52-46.

317. Copies of books of account which would themselves be admissible in evidence are not competent: *Halstead v. Cuppy*, 67-600; *Creswell v. Slack*, 68-110.

318. A receipt, the best evidence: Where the books show that a receipt was given for money, it is the best evidence and must be produced or accounted for: *Sloan v. Ault*, 8-229.

319. Showing account barred: Even though the books show the account sought to be proved by them to be barred by the statute of limitations, they are still admissible in evidence for the purpose of laying the foundation for showing defendant's written admission or promise removing the bar, or for showing from defendant's testimony that the cause of action still subsists: *Thorn v. Moore*, 21-285.

320. Not admissible to prove agreement: The entry of a contract or agreement made by the party in his own book is not receivable in evidence. So held in case of a memorandum or stock book in which purchases

of stock, etc., were
ton, 29-217; *Whisle*

321. Must be bo
Where it appeared
used as a mere m
which an entry of c
what was called th
held, that the sales b
able in evidence as t
and not the memoran
Hintrager, 60-374.

322. Where it app
books were kept, the
of original entries, l
that a particular en
there made original
from any other book,
not render the ledger a
prove such item: *Fitz*
702.

323. Preliminary
party other than the o
is competent to mak
oath necessary for the
Karr v. Stivers, 34-123

324. Time-books ke
ploys of defendant, l
when offered in eviden
ported by testimony of
as to their correctness
& *N. W. R. Co.*, 54-72

325. Where books c
duced in evidence c
different persons, hel
missible as to entries
were called as witness
site statutory eviden
although not as to e
Herriott v. Kersey, 69

326. When a witne
count, in aid of his st
competent to show a
mony; and in such ca
not necessary: *Daven*
219.

327. Credibility: TI
ing made, the questio
books in evidence is f
of credit given then
whether the charges
course of business, an
the jury: *Veiths v.*
Jones, 8-219.

 Maps, books, etc.—Opinions and conclusions.—Admissibility of opinions.

328. When the proper preliminary proof is made, the books should be received in evidence, and any objection on account of discrepancies, etc., affecting their credibility only, should be left to the jury: *Eyre v. Cook*, 9-185.

h. *Maps, plats, books of science, general history, etc.*

329. The books and maps which are admissible under statutory provision (Code, § 8653) are such as are published for circulation among people generally. They must be printed or otherwise published, so that the presumption will follow that their contents will be or may be generally known. A record filed in a public office is not such a publication as is here contemplated: *Heinrichs v. Terrell*, 65-25.

330. To render a map or plat admissible under this section, it must be public, and must be shown to be the work of a disinterested person: *Pfotzer v. Mullaney*, 30-197.

331. The herd-book of a particular breed of cattle is receivable in evidence under the same statutory provision: *Kuhns v. Chicago, M. & St. P. R. Co.*, 65-528.

332. But without proof that a herd-book offered in evidence is recognized as correct by cattle dealers, and that the animal referred to is the same as the one therein entered, the herd-book is inadmissible: *Crawford v. Williams*, 48-247.

333. Standard medical books are admissible as evidence of the author's opinions as to methods of medical skill or practice: *Bowman v. Woods*, 1 G. Gr., 441.

334. The statutory provision as to medical books does not render inadmissible in evidence that which was before admissible, and standard medical authorities are not therefore the best evidence of what they teach or whether they differ. The testimony of experts is admissible on such points and also as to what are standard authorities, etc.: *Brodhead v. Willse*, 35-429.

4. *Opinions and conclusions; testimony of experts.*

a. *Admissibility of opinions in general.*

335. Inferences or conclusions not admissible: A witness should testify as to facts

and not to his understanding or inferences: *Mead v. Hogue*, 49-703.

336. A question calling for an inference or opinion may properly be excluded: *State v. Donnelly*, 69-705.

337. It is improper to ask a witness why he did not do a certain act. Such question calls for his conclusion: *Locke v. Sioux City & P. R. Co.*, 46-109.

338. The opinion of a witness on a material point in a case is not admissible: *Curl v. Chicago, R. I. & P. R. Co.*, 63-417.

339. Non-expert testimony is not admissible upon the question as to how injuries upon the person appeared to have been made. Such a non-expert witness cannot properly more than describe the injuries: *State v. Cross*, 68-180.

340. The opinion of a witness as to the rights of parties and the legal effect of their acts is not competent: *Smyth v. Ward's Ex'rs*, 46-339.

341. The opinion of a witness is not admissible for the purpose of proving the meaning of words used in a written instrument, nor what he would understand by such instrument, unless such words have a peculiar meaning rendering the instrument ambiguous and unintelligible to one not acquainted with such meaning, and the testimony of such witness is necessary in order to explain them: *Campbell v. Rusch*, 9-337.

342. It is not competent for a witness to state his understanding with reference to an agreement, nor state as a legal conclusion what the agreement was: *Kelso v. Fitzgerald*, 67-266.

343. The question as to what a witness understood to be meant by certain language is not proper where the facts upon which such inference would be based can be presented to the jury: *Johnson v. Miller*, 69-562.

344. It is ordinarily the province of the jury to determine what deduction or conclusion should be drawn from a given state of facts: *Ibid.*

345. The fact whether an answer to a letter is evasive or not is not one about which the party receiving it can testify directly, but the fact is to be determined from the letters or their contents: *Kellogg v. Frazier*, 40-502.

346. Testimony of a witness in an action

Admissibility of opinions in general.

for slander, as to language used by defendant, where it appears that it was the inference of the witness merely that such language was spoken of plaintiff, is not admissible: *Herzman v. Oberfelder*, 54-83.

347. It is not proper for a witness to state whom he understood a writing, claimed to be libelous, to refer to, there being nothing on the face of the writing indicating that any particular person is referred to therein: *Anderson v. Hart*, 68-400.

348. The opinion of a witness as to whether the names "Ritchen" and "Kitchen," appearing in a chain of title, are in fact intended for the same person, held incompetent: *Roziene v. Ball*, 51-328.

349. In an action to recover for an injury due to a defective sidewalk, held not proper for a witness to testify that the sidewalk was not more dangerous to travel than the street was before the sidewalk was built: *Barnes v. Newton*, 46-567.

350. In an action against a city for injuries received from defective sidewalks, it is not proper for a witness to state his opinion that the walk was not a good one, or that plaintiff was not able to do her ordinary work after receiving the injury complained of: *Spears v. Mt. Agr*, 66-721.

351. While a witness cannot be permitted to testify as to a conclusion of fact, yet if he incidentally states a conclusion necessary to a clear understanding of his testimony which reveals the facts upon which such conclusion is based, the statement will not be regarded as a violation of the rule: *Hoadley v. Hammond*, 63-599.

352. In an action against a railway company for damages, held, that evidence of the agent of the company charged with the examination of claims, that he at one time reached the conclusion, from an examination of the evidence, that the claim was correct, held not admissible: *Aiken v. Chicago, B. & Q. R. Co.*, 68-363.

353. Opinion as to intent: Upon the question whether defendant in an attachment proceeding was about to dispose of his property to defraud his creditors at the time of the attachment, it is not proper to ask a witness what efforts were made by defendant to sell with intent of defrauding his creditors. An answer to such question would be merely

the expression of a
intent: *Carey v.*

354. As to whether
honest one or not is
the testimony of a witness
Sweet v. Wright, 62-

355. Negligence:
a witness to express
an injury was caused
party: *Brant v. Lyon*

Amount of damage
infra, §§ 501-504.

356. Solvency: The
witness as to whether
insolvent at a particular
sible: *Hall v. Ballou*,

357. Reputation: T
as to a person's general
competent: *Kitteringham*

358. Inferential fact
issue being whether one
fire at a particular time
proper to ask a witness
was in a position to have
isted, whether there was
that time, but that he
fined to stating whether
fire: *Parkhurst v. Mason*

359. To ask a witness
changed his gait from
he saw that he was
held improper as calling
opinion: *Hollenbeck v.*

360. Whether the witness
ordinarily good walk or
of an opinion: *Ibid.*

361. Facts of observation
of a witness to the effect
claimed to have been due
caused injury to plaintiff
is not an expression of
fact discoverable by observation
to that class of testimony
experience and observation
every-day life, to which
is directed and of which
speak: *Kelleher v. Keo*

362. In a proceeding
the taking of a right of way
company, held, that the
ness that the embankment
right of way prevented
side of the track to the

Admissibility of opinions in general.

implements was not an expression of an opinion, but the statement of a fact: *Smalley v. Iowa Pacific R. Co.*, 36-571.

363. The bishop of a church may state the admission of a particular parish into the general convention of the church, such matter being a question of fact and not of opinion: *Bird v. St. Mark's Church*, 62-567.

364. Evidence of a witness that, in a certain transaction, credit was given to a certain party is not objectionable as being the statement of an opinion: *Hale v. Gibbs*, 43-880.

365. Possession is a fact to be proven as any other fact, and it is competent to state who has possession of a building, such statements not being objectionable as a legal conclusion: *Boothby v. Brown*, 40-104.

366. Where the question at issue was whether plaintiff sold property to defendant as partner, *held*, that it was not error to admit his evidence as to his opinion and belief at the time of the sale, formed from the statements of the parties, as to the existence of a partnership: *Seekell v. Fletcher*, 53-330.

367. Where the question was as to the extent of disability suffered by plaintiff on account of an accident, *held*, that the question, "what was your physical ability to perform labor or business of any kind for nine or ten weeks after the injury," in answer to which defendant replied, "I was not able to do anything," was not improper: *Lyon v. Railway Passenger Assurance Co.*, 46-631.

368. In an action for malpractice where defendant claimed the application of other medicines than those prescribed by him, the father of plaintiff was asked if he would have most likely known of such application, if any there was. It appearing that the father had abundant means of knowledge as to the treatment which defendant received, *held*, that the question was not objectionable as calling for an opinion: *Cochran v. Miller*, 18-128.

369. A fracture of the ribs may be of such unmistakable character that the person having sustained the injury may have had positive knowledge of the fact and testify as to it without being required to show that he is an expert: *Ferguson v. Davis County*, 57-601.

370. Testimony of parties as to the speed of a train, based upon the sound made by it,

is admissible where the question is as to whether the train was moving at a slow or a rapid rate: *Van Horn v. Burlington, C. R. & N. R. Co.*, 59-33.

371. It is competent for a witness to give an opinion as to a matter based on facts coming under his observation; for instance, as to the effect which a sudden increase of the motion of the engine would have in producing a jerk in the train: *Whitsett v. Chicago, R. I. & P. R. Co.*, 67-150.

372. The question whether a team can be turned in a road of a certain width is a fact as to which a witness can testify and such testimony cannot be classed as expert testimony: *Funston v. Chicago, R. I. & P. R. Co.*, 61-452.

373. In a particular case, *held*, that while the opinion of a witness as to a particular matter based upon facts and circumstances testified to by him might have been material, yet that the exclusion of such opinion was not prejudicial error, since all the facts upon which the opinion must have been grounded were before the court: *McIntosh v. Livingstone*, 41-219.

374. Conclusions drawn from conversations: A witness who cannot testify as to the exact language used in a conversation heard by him may properly be allowed to testify as to impressions received by him from such conversations and the ideas formed therefrom: *State v. Donovan*, 61-278.

375. Testimony in regard to a conversation is not to be rejected, though the witness disclaims his ability to remember the words used. He may nevertheless give the purport of the conversation, without his testimony being objectionable as constituting a mere conclusion: *Walker v. Camp*, 63-627.

376. The admission over objection of a statement by a witness as to his conclusions as the result of a conversation heard by him, the fact as to which such conclusions were formed not being ultimate to the facts of the case, *held* not sufficient to require reversal: *State v. Jones*, 64-349.

377. General conclusions in the nature of facts: It is competent for a witness to testify to his conclusions, if the matter to which the testimony relates cannot be produced or described to the jury, precisely as it appeared to the witness. Therefore, *held*, that it was

Admissibility of opinions in general.

competent for a witness to testify whether horses were frightened by a stream of water from a hose, or by escaping steam from an engine, or the like: *Yahn v. Ottumwa*, 60-429.

378. State of feelings or mental condition: Under the exception to the rule that the opinions of a witness are not receivable, are those cases where the judgment or opinion of a witness on some matter material to be considered by the court is founded on facts which, from their very nature or number, it would be impossible to bring before it. Therefore, *held*, that a witness being examined as to facts tending to show the insanity of his brother, might testify as to the state of feeling manifested toward him by his brother and that there was no cause for such feelings: *Pelamourges v. Clark*, 9-1.

379. It is always allowable for a witness to describe the appearance of an object or a thing, when material, as that a person appeared excited, or amused, or intoxicated, or the like, and yet in a certain sense this is an opinion, but it is not an opinion as distinguished from a fact in such sense as to be inadmissible: *State v. Moelchen*, 53-310.

380. The physical or mental condition or appearance of a person or his manner or conduct may be proved by the opinion of an ordinary witness founded on observation. It is therefore competent for an ordinary witness to testify as to whether a certain person looked angry: *State v. Shelton*, 64-333.

381. The fact that a person acted strangely or in a childish manner is not one requiring expert testimony and may be testified to by any one: *Parsons v. Parsons*, 66-754.

382. Where the issue is as to whether testamentary capacity has been impaired by sickness, a non-expert witness well acquainted with testator both in sickness and health, and who has had the care of him in sickness, can be allowed to state that he saw no difference in his mental condition in sickness and his mental condition in health: *Severin v. Zack*, 55-28.

383. Intoxication: While witnesses cannot in general give their opinions, there are cases where evidence of observed facts alone as distinguished from inferred facts is not especially valuable, and where inference based upon observed facts without any special skill or special knowledge on the part of the

observer is valuable, competent for a witness

directly whether a person is intoxicated or not: *State v. Huxford*.

384. Insanity: Affirmative facts and circumstances showing insanity or insanity, then a condition derived from or resulting therefrom may be given: *Pelamourges v. St. Louis L. & N. Ry. Co. v. Hickenbottom*, 57-74.

385. The rule as to giving an opinion is that where the facts and circumstances derived from and based upon may be given; but he cannot give his opinion as based on what he has heard, or allow a witness to exercise judgment as to what facts and circumstances are of consideration: *Parsons v. Parsons*, 66-754.

386. A subscribing witness may state whether the testator was sane at the time the will was executed.

387. Where a witness, being an expert, has detailed fully the facts, his opinion is based, he is not competent as to defendant's lack of sanity or the degree of his imbecility: *State v. Shelton*, 64-131.

388. An opinion as to the sanity of a party is not competent to distinguish right from wrong, or to show the power: *Ibid.*

389. While a witness is not competent to express an opinion as to the truth of facts testified to by him, he is competent to express an opinion based upon facts and acquaintance: *State v. Shelton*, 64-131.

390. It is improper for a witness to express an opinion as to the sanity of a party to make a business at the time in question, or his personal knowledge of the facts, language and actions of a party, or specifying them: *Pelamourges v. Ashcraft v. De Armond*.

391. A witness not an expert is not competent to give an opinion as to the mental condition of a party only after he has detailed the facts and circumstances on which such opinion is based: *State v. Pennyman*, 68-131.

Opinions of experts.

392. A person who is not an expert is not competent to give a general opinion as to the mental condition of a person: *State v. Geddis*, 42-284; *Hurst v. Chicago, R. I. & P. R. Co.*, 49-76.

393. The opinion of a medical witness, based wholly upon testimony of previous witnesses, and from observation of defendant's conduct during the trial, is incompetent as to the insanity of a party. Such medical witness may, from personal knowledge and examination, give an opinion based thereon as to mental condition: *State v. Felter*, 25-67.

b. *Opinions of experts.*

394. When admissible: The opinion of a witness possessing peculiar skill is admissible whenever the subject of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study in order to the attainment of the knowledge of it: *Muldowney v. Illinois Cent. R. Co.*, 36-462; *Belair v. Chicago & N. W. R. Co.*, 43-662.

395. The opinion of a witness is not to be received when the inquiry is as to a subject-matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. If the relations of facts and their probable results can be determined without special skill or study, the facts themselves must be given in evidence and the conclusions or inferences must be drawn by the jury: *Ibid.*

396. Therefore, *held*, that a question as to whether there was danger in coupling cars with draw-heads of unequal height was not a question for expert testimony: *Muldowney v. Illinois Cent. R. Co.*, 36-462.

397. *Held*, also, that the question as to whether it was dangerous to stand in a particular position in coupling a locomotive to a way car, the fact being in evidence as to the space usually remaining between the car and the locomotive when the draw-heads come in contact, was not one upon which expert testimony was admissible: *Belair v. Chicago & N. W. R. Co.*, 43-662.

398. The question as to the effect of applying brakes to different parts of a railway

train, as being likely to cause the breaking apart of the train or not, *held* to be for the jury and not a matter of expert opinion: *Burns v. Chicago, M. & St. P. R. Co.*, 69-450.

399. Every employment requires a degree of skill, and there is none in which proficiency cannot be obtained by practice, but this fact is not sufficient ground for the admission in evidence of the opinions of those who have attained such proficiency. The pursuit in which the witness claims to be an expert must be one of science, skill, trade, or the like, that his opinions may be admissible. The fact upon which the opinions may be expressed must be of such character that it cannot be inferred, from other facts proved, by one not skilled or not possessing peculiar knowledge of the subject in controversy: *Hamilton v. Des Moines Valley R. Co.*, 36-31.

400. Therefore, *held*, that the method in which railway cars on which are loaded projecting timbers should be coupled was not a question for expert testimony: *Ibid.*

401. A bridge builder cannot testify as an expert as to what effect a log floating down as drift wood, and caught on the bent of a bridge, would have in changing the current and causing a washout: *Cooper v. Mills County*, 69-350.

402. Expert testimony is not admissible where no question of science or special skill is involved in the inquiry, or the judge or jurors, when informed as to the facts in the case, can determine the question as well as the witness: *Stafford v. Oskaloosa*, 64-251.

403. The question whether timbers are piled in a negligent manner or not is not a question upon which expert testimony is admissible. Such matter does not in any sense involve the mastery of technical knowledge or skill: *Baldwin v. St. Louis, K. & N. R. Co.*, 68-87.

404. The opinion of a witness is not to be received as expert testimony merely because he has had some experience or a greater opportunity for observation than others, unless the experience relates to matters of skill and science: *Kilbourne v. Jennings*, 38-533.

405. Therefore, *held*, that a painter was not better qualified than any other witness to testify as to the character of carpenter work: *Ibid.*

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403. Although the testimony of an expert witness as to matters of opinion involving no question of skill, science or trade is not admissible, *held*, that as the testimony in a particular case was as to matters which were self-evident, its admission was not prejudicial: *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50-656.

407. A practical surveyor who has made actual survey of the premises in question may state the result of his survey, and having drafted a plat, which is in evidence, may state his opinion as to the correctness of the plat and the location of the boundaries of the premises and the buildings situated thereon with reference to such boundaries: *Messer v. Reginnitter*, 32-312.

408. In an action upon a contract for the construction of a brick building in accordance with specific instructions, *held*, that opinions of experts were admissible as to the proper method of constructing the building in accordance with such specifications: *Haver v. Tenny*, 36-80.

409. In an action for profits arising upon a contract of railroad excavation, the embankment, the character of the ground, etc., may be stated as facts to a witness who is experienced in such work and who is acquainted with the locality, for the purpose of having him give an opinion on the question of profits: *Crawford v. Wolf*, 29-567.

410. The question whether the fact that the wound made by a ball passing through the hand was a simple skin wound was consistent with the theory that it was made while the hand was pressed tightly over the muzzle of the weapon from which the ball was discharged, *held*, a proper question for expert testimony: *State v. Cross*, 68-180.

411. Expert evidence *held* admissible on the question whether a certain obstruction on a bridge was of such character as to be likely to frighten horses of ordinary gentleness, the habits, nature, etc., of horses being a matter about which persons are better able to judge who have had experience in handling and driving them: *Moreland v. Mitchell County*, 40-394.

412. Testimony of a locomotive engineer as to the care usually exercised by those running trains under the circumstances attending the injury complained of, *held* proper in

determining whether of care was exercised: *Cooper v. Central R.*

413. Also, *held*, that to show the effect of a animal, when running, in the injury sue also the structure of tender and its height, such matters not being knowledge of all men: *Ibid*.

414. Where the question is the effect of a certain motion on the safety and usefulness of a machine, *held*, that the testimony of persons whose points was improperly excluded: *Chicago, R. I. & P. R.*

415. Where the question is whether a county had been negligent in repairing a bridge, it is proper to ask a bridge-builder, of long experience what would be the value of a particular kind of timber of a particular kind, the fact being one proper to the testimony of persons of knowledge respecting it: *Ferguson v. Chicago*, 601.

416. A witness who has operated a machine six or eight years may give an opinion as to the comparative value of such a machine, that a machinist was competent to give an opinion as to the value of a machine was well considered: *Sheldon v. Boot*.

As to admissibility of expert testimony on questions of value, see *infra*, §§ 483-504.

As to expert testimony on handwriting, see *infra*, § 505.

417. Medical experts may give an opinion as to the change which a disease usually takes place in the human body according to the laws of nature, the extent of such change, the question, but it must be determined from such testimony whether it is possible for any one to give such testimony: *State v. Vincent*, 2-100.

418. Opinions of medical experts as to whether a person shown to be expert, as to

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ducing and the nature and consequences of wounds or the causes of diseases, are competent evidence in a prosecution for homicide: *State v. Morphy*, 33-270; *State v. Porter*, 34-181.

419. Before the enactment of the statutory provision allowing the introduction in evidence of books of science, etc., medical works were not competent evidence. The fact that they are now admissible does not render other testimony incompetent, but an expert may still be allowed to testify as to what is the practice of the ablest modern surgeons in a particular class of cases, and as to whether standard authorities differ or not in reference to particular cases: *Brodhead v. Wiltse*, 35-429.

As to medical testimony in regard to insanity, see *supra*, §§ 384-393.

As to competency of medical witnesses to testify as experts, see *infra*, § 443.

420. Laws of another state: Evidence of expert witnesses as to the validity of a judgment under the usages of another state is competent: *Crafts v. Clark*, 38-237.

421. What is not subject of expert testimony: The credit of a merchant is not a matter about which the opinion of a witness is receivable in evidence as expert testimony: *Thomas v. Isett*, 1 G. Gr., 470.

422. The fact of a place being safe or unsafe, as tending to show whether a man who is missing was murdered or not, is not a question for experts to determine. The facts showing such safety or the want of it must be proved to the jury: *Tisdale v. Connecticut Mut. L. Ins. Co.*, 28-12.

423. The question as to whether it was negligent to ride upon a wagon load of straw, loaded in a particular manner, *held* not to be proper for expert testimony: *Bills v. Ottumwa*, 35-107.

424. Where the question was whether, in descending from a car in a particular manner, a brakeman was guilty of contributory negligence, *held*, not proper to ask the opinion of a yard master or a freight conductor as to whether the method adopted in doing the act was or was not the proper method, that being a question for the jury: *McKean v. Burlington, C. R. & N. R. Co.*, 55-192.

425. The propriety of cutting a train in two, while in motion is not a question on

which a witness familiar with the operation of trains is authorized to express an opinion: *Jeffreys v. Keokuk & D. M. R. Co.*, 56-546.

426. Where the question was as to whether a brakeman had acted in a proper manner, *held*, that it was not proper for a witness, also a brakeman, to testify as to how he would have acted under the circumstances: *Whitsett v. Chicago, R. I. & P. R. Co.*, 67-150.

427. The question whether, when a train is in motion, a person can go between the cars and uncouple them and at the same time see whether a frog in the track is blocked or not, is not a question upon which the opinion of a witness may be given. Circumstances bearing on that question should be shown in evidence: *Coates v. Burlington, C. R. & N. R. Co.*, 62-486.

428. Where plaintiff claimed that he had been injured in the removal of brass boxings of car-wheels by reason of the fact that a poisonous substance was formed thereon, on account of their having been allowed to wear too thin before being removed, *held*, that a question asked an expert witness with regard to when such boxings ought to be removed was improper as calling for an opinion about a fact which should have been determined by the jury: *Kitteringham v. Sioux City & P. R. Co.*, 62-285.

429. In an action against a railway company for injuries received by an employee alleged to have resulted from improper construction of the cars, *held*, that the question whether it was dangerous to couple an engine and a car of a certain pattern was not one for expert testimony: *Way v. Illinois Cent. R. Co.*, 40-341.

430. It is not competent for a witness to declare as to whether or not a certain act on the part of a brakeman was within the line of his duty. It is for the jury to determine in such cases whether it was required to be done in performance of the services imposed, or whether the act could not have been done in another manner accompanied with less danger. Such a question is not one for expert testimony: *Allen v. Burlington, C. R. & N. R. Co.*, 57-623.

431. Evidence as to continual danger from fires set out by an engine used in operating the road, *held* incompetent in a particular case, because a mere matter of opinion:

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upon a question not involving science or skill: *Lance v. Chicago, M. & St. P. R. Co.*, 57-636.

432. Opinions of expert witnesses as to the action of water and ice upon a bridge, causing it to fall, *held* improperly admitted: *Hughes v. Muscatine County*, 44-672.

433. Questions of ordinary judgment, based upon common observation, such as the effect of a lantern in a dark, misty night in rendering objects visible, are not subjects for expert testimony: *Weane v. Keokuk & D. M. R. Co.*, 45-246.

434. The question whether a portion of a street in a city was worked, or prepared, or intended to be prepared, by the city for public travel for teams, calls for an opinion in a matter as to which expert testimony is not admissible: *Stafford v. Oskaloosa*, 64-251.

435. Where the question in issue was, whether plaintiff was competent to perform the duties of express messenger and baggage master, involving the handling of heavy articles and the clerical duty of making out duplicate way-bills, *held*, that his fitness for such duty was not a subject upon which those familiar with the business, and who had been acquainted with his method of conducting the same, could express an opinion as experts, but that the facts must be communicated to the jury and the fitness of the plaintiff for the business determined by them: *Moore v. Chicago, B. & Q. R. Co.*, 65-505.

436. In an action to recover from a livery-stable keeper the value of a horse dying while in his possession, *held* not competent to introduce the testimony of a veterinary surgeon that horses frequently fall down and die instantly without any apparent cause, such evidence not being in the nature of an expert opinion: *McPherrin v. Jennings*, 66-622.

437. The question whether the fees claimed by a justice of the peace for the trial of a particular case were reasonable, *held* not to be a matter for expert testimony: *Evans v. Story County*, 35-126.

438. An inquiry of an expert witness as to what it would cost to make a building erected under a contract "a good and workmanlike job according to the contract testified to by plaintiff," *held* not proper, as it required the

witness to put his plaintiff's testimony

439. Where the conductor had acted in the management of his train, in the superintendent, competent for such as to the language used in the true question being, in the mean, when read by light of surrounding circumstances: *Sioux City & P. R. Co.*

440. Matters which require, such as the presence of an animal under certain conditions, not be proved, and it does not require expert testimony: *Kraus v. Burlington*, 55-338.

441. Matters of general knowledge may be taken notice of by the jury without other evidence to prove: *Clark v. Kansas City & P. R. Co.*, 55-455.

442. Who qualified as an expert. Any evidence tending to show that a person called as an expert possesses special knowledge and skill in a particular line of knowledge and skill is to be considered for what it is worth: *Maynes*, 61-119.

443. On the question of whether a person offered as a witness is competent to testify as to a post-mortem examination of a stomach and testify as to the presence of arsenic, it would be proper to show that he was a physician. Upon such evidence a court need not allow him to testify. Such evidence will tend to show that he was a physician: *State v. Cole*, 63-695.

444. If a party against whom a witness is offered makes out a prima facie case of the insufficiency of the evidence, the court would not allow the witness to testify in assuming that the witness was not qualified, or relied upon the fact of such qualification: *State v. Cole*, 63-695.

445. When a witness is offered as an expert, the court would not allow him to testify, unless the party against whom he is offered, until some evidence is offered, until some evidence is offered, until some evidence is offered.

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he is of the requisite character; but when a witness has been once admitted by the court to testify, the weight that should be given to his evidence in view of the evidence as to his qualifications becomes a question for the jury, and in a proper case they may be justified in disregarding his testimony entirely: *Ibid.*

446. It is competent to prove by the bishop of a church the meaning of the words "parish" and "rector," as understood by the canons of the church: *Bird v. St. Mark's Church*, 62-587.

447. A person resorting to a saloon for intoxicating drinks may be presumed to be qualified to give an opinion as to the liquor supplied him: *State v. Miller*, 53-84.

448. Expert testimony as to the detection of poison is not to be limited to the testimony of the highest professional skill, but if the experiment has been conducted by a person who has not had experience or is not practically familiar with the operation, his credibility is for the jury: *State v. Hinkle*, 6-880.

449. A person not belonging to the guild, trade or profession of engineer, held not qualified to testify as to the competency of an engineer: *Couch v. Watson Coal Co.*, 40-17.

450. A person does not show that he is qualified as an expert to testify as to whether a particular matter constitutes an increase of risk by the mere fact that he is an insurance agent. To be entitled to testify as such expert, he must show that his duties have been such that he has become experienced in passing upon risks or has acquired special knowledge on the subject. A mere soliciting agent is not necessarily of such class: *Stennett v. Pennsylvania F. Ins. Co.*, 68-674.

As to who are qualified to testify as experts as to value, see *infra*, §§ 486-500; and as to handwriting, see *infra*, §§ 468-470.

451. Method of introducing expert testimony: A witness introduced as an expert cannot undertake to show what is determined by the evidence and give an opinion on that, but facts must be stated hypothetically upon which his opinion can be predicated: *Philips v. Starr*, 26-349.

452. An expert witness may properly state such facts as he knows respecting the case,

and then give his opinion on such facts; or he may be asked his opinion on an assumed state of facts, which the testimony of other witnesses tends to establish. But he cannot be asked his opinion upon facts assumed by him from the evidence before the jury: *Muldowney v. Illinois Cent. R. Co.*, 89-615.

453. The interrogatories to be put to an expert are not as to what his opinion is of the testimony, but as to what his opinion is, if the facts are as stated to him by the questioner. If the question calls for an answer involving an opinion of the testimony itself, it is not proper: *Butler v. St. Louis L. Ins. Co.*, 45-93.

454. Hypothetical questions should be based upon the language used by the witnesses as to the facts, and not upon a relation of the evidence of witnesses not directly supported by their testimony: *State v. Cross*, 68-180.

455. An expert may base his opinion upon facts which the evidence tends to establish, but he cannot base it upon facts stated by counsel, of which there is no evidence: *Hurst v. Chicago, R. I. & P. R. Co.*, 49-76.

456. It is error to admit an opinion of an expert based upon a hypothetical case, in which facts are introduced of which there is no proof: *In re Will of Ames*, 51-596.

457. To make a hypothetical question propounded for the purpose of getting the opinion of the expert proper, there must be evidence tending to prove the matters stated in such question: *Bomgardner v. Andrews*, 55-638.

458. Where there is a conflict in the testimony, it is improper to ask an expert witness a question based upon the testimony in general: *Smith v. Hickenbottom*, 57-733.

459. The fact that a hypothetical question is asked of an expert witness, based upon the terms of a lease and the condition of the property, held not sufficient to render his answer objectionable, as amounting to a construction of the lease as applied to the property: *Taylor v. French Lumbering Co.*, 47-662.

460. Weight of expert evidence: While there are doubtless cases in which it is proper to charge the jury that expert evidence is regarded as the lowest order, or evidence of the most unsatisfactory character, yet where

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such evidence was that of medical experts relating to the mental condition of defendant, depending upon the effect on the mind of an obscure form of epilepsy, the effects of which are such as not to be observable by one not an expert, *held* error to thus disparage such expert testimony: *State v. Townsend*, 66-741.

As to the weight of expert evidence as to handwriting, see *infra*, §§ 471, 472.

5. Evidence as to handwriting.

461. Comparison: The writing with which comparison is made must be proved to be genuine by testimony of witnesses who saw the party write it, or by the party's admission, when not offered by him, or in some such a positive manner. The genuineness of the standard cannot be proved by a witness who has seen the party write generally. The standard, however, need not be a writing connected with the case: *Hyde v. Woolfolk*, 1-159.

462. A paper offered in evidence for the mere purpose of furnishing the jury a standard of comparison is admissible only where no collateral issue can be raised concerning it; that is, when the paper is conceded to be genuine, or is such that the other party is estopped to deny it, or belongs to the witness, who was himself previously acquainted with the party's handwriting, and exhibits the paper in confirmation and explanation of his own testimony: *Wilson v. Irish*, 62-260.

463. The genuineness of the writing made the basis of the comparison, called the standard writing, should be proved by direct and positive evidence. A writing cannot be thus used when its genuineness rests only upon evidence based upon comparison with other writing claimed to be genuine: *Winch v. Norman*, 65-186.

464. The party whose handwriting it is sought to prove may, on his behalf, offer in evidence writings of his own proved to be genuine, and is not to be limited to such writings as were made before the issue as to genuineness of handwriting was raised. Therefore, *held*, that defendant might offer in evidence his signature to his answer in the case: *Singer Mfg. Co. v. McFarland*, 53-540.

465. An instrument executed by the party in question, and duly admissible in proof of the fact, may be properly executed though the signature of another: *Hyde v. Woolfolk*, 1-159.

466. On appeal in a case *de novo*, the superior court may compare the writing with the original, 18-90; and see 131.

467. But in an action, the determination of the genuineness of a signature is a question entitled to the same verdict of a jury: *Lay v. ...*

468. Expert testimony: An ordinary witness, not an expert, is not competent to give an opinion of the genuineness of a writing. No one but an expert can give an opinion formed upon comparison of the writing with a standard. But to be an expert in handwriting, the witness need not be called to give particular calling: *Hyde v. Woolfolk*, 1-159.

469. The competency of a witness to give an opinion of the genuineness of a particular case, *held*, shown: *Ibid.*

470. The mere fact that a writing is admitted of the courts will not make it an expert in regard to handwriting: *Norman*, 65-186.

471. Weight of expert testimony: Expert testimony of the genuineness of a signature is of the lowest order of evidence, and ought not to be thrown positive and direct upon the jury by direct witnesses who testify to their knowledge: *Borland v. ...*

472. Expert testimony of the genuineness of a signature is of the lowest order of evidence, and ought not to be thrown positive and direct upon the jury by direct witnesses who testify to their knowledge: *Borland v. ...*

As to weight of expert testimony, see *supra*, § 460.

6. Evidence as to value.

473. Other sales: In the case of real property, testimony of the value of land in the same neighborhood is admissible.

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for is admissible only where it is shown that there is uniformity of the lands thus brought into question with the land whose value is to be determined: *King v. Iowa Midland R. Co.*, 34-458.

474. In such a case witnesses may testify as to the price which other tracts in the neighborhood have brought in actual sales, the difference in the location and quality of the two tracts being shown: *Cherokee v. Sioux City & I. F. Town Lot, etc., Co.*, 52-279.

475. A witness who has given his opinion as to the value of land may give evidence as to particular sales in the neighborhood and the price obtained thereat, for the purpose of showing his knowledge: *Winklemans v. Des Moines Northwestern R. Co.*, 62-11.

476. Where it appeared that a witness had sold some land near that in controversy ten or twelve years before the trial, *held*, that his evidence as to the price then obtained was not competent as bearing upon the value of the land in question, the period at which the transaction occurred being too remote: *Everett v. Union Pacific R. Co.*, 59-243.

477. But evidence of the selling price of other lots not shown to be similar to the ones in question is not admissible in determining the value of the latter: *Cummins v. Des Moines & St. L. R. Co.*, 68-397; *Hollingsworth v. Same*, 68-448.

478. Where the value of a stallion was in controversy, evidence as to what he was sold for eighteen months previous to the time in question and when he was not in as good a condition, *held* not admissible: *Gere v. Council Bluffs Ins. Co.*, 67-272.

479. Hearsay: The knowledge which qualifies a witness to testify as to value must necessarily consist largely of hearsay, and it is not error to allow him to answer as to sales in the neighborhood of which he has knowledge by hearsay only: *Winklemans v. Des Moines Northwestern R. Co.*, 62-11.

480. The price at which an article is sold in a particular instance is evidence tending to show its market value: *Buford v. McGetchie*, 60-293.

481. Other services: In an action for services rendered, evidence of the sum received by another person for the same services is not admissible on the question of value: *Forey v. Western Stage Co.*, 19-535.

482. Rental value: Where the question was as to the amount of damage caused to abutting property by the construction of a railway upon a city street, *held*, that evidence of annoyance to occupants of property by noise, escape of fire from engines, etc., in the operation of the road was admissible as bearing on the question of rental value: *Wilson v. Des Moines, O. & S. R. Co.*, 67-509.

483. Opinions on questions of value: Opinions are admissible in determining value: *Henry v. Dubuque & P. R. Co.*, 2-288, 310.

484. The value of personal property may be established by the opinions of witnesses who are first shown to know such value: *Anson v. Dwight*, 18-241; *Prosser v. Wapello County*, 18-327.

485. The opinion of a witness as to value cannot be received without first laying a foundation therefor by showing him possessed of sufficient knowledge of the subject to form an opinion: *Haight v. Kimbark*, 51-13.

486. Who competent to give opinion: The competency of a witness to testify respecting the value of any item of property is not determined by any inflexible rule of law as to the extent of his knowledge of such property, but it is largely a matter of discretion with the trial court in the first instance, the weight of his evidence being for the jury: *Sadler v. Bean*, 37-439.

487. Opinions of witnesses acquainted with the value of such property, as is in controversy, in the market, are competent as evidence to prove such value. But there can be no presumption in the absence of a showing that a witness is competent to form a correct opinion on the subject, and until some showing of competency is made the opinion of the witness is not admissible: *Daly v. W. W. Kimball Co.*, 67-132.

488. Where property has not a market value, as, for instance, vines or hedges on real property, and it appears that the witness has knowledge of the value of such property, he may be permitted to give his estimate thereof: *Lanning v. Chicago, B. & Q. R. Co.*, 68-502.

489. In an action for damages for breach of contract to lease coal land for mining, *held*, that an operator of coal-mines, knowing the thickness of the vein, its convenience to

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transportation and market, and the like, might give his opinion as to the value of a lease of the land for mining purposes: *Chambers v. Brown*, 69-218.

490. The fact that a witness knows the value of cornstalks for pasture in his neighborhood, from six to nine miles from the property in question, will not qualify him to testify to the value of like stalks on such property: *Raridan v. Central Iowa R. Co.*, 69-527.

491. Evidence of a witness, in a prosecution for larceny of a seal-skin coat, held properly admissible and sufficient to support the verdict, although the witness was not shown to be possessed of any special knowledge of the value of such an article: *State v. Finch*, 70—.

492. Where the value of a blooded stallion was in controversy, held, that a farmer engaged in raising horses for the market was competent to testify in regard to the animal, whether he was acquainted with that particular breed of animals or not: *Gere v. Council Bluffs Ins. Co.*, 67-272.

493. A husband and wife who are owners of and using household goods are competent witnesses as to their value, without other showing that they are acquainted with the value of such property: *Tubbs v. Garrison*, 68-44.

494. In ascertaining damages sustained by the appropriation of land, it is not necessary that the witnesses whose opinions are given be shown to be experts. If it appear that they know the quality and location of the land, are residents and owners in the neighborhood, etc., they may be competent: *Cherokee v. Sioux City & I. F. Town Lot, etc., Co.*, 52-279.

495. Where it is claimed that the testimony of a witness as to value is incompetent by reason of his want of knowledge, etc., that fact should be shown by evidence: *Deane v. Garretson*, 24-351.

496. The usual rule when a witness is called to testify as to the value of property is to ask him generally if he has knowledge of the value of the property in question or of property of that kind. If he answers that he has, he is allowed to state the value of the property in question, and, on cross-examination, his means of knowledge or

qualification to testify as to the subject in question may be practically inquired into. If he shows that his knowledge of values is limited, his testimony is not for that reason to be stricken out, but goes to the jury for what it is worth: *Winklemans v. Des Moines Northwestern R. Co.*, 63-11.

497. Where a witness has been examined with reference to the value of property before and after the appropriation thereof for right of way, and has expressed an opinion as to its value in each instance, he may state as a ground of his opinion that before the appropriation the ground was well adapted to residence purposes, which gave it its principal value, and that after such appropriation it was no longer adapted to such use: *McClean v. Chicago, I. & D. R. Co.*, 67-568.

498. Persons having had experience in taking care of the sick may give their opinion of the value of board, lodging, care, etc., of the sick, based upon a hypothetical case: *Shafer v. Dean*, 29-144.

499. A witness who has examined books of account and is acquainted with the parties against whom accounts are found therein is competent to testify as to the value of such accounts in the aggregate without the production of the books themselves: *Drummond v. Stewart*, 8-341.

500. The question as to whether a witness has shown himself competent to give an opinion as to value is left largely to the discretion of the trial court, and its ruling thereon will not be disturbed on appeal unless manifest abuse of discretion is shown: *Smalley v. Iowa Pacific R. Co.*, 36-571.

501. Opinions as to damages: The opinion of a witness as to the amount of damages is not admissible: *Anson v. Dwight*, 18-241; *Prosser v. Wapello County*, 18-327; *Cannon v. Iowa City*, 34-203; *Harrison v. Iowa Midland R. Co.*, 36-323.

502. In determining the damages sustained by adjacent property by reason of change of grade of a street, a witness may be asked as to the value of the property before and after the change, but it is not competent to ask him to give an opinion as to the effect of such change in adding to or taking from the value: *Dalzell v. Davenport*, 12-437.

503. Where the facts were not in evidence as to the extent to which goods were dam-

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aged, *held*, that an individual witness was not competent to give an opinion in regard to the amount of damages: *Selz v. Belden*, 48-451.

504. *Held* not error to refuse to allow a witness to state generally the amount of damage done to a house and lot by a tenant, a general estimate of damages not being proper until it is shown that damages exist, and the particular items thereof: *Dougherty v. Stewart*, 43-648.

505. Value of services: Where a plaintiff seeks to recover the value of services rendered, evidence as to whether he was industrious, careful and prudent in the rendering of such services is admissible: *Lyle v. Gray*, 47-153.

As to materiality of evidence of value, see *supra*, §§ 35-38.

7. Evidence of title to real property.

506. What sufficient chain of title: Where both parties claim title through a common grantor, it is sufficient to prove the derivation of title from him without proving his title: *Cooley v. Brayton*, 16-10; *Byers v. Rodabaugh*, 17-53.

507. A deed of a party claiming from a grantor not shown to have had title is not sufficient to establish title in the party claiming it, nor to raise a presumption of actual possession in such party: *Wearin v. Munson*, 62-466.

508. In order to establish title in himself, a party must show not only a conveyance to him from another, but trace the title to the general government. The fact that a deed offered in evidence for the purpose of establishing a party's title does not clearly describe the premises is not ground for refusing to receive it: *Heinrichs v. Terrell*, 65-25.

509. Parol evidence: To the general rule that parol evidence is not admissible to prove title to real estate, there are exceptions; if the title paper is lost, its contents may be shown; or a parol purchase of real estate may be proved, followed by payment of the purchase money or the taking of possession under such contract; or if the vendor is himself the witness to prove such sale, parol evidence is admissible: *Davis v. Stroh*, 17-421

510. Where defendant sought to defeat collection of his note given for the purchase of land by proving that his grantor had no title, *held* competent for him to prove by the parol testimony of his grantor that the only title or claim that he had was the bond from his grantor, not to show title but to direct the investigation and show that the title was worthless; also for the purpose of tending to show that such bond for title was destroyed and to prove its contents. Whether the witness could state that he had ascertained that his grantor could not make title would depend upon whether he had ascertained it from personal examination of the records and could state the chain of title so that the deeds themselves, or copies, could be produced, and that there was no other title of record: *Ibid*.

511. Sufficiency of evidence of title: One who seeks to overturn a legal title must have proof, clear, satisfactory and conclusive, and not made up of loose and random conversations: *Parker v. Pierce*, 16-227.

And see further, EQUITY, §§ 87-93.

512. Where a mother had procured land from her husband under decree of divorce and granted it to her daughter, and there was nothing in the record to show but that the daughter still held the legal title, though the husband had obtained a judgment for the land in an action against the mother alone, subsequent to the conveyance, *held*, in an action by the husband against a third party for trespass, that he had failed to show title: *O'Hagan v. Clinesmith*, 24-249.

II. PROOF.

1. Judicial notice.

513. Days of the week and month: Courts will take judicial notice of coincidences of days of the week with days of the month: for instance, as to what days of the month fall upon Sunday: *Clough v. Goggins*, 40-325.

514. History, etc.: A court may take judicial notice of the history and condition of the country in which it acts: *O'Ferrall v. Davis*, 1-560.

515. Common law: Matters of national history are recognized by courts, as, for instance, that the common law prevails in the

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states of the United States which were originally colonized from England: *Holmes v. Mallett*, Mor., 82.

516. General election: The courts of the state will take judicial notice as to the day upon which the general election is held and as to what officers are to be voted for at such election: *State v. Minnick*, 15-123.

517. Names of judges: While the supreme court knows judicially the judges of the different judicial districts, and, in the absence of any showing to the contrary, that the courts in such districts are held by such judges, yet it cannot know that a judge and a person of the same name appearing as an attorney in the case are one and the same person: *Ellsworth v. Moore*, 5-486.

518. Customs of merchants: A court will take judicial notice of the general customs and usages of merchants and of whatever ought to be known within the limits of their jurisdiction. Therefore, *held*, that the system by which nearly all banks transact monetary affairs by the use of checks and certificates of deposit without the actual handling of bank-notes or coin is so well known and understood that judicial notice thereof may be taken by the courts, and it may be considered that persons dealing with banks have acted with reference to such custom: *British & Am. M'tge Co. v. Tibballs*, 63-468.

519. Matters of general knowledge: A court can take judicial notice of the fact that a large part of a threshing machine is composed of materials which are of some value apart from the use to which the machine is intended to be applied: *Case Threshing Machine Co. v. Haven*, 65-359.

520. The fact that grass cannot be cut and made into hay after the month of September is a fact within the knowledge of all men and of which the courts will take judicial notice: *Raridan v. Central Iowa R. Co.*, 69-527.

521. The admission of the testimony of a witness as to matters of common observation known to all men, which testimony is in accordance with such common observation, cannot be considered as prejudicial: *State v. Smith*, 46-670.

522. The court cannot take judicial notice of the fact that a railroad corporation is popularly known by the initial letters of the

words constituting its corporate name: *Accola v. Chicago, B. & Q. R. Co.*, 70—.

523. Public surveys are within the judicial notice of the courts, and they will take notice within what civil township and county any particular section of land according to the public survey will fall: *Wright v. Phillips*, 2 G. Gr., 191; *Hyppner v. Walsh*, 3 G. Gr., 509.

524. The court will take judicial notice that a certain township in a certain range according to the government survey is situated within a particular county. Also, as to the meaning of "north" and "west" as applied to a township and range: *Fogg v. Holcomb*, 64-621.

525. Boundaries of state: The state courts take judicial notice that the island of Rock Island is within the jurisdiction of the state of Illinois, and forms a part of its territory for judicial and other purposes: *Gilbert v. Moline Water Power, etc., Co.*, 19-319.

526. Division of state: In a particular case, *held*, that the courts of this state would take judicial notice of the division of the state of Virginia and the formation of the new state of West Virginia: *Darrak v. Watson*, 36-116.

527. Location of town: The courts will take judicial notice that a certain town is a county seat, if such be the fact, and as to what county it is located in: *State v. Laffer*, 38-422.

528. Charters of cities and towns: The courts will take judicial notice of the charters or laws under which cities are incorporated: *Stier v. Oskaloosa*, 41-353; *Lytle v. May*, 49-224.

529. And it is not necessary, therefore, to allege or prove the powers possessed by a city under the laws of the state: *Stier v. Oskaloosa*, 41-353.

530. Where a town or city is incorporated by special act of the legislature, the statute partakes of the nature of a public act and the courts take judicial notice of it, but the fact that the particular village or town has availed itself of the provisions of the statute authorizing incorporation in a particular manner, and has become incorporated thereunder, is private in its character, and the courts are not required to take judicial notice of it: *Hard v. Decorah*, 43-313.

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531. City ordinances: The courts cannot take judicial notice of the ordinances of a city: *Garvin v. Wells*, 8-286; *Wolf v. Keokuk*, 48-129.

532. The mayor of a city may take judicial notice of the city ordinances in a prosecution for their violation: *Conboy v. Iowa City*, 2-90; *State v. Leiber*, 11-407; *Laporte City v. Goodfellow*, 47-572.

Statutes of another state cannot be taken judicial notice of, but must be pleaded and proved: See *infra*, §§ 558-566.

533. Notice of its own records: The court is supposed to know the genuineness of its own records and signature of its officers: *State v. Postlewait*, 14-446.

534. A court will not in one case take judicial notice of what has transpired in another case between different parties: *Baker v. Mygatt*, 14-131.

535. A court cannot take judicial notice in one case of its records in a different case. So held where it appeared that the opinion of the supreme court in a different case was introduced in evidence on the trial in the court below, but was not set out in the abstract on appeal: *Enix v. Miller*, 54-551.

536. The court will, in a proceeding for contempt, take judicial notice of its own orders in the matter out of which the alleged contempt grew: *Jordan v. Circuit Court*, 69-177.

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537. Authentication of domestic judgments: The record of a judgment is sufficiently authenticated if the certificate of the clerk identifies the transcript to be a true copy, and there is a further certificate of the presiding judge that such attestation is in due form of law: *Lewis v. Sutliff*, 2 G. Gr., 186.

538. Where a party relies upon a prior adjudication, he should introduce in evidence not only a copy of the judgment but also a copy of the pleadings: *Campbell v. Ayers*, 6-339.

539. A copy of the record of the judgment properly authenticated is competent evidence without proof of the official character of the person rendering the judgment: *Railroad Bank v. Evans*, 32-202.

540. Under a statutory provision (Code, § 3712) authorizing the proof of a judicial record by the production of the original or by a copy thereof, certified, etc., it is not necessary to account for the original before introducing a copy: *Dupont v. Downing*, 6-173.

541. Foreign judgment: The attestation of the copy of the record in another state must be according to the form used in the state from which the record comes; *Roop v. Clark*, 4 G. Gr., 294.

542. Attestation of a foreign judgment in the name of the clerk by a deputy, together with the presiding judge's certificate of the official character of such clerk and deputy, and that the certificate is in due form of law, held sufficient: *Young v. Thayer*, 1 G. Gr., 196.

543. Under the state statute (Code, § 3718) the certificate of a judge, whether the presiding officer of the court or not, to the attestation by the clerk, is sufficient: *Simons v. Cook*, 29-324.

544. The certificate of the judge is conclusive that the attestation of the record is in due form, and if it appears to be made by a deputy in the name of the principal, it is conclusive as to the authority of the deputy to make such certificate: *Greasons v. Davis*, 9-219; *Young v. Thayer*, 1 G. Gr., 196.

545. Parol evidence may be received to show the practice and usage in the courts of another state, and whether a record conforms thereto, and its effect: *Greasons v. Davis*, 9-219.

546. Where a foreign judgment is introduced in evidence on the trial in the court below, and it appears not to be sufficiently formal and authoritative as a judgment on its face to authorize a recovery upon it, the presumption will be on appeal that it was supported by proper evidence to entitle it to faith and credit, unless the contrary appears by affirmative showing: *Clemmer v. Cooper*, 24-185.

547. The method prescribed by act of congress for authenticating a judicial record is not exclusive of that which a state may adopt with reference to such an authentication in its own courts: *Latterett v. Cook*, 1-1.

548. Certificate of successor: A certificate of the clerk of the circuit court of West

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Virginia, stating that he was the successor of the clerk of the county court of Virginia in which the judgment was rendered before the formation of the state of West Virginia, *held* competent evidence of that fact and of the existence of the judgment: *Darrah v. Watson*, 36-116.

549. Judgments of justices of the peace: The provisions of the statutes of the United States as to the mode in which the judicial proceedings of a state may be authenticated so as to be given effect in other states, refer only to courts of general jurisdiction and not to those of inferior jurisdiction, such as justices of the peace: *Gay v. Lloyd*, 1 G. Gr., 78.

550. Under the statutory provision (Code, § 3714) as to the method of authenticating the judgments of a justice of the peace in another state, the certificate of the clerk of a court of record within the county in which the justice of the peace resides should show that the justice of the peace was a justice within the same county, and also that he was an acting justice of the peace at the time of signing the certificate: *Guesdorf v. Gleason*, 10-495.

551. The certificate of a retired justice of the peace in relation to his former official proceedings has no more weight than that of a mere stranger: *Brown v. Scott*, 2 G. Gr., 454.

552. The successor in office of a retired justice is the proper person to make the certificate here contemplated, as to any of the official proceedings of his predecessor shown by the records in his office, and the certificate of the clerk of a court that the justice is an acting justice and his signature genuine is sufficient: *Railroad Bank v. Evans*, 32-202.

553. Where, in the body of a certificate of a justice of the peace, he states his official character, the failure to affix his official designation to the signature of the certificate will not affect its validity: *Ibid.*

554. The admission in evidence of the transcript from the docket of a justice of the peace in a foreign state, *held* not error where such transcript was embraced in the certified copy of proceedings in the court of common pleas where the judgment sued on was rendered on appeal: *Clemmer v. Cooper*, 24-185.

555. Laws of the of the general assembly of the secretary of state, the ultimate proof of errors there may be such statutes. The and take judicial notice of the statutes as the 5-509; commented on 8-396.

556. The acts which receive the same etc., and behind the any court to go for finding what the law is 12-1.

557. The enrolled filed in the office of at least presumptive enactment, and the notice of what appears to be the law. The fact of the houses of the legislature that the statute passed sufficient to overcome *Jordan v. Circuit Court*

558. Laws of another provision (Code, § 3714) statute laws of a state been published undermissible as evidence of *v. Rees*, 23-269.

559. But the method not exclude other methods copies duly authenticated the state: *Latterett v.*

560. The testimony of would not be admissible of another state: *Ibid.*

561. Parol evidence with the laws of another state for the purpose of of a notary public under state: *State v. Cross*, 68

562. Parol evidence with the practice in other received to show that commonly received by the court evidence of the statute *sons v. Davis*, 9-219.

563. Presumption as state: Courts do not take the statutes of another state

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lies upon such statutes, he must plead them as any other fact; and it will not be sufficient to refer to them by their title or date of approval, nor by stating what are their general provisions and requirements: *Carey v. Cincinnati & C. R. Co.*, 5-357; *Taylor v. Runyan*, 9-522.

564. The presumption is that the laws of a foreign state are the same as our own. If it is claimed that they are different from our own, that fact must be averred and proved: *Bean v. Briggs*, 4-464; *Crafts v. Clark*, 31-77; *S. C.*, 38-237; *Sayre v. Wheeler*, 31-112; *Sayre v. Wheeler*, 32-559; *Stephens v. Williams*, 46-540; *Church v. Crossman*, 49-444; *Webster v. Hunter*, 50-215; *Neesse v. Farmers' Ins. Co.*, 55-604; *Hadley v. Gregory*, 57-157.

565. In a prosecution for bigamy, evidence of a marriage in another state which is sufficient in form to be valid under the laws of this state will be sufficient, the statutes of the state where the marriage was celebrated being presumed to be the same as those of this state in the absence of proof to the contrary: *State v. Nadal*, 69-478.

566. The presumption is that the rule of law on a particular question is the same in another state as in this state: *Leiber v. Union Pacific R. Co.*, 49-638.

567. Legislative proceedings: The journals of the respective houses of the general assembly are competent evidence to show the proceedings of such houses: *Koehler v. Hill*, 60-543.

City ordinances: A court cannot take judicial notice of the ordinances of a city: See *supra*, §§ 531, 532.

568. In a proceeding under a city ordinance, it is competent to prove publication thereof by introducing the original ordinance with a certificate of the clerk that it was regularly enacted and published as required. Such evidence is original, not secondary: *Des Moines v. Casady*, 21-570.

569. Evidence in a particular case held sufficient to identify a certain book as the ordinance book of a city: *Ottumwa v. Schaub*, 52-515.

570. Records of a board of directors: Entries in a record book of a board of directors of a district township, held sufficiently verified in a particular case: *Cooper v. Nelson*, 38-440.

571. Protest of a notary public: The certificate of protest is only evidence of notice when it recites that notice was given: *Sather v. Rogers*, 10-231; *Thorp v. Craig*, 10-461.

572. It is only evidence of the facts therein recited; and where it shows that the notice was directed to the indorser at a particular place it will not be presumed that such place was the residence of such indorser: *Bradshaw v. Hedge*, 10-402.

573. If the certificate states that notices of protest properly addressed were deposited in the postoffice, it will be presumed that the postage was prepaid: *Brooks v. Day*, 11-46.

574. When the certificate of protest states that the notary notified the proper parties in a certain manner, the credit due the certificate will generate the presumption that the mode adopted accomplished the result certified to, unless it affirmatively appear that the method adopted could not have done so; but if the notary only certifies as to the steps taken, then, to make out a *prima facie* case, it must further appear that such steps would effectuate notice: *Wamsley v. Rivers*, 34-463.

575. The fact that the certificate is dated at a time subsequent to that of the dishonor and protest will not render it incompetent: *Chatham Bank v. Allison*, 15-357.

576. The protest of a notary is not receivable without his seal, but such defect may be cured by the affixing of the seal by the notary at the trial: *Rindskoff v. Malone*, 9-540.

577. The certificate of a notary public as to the protest of a bill or note is not admissible against defendant in a criminal case, as he is entitled to be confronted with the witnesses against him: *State v. Reidel*, 26-430.

578. Instruments duly acknowledged: The certificate of acknowledgment is *prima facie* evidence of the fact of acknowledgment, but not conclusive, and may be overcome by other evidence, the burden of proof being upon the party seeking to rebut the effect of the certificate: *Morris v. Sargent*, 18-90.

579. The right to contradict the certificate exists, for instance, when fraud is supposed in obtaining the acknowledgment, or when the certificate is alleged to be false, and it is proposed to show that the deed was never acknowledged: *Tatum v. Goforth*, 9-247.

580. But it is not contemplated that a de-

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fective certificate is to be supplied or made good by other evidence: *O'Farrell v. Simplot*, 4-381.

581. The deed, such as here contemplated, being in the custody of the grantee, will be presumed to have been delivered, and being in writing will import a consideration, and these facts need not be proved before offering the instrument in evidence: *Wolverton v. Collins*, 84-238.

582. Recitals in an instrument which is admissible by reason of acknowledgment are *prima facie* evidence of the facts recited: *Beal v. Blair*, 83-818.

583. A deed which is not properly acknowledged may still be received in evidence: *Gould v. Woodward*, 4 G. Gr., 82.

And see further, ACKNOWLEDGMENT, §§ 14-22.

584. In order to entitle a written instrument duly acknowledged to be read in evidence without proof of execution under the statutory provision (Code, § 8656) that private writings acknowledged in the manner prescribed for the acknowledgment of conveyances of real property may be read in evidence without further proof, it must appear, if the instrument was a mutual one, that it was so executed as to be binding upon both parties, and an acknowledgment by one will not be sufficient: *Chicago, B. & Q. R. Co. v. Lewis*, 53-101.

585. Record of marriages: Under statutory provision making the court register of a marriage receivable as evidence thereof, it is not necessary to show that the one solemnizing the marriage was officially authorized, and it is permissible to show a mistake in the wife's name: *Verholf v. Van Houwenlengen*, 21-429.

586. To prove a marriage contract in a state where the law requires the officiating minister or officer to return a certificate of the fact, which is to be recorded, an exemplification of the certificate and not of the clerk's record is the proper evidence: *Niles v. Sprague*, 13-198.

Further as to evidence of MARRIAGE, see that title.

587. Certificate from land office: In an action for a breach of warranty in a deed for land purchased as swamp, *held*, that a certified abstract from the United States land

office was admissible in evidence to show that the land in question was not certified as swamp, and to throw upon defendant the burden of proving that the land had passed under the swamp grant: *Shorthill v. Ferguson*, 44-249.

588. Under the provisions of a railroad land grant authorizing the selection of indemnity lands, and an act of congress providing that in such case lists of the land certified by the commissioner of the general land office should be regarded as conveying the fee-simple title, and under state statute (Code, § 8703) allowing the production in evidence of duly certified copies of the records, etc., in any public office, *held*, that a duly certified copy of the original certified lists of selections under the grant, on file in the office of the commissioner of the general land office, was properly admitted in evidence: *Chicago, B. & Q. R. Co. v. Lewis*, 53-101.

589. Where letters were on file in the state land office which would be themselves admissible in evidence, *held*, that they might be proven by copies certified by the register: *Bellows v. Todd*, 34-18, 26.

590. The provisions of the statute with reference to duplicate receipts of the receiver of a land office, *held* applicable to the receiver of the Des Moines river land office: *Stone v. McMahan*, 4 G. Gr., 72.

591. The provision of statute (Code, § 8710) making the certificate of the register or receiver of any land office as to the entry of land within his district presumptive evidence of title relates to the remedy and applies to all actions in the courts of the state whether the land is situated in the state or not: *Piereson v. Reed*, 36-257.

592. Where the statute requires an officer to make a statement or certificate in writing, such writing is competent evidence of the fact stated or certified: *Clark v. Polk County*, 19-248.

593. Certified copies: A certified copy of a paper in a public office, but which is of such nature that it is not authorized by law to be kept there, is not receivable in evidence: *Morrison v. Coad*, 49-571.

594. Parol evidence is not competent to correct a mistake in a duly certified copy of a record: *Monk v. Corbin*, 58-503.

595. A copy of a public document, or what

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purports to be such copy, found in the custody of a public officer, is not admissible in evidence under the rule admitting public documents, unless it be properly authenticated or proved to be correct: *Pfotzer v. Mullaney*, 30-197.

Certified copies of instruments recorded in the recorder's office are not admissible, unless the loss of the original is shown or the failure to produce it is otherwise excused: See *infra*, § 615.

596. Certificate as to contents: The certificate of the custodian of a record stating its contents is not admissible in proof thereof. Neither will such certificate be received as evidence of the contents of a lost or destroyed record; nor can facts which are required to be of record, but which have been omitted, be proved by the certificate of the officer required to keep such record: *Goodrich v. Conrad*, 24-254.

597. The auditor's plat-book made up from records in the recorder's office is not admissible in evidence as a duly certified copy of the records of conveyances, to establish the title of the party whose name is entered thereon: *Heinrichs v. Terrell*, 65-25.

598. The reports of the register of the state land office are not receivable in evidence: *Gordon v. Bucknell*, 38-438.

599. Subscribing witnesses: Where it is shown that the subscribing witness to an instrument is out of the state, or that his place of residence is not known, and that diligent inquiry has been made to find him, other evidence is admissible to prove the execution of the instrument: *Ballinger v. Davis*, 29-512.

600. Letters received in reply to others proved to have been sent to a party are admissible in evidence without proof of the signature of such party: *Lyon v. Railway Passenger Assurance Co.*, 46-631.

601. Letters purporting to be written by one party to another relating to the subject in controversy between them, received through the mail, and purporting to be in answer to letters written by the other party, are admissible in evidence, although written by a type-writer, and in the absence of direct evidence that they were written by the party by whom they purport to have been written or by his directions: *Davis v. Robinson*, 67-355.

602. Signature: Where a witness in his deposition produced certain written orders purporting to be signed by defendant, *held*, that such orders were admissible without proof of defendant's execution thereof, it being time enough to prove such fact when their admissibility was objected to for that reason: *Davis Sewing Machine Co. v. McGinnis*, 45-538.

603. Evidence of the genuineness of the signature, when offered for the purpose of admitting a written instrument to the jury, is addressed to the court, and though it may not have been sufficient at the time of the introduction of the instrument, yet if such genuineness is afterwards established, the error in allowing the introduction of the instrument at the time will be without prejudice and not a ground for reversal: *Davenport v. Cummings*, 15-219.

As to the method of putting in issue the genuineness of a signature to a written instrument and the proof necessary to establish such signature, see PLEADINGS, V, d.

That the instrument may be introduced before the proof of signature is made, the order of introduction of evidence being discretionary with the court, see *infra*, § 1386.

3. Primary and secondary evidence; the best evidences.

604. Obligation to produce the best evidence: No evidence shall be received which is merely substitutionary in its nature so long as original evidence can be had: *Williams v. Heath*, 22-519.

605. The fact that a party has a life lease on real property, such lease being in writing, must be proven by the written lease itself, unless its absence is properly accounted for. Until it is accounted for, parol proof of the contents will be inadmissible: *Wallace v. Wallace*, 62-651.

606. Where the testimony in a foreclosure suit was reduced to writing and made part of the record, *held*, that such record was the best evidence of what the testimony was, and it was not proper to ask a witness what he testified to on such trial: *Gaston v. Austin*, 52-35.

607. Where a family record is admissible

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in evidence, the original must be produced, and the testimony of a witness, even though given from the record before him, is secondary and not admissible: *Greenleaf v. Du-buque & S. C. R. Co.*, 30-801.

608. Where the question of incorporation is in issue, parol evidence to prove incorporation is not competent, the fact being such that there must be written evidence thereof: *Jones v. Hopkins*, 32-503.

609. Testimony of an agent as to what he wrote to his principal, *held* not admissible without accounting for the absence of the letter itself: *Gimbel v. Salomon*, 54-389.

610. A witness cannot be asked whether a bill of invoice seen by him at a previous time covered certain goods in question, the bill being, until its loss or absence is accounted for, the best evidence of its contents: *Sunberg v. Babcock*, 66-515.

611. The officer's return on an execution is the evidence as to whether a levy has been made, and, if so, what property is covered by it. If this return is lost, parol evidence can be introduced as in case of any lost record, but it must be confined to evidence of the contents of the lost return: *Le Barron v. Taylor*, 53-637.

612. A certified copy of the officer's return on an execution is admissible in evidence without accounting for the original: *Dupont v. Downing*, 6-172.

613. Service of original notice may be proven as well by the copy of the notice served upon defendant and certified by the officer as being a true copy as by that on which the officer makes his return: *Hollenbeck v. Stanberry*, 38-325.

614. Other notices: Proof of service of a notice may be made by the oath of any person cognizant of the fact, and when it is shown that the paper offered in proof of such service is a true copy of the original, such proof being by affidavit or the oath of the person making the service, a copy of such affidavit and in connection with such oath is competent evidence although the opposite party has not been required to produce the original notice and its loss or destruction is not shown: *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69-320.

615. Contents of recorded instrument: Under the statute making the record of an

instrument duly acknowledged and recorded, or a certified copy of such record, competent evidence of the contents thereof (Code, § 3660), the record of such instrument is not admissible as evidence unless it is shown that the original is lost or does not belong to the party wishing to use the same or is not within his control: *Williams v. Heath*, 22-519; *Ackley v. Sexton*, 24-320; *Courtright v. Deeds*, 37-503; *Jaffray v. Thompson*, 65-322; *State v. Penny*, 70—.

616. What sufficient showing as to inability to produce: Where it is not shown that the instrument is lost, the party desiring to introduce a copy thereof should show both that it does not belong to him and that it is not under his control; but it will not be considered to be within his control merely from the fact that he may compel its production by a subpoena *duces tecum*: *McNichols v. Wilson*, 42-385.

617. In a criminal prosecution where the introduction of a mortgage in evidence became material in behalf of the state, *held*, that the testimony of the prosecuting witness, that he did not have possession of the original instrument, was not sufficient showing to authorize the admission of secondary evidence: *State v. Penny*, 70—.

618. Where it was testified by the attorney of a party that the party offering in evidence the record of a deed did not have the original deed and that he could obtain no knowledge as to where it was, *held*, that the record should have been admitted: *Olleman v. Kel-gore*, 52-88.

619. Where a party offering in evidence a deed proved that application had been made to a person who ought to have had the deed, and search had been made among papers among which it probably would have been found, without success, *held*, that secondary evidence was properly admitted: *Laird v. Kilbourne*, 70—.

620. It does not follow that deeds belong to a grantee simply because they are executed to his grantor. They may contain a description of many other tracts of land owned by such grantor or his other grantees: *McNichols v. Wilson*, 42-385.

621. Where it appeared that the original was part of the files of a case in the supreme court and could have been readily procured,

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held, that a copy was not admissible in evidence: *Byington v. Oaks*, 32-488.

622. But where a deed had been introduced in evidence in a case in another county and was in the hands of the court there, held, that it was sufficiently shown not to be in the possession or under the control of the party: *Ingle v. Jones*, 43-286.

623. Proof of delivery: The provisions of statute as to the admissibility of the record of an instrument in evidence do not dispense with the necessity of proof of delivery of the original in cases where such proof would be necessary, if the original itself were introduced: *Foley v. Howard*, 8-58.

624. Land patents: The statutory provision as to the introduction in evidence of the record of instruments duly acknowledged and recorded was not sufficient to make the record copy of a patent of lands from the United States admissible in evidence: *Curtis v. Hunting*, 6-536. (But now see the statutory provision, 16 G. A., ch. 10, McClain's Ann. Stats., 925.)

As to proof of lost deeds, etc., to establish title, see further, *supra*, §§ 509, 510.

625. What deemed primary evidence: In an action upon a subscription to the capital of a railway corporation, it appeared that at a meeting called for the purpose, the names of the subscribers and amounts subscribed were written by the solicitors of the company upon a small book or slip of paper, and afterwards transcribed by an officer of the company into the book offered in evidence, under authority conferred at the meeting so to do; held, that the book and slips of paper used at the meeting were but memoranda of the authority conferred upon the officer, and the book upon which they were finally entered became the original contract of subscription and was properly admitted in evidence without proof of the loss of the memoranda: *Iowa & M. R. Co. v. Perkins*, 28-231.

626. Where the written contract is void: Where an instrument evidencing a written contract is invalid so as not to be admissible in evidence, but the contract itself remains unaffected, if by the rules of law it is such as may be shown by parol had there been no written instrument, the attempt to reduce it to writing will not exclude parol evidence of

the contract: *McAfferty v. Hale*, 24-355; *Leach v. Hale*, 31-69.

627. Parol evidence deemed primary, when: Parol evidence of the fact that a sale of land was made in writing by a quitclaim deed is admissible: *Trimble v. Shaffer*, 8 G. Gr., 233.

628. Where the question was whether a note had been canceled by the taking of a new note in lieu thereof, held, that parol evidence as to whether the new note had been taken in place of the old one was admissible as primary evidence, although the new note was not produced: *Morrison v. Myers*, 11-538.

629. Though evidence of the contents of a written notice cannot be admitted without accounting for the absence of the writing, yet the fact of notice may be stated: *Burlington Gas Light, etc., Co. v. Greene*, 28-289.

630. Where the question is whether as a fact a certain written contract was made and not as to the terms thereof, parol evidence as to the existence of the contract is admissible: *St. Louis & C. R. R. Co. v. Eakins*, 30-279.

631. Parol evidence as to the fact of making a written instrument will not be secondary: *Bish v. Hawkeye Ins. Co.*, 69-184.

632. A surveyor may state the result of his survey although based upon a record: *Messer v. Reginnitter*, 32-812.

633. When the question whether a person doing an act was an officer arises between third persons, oral evidence that he was such officer is admissible: *Gourley v. Hankins*, 2-75.

634. The fact of marriage in a prosecution for adultery need not be established by record evidence, and testimony of a party present at the time of the marriage is competent evidence of the fact: *State v. Hazen*, 39-648.

635. Items of account may be testified to by a witness although the account itself is not produced: *Wilson Sewing Machine Co. v. Bull*, 52-554.

636. Excuse for non-production of original, what sufficient: Where it does not appear that an instrument at one time in the possession of the party is lost or beyond his control, he cannot introduce secondary evidence of the contents thereof: *Hawkins v. Rice*, 40-435.

Primary and secondary; the best.

637. Secondary evidence cannot be produced to prove the contents of a written instrument unless proper steps have been taken to require its production or prove its loss, even though it may appear that it is properly in the possession of the adverse party: *Patterson v. Linder*, 14-414.

638. Where it is claimed that the original of a written instrument is lost, such fact of loss must be satisfactorily shown before a copy can be introduced in evidence: *Grimes v. Simpson College*, 42-589.

639. The fact of an instrument being lost cannot be established without evidence that search has been made therefor: *Howe Machine Co. v. Stiles*, 53-424; *Hansen v. American Ins. Co.*, 57-741.

640. Where the loss or destruction of the primary evidence is not shown, and there is no evidence of search being made therefor in the place where it should be found, the admission of secondary evidence is improper: *Hill v. Aultmann*, 68-630.

641. Testimony of a party to the suit who never had the custody of an instrument, that he does not know where it is, is not sufficient to authorize the admission of secondary evidence as to its contents: *Horseman v. Todhunter*, 12-230.

642. Where a party is not entitled to the possession or control of a written instrument, it is not necessary to show that the original is not in his possession or under his control before introducing a copy thereof: *Bixby v. Carskaddon*, 55-533.

643. Where a company became the successor of an individual in prosecuting a particular business, and an order sent to the individual containing certain stipulations was filled by the company, *held*, that the company became bound by the terms of the contract under which the order had been made to the individual, and that upon proof of such facts, it appearing that the contract, if in existence at all, was in the possession of either the individual or the company, who were joint parties to the suit, and the existence of the contract being denied by them in the pleadings, secondary evidence of its contents became admissible: *Cook Mfg. Co. v. Randall*, 62-244.

644. Where it appeared that the witness had made search for an instrument which he

had supposed he could not find it, as to its contents, a his evidence that it another place where made within a prop *consin v. Young*, 30

645. Where a county warrant in session, that he cop petition and that it that the copy in the one, etc., *held*, that p original was suffice properly admitted in *v. Grundy County*, 24

646. Where an ag alone had held posse which had never beer party himself, testified the showing was suffice 36-336.

647. The statement which had been taken new note, that he had and could not find it showing of loss, or sear it ought to be found, t duction of secondary e tents: *Crowe v. Capwell*

648. To entitle a wit the contents of letters r not sufficient for him to for them and could not f they were destroyed, if that he has looked in the ters were likely to be fou kept. It is not sufficien state that he does not kn *Howe Machine Co. v. Stil*

649. Where the attorn party, for the purpose of introduced in evidence, obt it and then put it out of his by giving it to the sheriff to cution, *held*, that proof of was authorized: *Selman v.*

650. Notice to produce dence of a letter claimed to b of the opposite party can without notice having been party to produce the origi the loss or destruction of

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such opposite party. Notice is necessary in order to advise the opposite party that an effort will be made to prove the instrument and enable him to meet the evidence with respect thereto: *Burlington Lumber Co. v. Whitebreast Coal, etc., Co.*, 66-292.

651. Where, without any notice to produce a paper, the party in whose custody it is brings it into court, claiming that it is the paper in question, the opposite party may introduce evidence to show that a portion thereof has been detached, and to prove the contents of the part not produced: *Bell v. Chicago, B. & Q. R. Co.*, 64-321.

652. The failure to produce an instrument upon notice has only the effect of admitting secondary proof of its contents, and will not of itself raise the presumption that such instrument contains something which would defeat the rights claimed thereunder by the party failing to produce it: *Hunt v. Collins*, 4-56.

653. A letter-press copy of a letter in possession of a party cannot be introduced without notice to the opposite party to produce the original: *Burlington Lumber Co. v. Whitebreast Coal, etc., Co.*, 66-292; *Cable v. Paine*, 8 McCrary, 169.

654. How contents proved: After proof of the loss of a record, its contents may be proven like any other document by secondary evidence, which may be a copy, if it can be procured, or if not procurable, then parol evidence: *Higgins v. Reed*, 8-298.

655. Where a record is shown to be lost, its contents may be proved by any secondary evidence. If the offer discloses the fact that other and better evidence exists, then such other and better evidence must be produced. But if the existence of such other and better evidence is not disclosed, the party objecting to that offer must show that there is better: *Conger v. Converse*, 9-554.

656. Where it is sought to prove the liability of defendant by introducing in evidence a copy of a lost paper evidencing such liability, it must appear that the original was genuine: *Corse v. Sanford*, 14-235.

657. A copy of a copy of a written instrument is not admissible in evidence without proof that the first copy was a true one: *Sternburg v. Callanan*, 14-251.

658. Parol evidence of a contract of af-

freightment held admissible to show that defendant had been in the habit of receiving goods for the plaintiff and delivering them in accordance with what were claimed to be the terms of the lost instrument: *Beiderbecke v. Merchants' Despatch Transportation Co.*, 39-500.

659. A judgment as to specific property is not void because the property is not therein described, if it refers to a petition in the case where the property is described, and in case of the loss of the petition it is competent to prove its contents by parol: *Foster v. Bowman*, 55-237.

660. Where it is attempted to make out an ante-nuptial contract by proof of the contents of lost letters, it is not sufficient that witnesses give their construction or opinion of the language used, but the contents should be so given that the court may be enabled to judge therefrom whether there was a contract in writing: *Ehwell v. Walker*, 52-256.

As to the order of introduction of secondary evidence, see *infra*, § 1238.

661. Failure to object to the introduction of secondary evidence will prevent the party from complaining on appeal of any error in the introduction of such evidence: *Ham v. Wisconsin, I. & N. R. Co.*, 61-716; *Taylor v. Wendling*, 66-562; *Saunders v. Mullen*, 66-728.

662. Where secondary evidence is introduced without objection on the trial, objection cannot be raised for the first time by an instruction that the primary evidence is necessary to a recovery: *State v. Munzenmaier*, 24-87.

663. Where secondary evidence is introduced without a proper foundation being laid therefor, but without any objection on that ground, it becomes in effect primary: *Jaffray v. Thompson*, 65-323.

664. Therefore, held, that where the entry in the judgment docket was introduced to prove a judgment, and no objection was made that the judgment itself was not introduced, the evidence was sufficient: *Moore v. McKinley*, 60-367.

665. Failure to object to the introduction of parol evidence as to a matter which can only be properly evidenced in writing does not waive the necessity of written evidence. So held as to the request of a creditor to the

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principal to enforce his claim against such principal, which request is by statute required to be written: *Davis v. Payne*, 45-194.

666. Error cured: Error in the admission of secondary evidence without accounting for the failure to introduce the primary evidence will be cured by evidence subsequently introduced that the primary evidence was not in existence: *Leebrick v. Stahle*, 68-515.

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667. Prior or contemporaneous parol agreement cannot be shown: Prior or contemporaneous declarations or understandings are merged in a written contract, and direct and independent extrinsic evidence is not, in an action at law and in the absence of fraud, admissible to show an intention different from that contained in the instrument itself: *Pilmer v. Branch of State Bank*, 16-321.

668. Where a contract is reduced to writing, the writing speaks for itself, and, in the absence of fraud or mistake, must be accepted as the authoritative evidence of the contract; and all evidence to change or alter it or in conflict with its terms is inadmissible: *Anderson v. Weiser*, 24-428.

669. In the absence of fraud or mistake, the parties to a written contract are precluded from showing that the agreement which it was executed to witness was different in its terms from that embodied in the writing: *Applegate v. Burlington & S. W. R. Co.*, 41-214.

670. It is conclusively presumed, in the absence of fraud, accident or mistake, that a written contract embraces all the agreement of the parties entered into at the time, and a parol contract in relation to the same matter cannot be shown: *Mann v. Independent School Dist.*, 52-130.

671. Evidence of a prior contract in parol cannot, in the absence of fraud, accident or mistake, be introduced to vary a subsequent written contract covering the subject-matter: *Barhydt v. Bonney*, 55-717.

672. Conversations by the parties relative to a trade which took place some days previous to the time of the trade, and in which nothing was agreed which constituted any part of the trade, should not be admitted in

evidence as bearing upon the question as to what the terms of the final trade were: *Johnson v. Harder*, 45-677.

673. Evidence of a contemporaneous contract in parol is not admissible for the purpose of varying or contradicting the terms of a written agreement: *McClelland v. James*, 33-571; *Cedar Rapids & M. R. R. Co. v. Boone County*, 34-45; *Farmer v. Perry*, 70—.

674. Where parties understand what is embraced in a written contract, and there is no stipulation omitted therefrom by mistake, or any ignorance or mistake of the law whereby it fails to embody their agreement, parol evidence of a contemporaneous agreement cannot be introduced to vary its effect: *Taylor v. Trulock*, 55-448.

675. A written agreement of the parties is conclusively presumed to be the final agreement, and any prior parol agreement inconsistent therewith is presumed to be waived: *Myers v. Munson*, 65-423.

676. A prior or contemporaneous agreement in parol cannot be shown in evidence when inconsistent with a written agreement, unless it be pleaded as constituting fraudulent representations or inducements to the contract: *Roberts v. Waters*, 9-434.

677. Where a written contract is reasonably clear in its provisions, a prior oral agreement under which it was executed cannot be proven even for the purpose of extending the meaning of the written contract, especially where it is sought in this manner to eliminate therefrom a distinct provision contained therein: *Annis v. Annis*, 61-220.

678. In an action upon a contract it is not competent to change or modify it, or engraft conditions upon it not expressed therein, by parol evidence of declarations or agreement of the parties, made before or at the time of execution: *Paddock v. Bartlett*, 68-16.

679. Parol evidence tending to prove a different contract from that which is reduced to writing is not admissible, and the court, instead of submitting to the jury the effect of such evidence, should determine for itself the interpretation of the written instrument: *Daly v. W. W. Kimball Co.*, 67-132.

680. While parol evidence may be introduced to show failure or illegality of consideration, it is not proper by parol evidence to

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show that a bill of sale, absolute on its face, is in fact entirely different, as, for instance, a mere bailment of the property for a temporary purpose: *Allen v. Bryson*, 67-591.

681. The rule that parol evidence is inadmissible to contradict a written contract is not applicable in a criminal prosecution for selling mortgaged chattel property, without the consent of the mortgagee, for the purpose of excluding evidence of an oral consent to such sale given before the execution of the mortgage: *Walker v. Camp*, 69-741.

That parol evidence is admissible to show fraud, accident or mistake, see *infra*, §§ 775-788.

682. Examples: Parol evidence as to the time for the execution of a deed under a contract to convey is inadmissible when the contract is in writing: *Warren v. Crew*, 22-315.

683. The resolution of a city council accepting a written proposition for services to be performed by contract cannot be varied by parol evidence: *Curtis v. Waterloo*, 38-266.

684. Where it appears that there is between the parties a written warranty, recovery cannot be had upon proof of a different contemporaneous parol warranty: *Shepherd v. Gilroy*, 46-193.

685. Where a surety became bound by a written contract and also by a bond, *held*, that he could not be permitted to show by parol evidence an agreement that the liability under the bond was to be measured by the terms of the written contract: *Domestic Sewing Machine Co. v. Webster*, 47-357.

686. Where a written instrument purports to be executed by and binding upon one person only as party of the one part, parol evidence is not admissible to show that the agreement was a joint one between such person and another intended to be interested therein: *Chambers v. Brown*, 69-213.

687. A contract of subscription cannot be varied by parol evidence as to the understanding existing at the time of the subscription: *McCabe v. O'Connor*, 69-134.

688. Parol evidence to show intent: It is not competent to vary a written contract by showing that the intent of the parties was different from that implied in the words used therein: *Walker v. Manning*, 6-519.

689. Therefore, *held* not proper to show by parol evidence that work provided for by a

contract was not to be done according to the specifications of the contract but in a different manner: *Ibid*.

690. A witness cannot give his understanding of the legal effect of an instrument, nor state how he interpreted it. The law presumes that it was understood according to the true import of its words: *Curtis v. Cass County*, 49-421.

691. A contract in writing, signed by a party with a full knowledge of its contents, cannot be defeated by him upon proof that it was intended and agreed in parol between the parties that such contract was executed for an entirely different object from that apparent upon its face, and that it was not intended to evidence the obligations of the parties to each other: *Hutton v. Maines*, 68-650.

692. Parol evidence is admissible to vary a blank indorsement by showing that it was to be without recourse: *Harrison v. McKim*, 18-485.

693. Where parties have entered into a written contract, but the words do not express their whole contract, but are nevertheless of such character that the law, by implication, superadds something, the implication may be rebutted or controlled by parol evidence. But where there is nothing left for implication, and the words used are a complete expression of the contract, parol evidence is not admissible to show that the intention of the parties was different from that expressed by the language used. So *held* with reference to the assignment of a judgment: *Evans v. Burns*, 67-179.

694. Parol conditions: Parol evidence is incompetent to engraft a condition upon a deed which contains no such words, there being no mistake in the deed, nor any intention at the time of its execution that it should contain any such condition, the action not being one to correct the deed: *Marshall County High School Co. v. Iowa Evangelical Synod*, 58-360.

695. Where certain representations were made at the time of the signing of a subscription in aid of a railway, such representations relating to the proposed construction of the railway and its effect upon the adjoining land, but no conditions as to the course of the railway were embodied in the

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fringement of the rule excluding parol contemporaneous evidence to contradict or vary the terms of a written instrument: *Port v. Robbins*, 35-208.

And on this point see, further, SURETYSHIP, I, c.

712. It is not competent by parol evidence to show that no payment upon a note was to be made and that it should be payable only at the option of the maker, such evidence being inconsistent with the face of the instrument: *Works v. Hershey*, 35-340.

713. It is not competent to show by parol that the payee of a note received it with the understanding that payment thereof was not to be claimed except upon a contingency: *Atkinson v. Blair*, 38-156.

714. Parol evidence is not admissible to show that the indorsement of a promissory note was made with the understanding that the indorsee should not have recourse thereon: *Sands v. Wood*, 1-263.

715. But a blank indorsement may be shown to have been made without recourse: *Harrison v. McKim*, 18-485.

716. It may be shown by parol that the indorser, at the time of making the indorsement, requested the indorsee not to enforce collection until the maker became insolvent: *Friend v. Beebe*, 3 G. Gr., 279.

717. Parol evidence is not admissible to show that a check was given with the understanding that the drawer should not be liable thereon according to the ordinary rules of commercial paper: *American Emigrant Co. v. Clark*, 47-671.

718. Nor to show that a note executed with full knowledge of its terms and of every fact connected with it was intended by the parties as a mere memorandum or receipt: *Dickson v. Harris*, 60-727.

719. Nor to show that one whose name is not attached to a written contract was, in fact, a party thereto, as the principal of one who signed it as a party: *Davison v. Davenport Gas, etc., Co.*, 24-419.

720. Nor to show that a written instrument purporting to have been executed by an agent and binding only upon the principal was intended to bind the agent individually: *Harkins v. Edwards*, 1-426.

721. It is proper, however, to show by parol evidence that the instrument was

executed without authority, and is, therefore, binding individually upon the agent: *Ibid.*

722. Where a party contracts in his own name, parol evidence is not admissible to show that it was understood he was acting only as agent for an undisclosed principal, and was not individually liable: *Bryan v. Brazil*, 52-350.

723. Date: While it is true that when the parties to a written agreement have made the date of the instrument a material part of it, as when the time of performance is fixed with reference to it, parol evidence is not admissible to vary or change it, yet where a party, for the purpose of correcting a supposed mistake in the date, changes it to another date which is itself incorrect, that fact does not preclude parol evidence as to the incorrectness of the date substituted: *Barlow v. Buckingham*, 68-169.

724. Nature of subject-matter: In the interpretation of a contract parol testimony may be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers: *Des Moines County v. Hinkley*, 62-637.

725. Surrounding circumstances: Evidence of facts existing at the time an agreement was made is not admissible for the purpose of showing that an agreement of a certain character would or would not likely have been made, where the question is, what agreement, express or implied, was made: *Nason v. Woodward*, 16-216.

726. It is always competent in considering a contract to show the situation of the parties, the subject-matter of the contract and the acts of the parties under the contract, as showing what the parties understood to be their obligations, and this is no infringement of the rule that the contract cannot be explained or varied by parol: *Thompson v. Locke*, 65-429.

727. The rule which inhibits the introduction of parol contemporaneous evidence to vary the terms of a valid written instrument is directed only against the admission of any other evidence of the language employed by the parties than that which is furnished by the writing itself. The writing may be read by the light of surrounding circumstances in order the more fully to understand the intent

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and meaning of the parties: *Rush v. Carpenter*, 54-132.

728. Evidence of inducement: Parol evidence of an agreement, serving as a consideration or inducement to a written contract, is not objectionable as extending or varying the written instrument: *Hubbell v. Ream*, 31-289.

729. To connect separate instruments: Where two papers are executed as parts of the same transaction they should be read and considered together, and the fact that they are parts of the same transaction may be shown by parol if it does not appear on their face. When the two papers are thus connected, they must, however, speak for themselves, and it is not proper to go further and to contravene them by parol evidence: *Myers v. Munson*, 65-423.

730. Whether subsequent agreement is a substitute for prior: Where it appears from the examination of two contracts by themselves, or in the light of the circumstances under which they were concluded, that the second and subsequent one was designed to take the place of the first and to embody the whole agreement of the parties, it is not error to refuse to admit parol testimony to show a contrary understanding: *Mather v. Butler County*, 28-253.

731. A subsequent written contract with reference to the same property referred to in a previous oral one, but not covering entirely the same ground, will not be held to supersede it: *Kempsy v. Metcalf*, 61-320.

732. Where partly in writing: A contract may be partly reduced to writing and partly exist by verbal agreement, and in such case the introduction of parol evidence to show the portion of the contract not reduced to writing is not a violation of the rule that a written contract cannot be proved by such evidence: *Keen v. Beckman*, 66-672.

733. Where the law does not require a contract to be in writing, and a part of it is reduced to writing and a part not, parol evidence is admissible to show the portion which is not reduced to writing: *Pinney v. Thompson*, 3-74.

734. Where the original contract was verbal and entire, and only a portion of it was reduced to writing, parol evidence is admissible to prove the portion not thus re-

duced to writing. evidence was admitted in a lease of a new periodical payment transaction in which upon the contract the property in the lessee: *Singer Holcomb*, 40-33.

735. Where a complete and conclusive and unimpeachable face it does not contradict, but a mere inference from parol evidence not the writing is admitted of the contract as inferred from the written instrument, 3 G. Gr., 17.

736. Where a declaration of a previous contract is not become evidence in sense as to prevent introduction of evidence with reference to the contract. It is to be of the final consummation previously made: *Pu Trayer v. Reeder*, 45-

737. A custom known to the parties to a contract is fixed matter of evidence: *Haddock v. W*

738. Where a tick delivered to an elevator completed contract upon evidence was necessary that custom and extent proven to show whether a sale or a bailment: *I*

739. But the extent of liability of the parties to a contract established by parol proof inconsistent with the contract have employed to explain: *Marks v. Cass County* 1

740. Where a receipt evidence to show a declaration of a particular day from one another, held, that evidence admitted which was sufficient to show that a contract between such contracts for goods delivered other during the afternoon

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day were not given until the day following: *Hewett v. Chicago, B. & Q. R. Co.*, 63-611.

741. Private rules or customs of a lessor will not affect the lessee of mining lands unless he had knowledge thereof, and such fact is a question for the jury. If there is no knowledge of such custom or rules and no special contract, the rights of the parties would be regulated by law and the established and uniform custom: *Beatty v. Gregory*, 17-109.

742. Evidence as to consideration: Parol evidence is admissible for the purpose of showing want of consideration for a written instrument: *Swan v. Ewing*, Mor., 344.

743. Or to show what the consideration for a written agreement was, and that such consideration has failed: *Scott v. Sweet*, 2 G. Gr., 224.

744. Or that the consideration mentioned in a deed has not been paid, or that it is different from the amount expressed therein: *Hall v. Perry*, 3 G. Gr., 579.

745. Parol evidence is admissible, as against a holder with notice, to prove that a contract constituted the consideration for a note, and that the consideration has failed: *Port v. Robbins*, 35-208.

746. Where the consideration of a contract is expressed in the written instrument itself in unmistakable language, and parol evidence is not necessary in order to understand it, such evidence is not admissible to vary or differently apply it: *Courtwright v. Strickler*, 87-882.

747. Parol evidence is admissible to show a consideration for a written contract other than that expressed on its face: *Taylor v. Wightman*, 51-411.

748. Parol evidence is receivable, it seems, to show that the consideration of a deed is other than that recited therein, but whether it is admissible to contradict a deed by showing want of consideration, *quære*: *Day v. Lown*, 51-864.

749. While it is competent to introduce parol evidence to show the real consideration of a conveyance of real estate, such evidence is not admissible to vary the terms of a written contract to convey, and show that as a part of the purchase price vendee agreed to pay off a certain mortgage: *Lewis v. Day*, 53-575.

Further as to oral evidence to show the consideration of a deed, see CONVEYANCES, §§ 108-116.

750. Subsequent modifications: Parol evidence is admissible to show that some subsequent arrangement was entered into with reference to the time, details or performance of a previous written contract: *Cox v. Carrell*, 6-350.

751. In an action upon a note claimed to have been altered, *held*, that although the note was not in the form contemplated in the contract in pursuance of which it was given, the party might prove a parol modification of such contract by which the terms of the note were changed: *Lister v. Clark*, 48-163.

752. Parol evidence of an agreement between the parties to a mortgage, entered into after the execution of the mortgage, by which the mortgagor was authorized to sell the property, *held* not incompetent as varying the written instrument: *Walker v. Camp*, 63-827.

753. Parol evidence of a subsequent agreement varying a written contract entered into without additional consideration cannot be received: *Jones v. Alley*, 4 G. Gr., 181.

754. Release: Parol evidence is admissible to show a release of a written obligation: *Hubbell v. Ream*, 31-289.

755. Settlement: A memorandum of a settlement *held* not to be a contract but merely a declaration designed as evidence of what was embraced in the settlement, so that parol evidence was admissible to show how it was made and what consideration passed: *Trowbridge v. Sypher*, 55-352.

756. A receipt may be explained by parol evidence: *Perkins v. Hodge*, 38-284; *Lowe v. Young*, 59-864.

757. Where county tax receipts were in evidence, *held* not error to allow the county treasurer to state the amount of a certain tax thereby shown to be receipted for: *Vaughn v. Stone*, 54-376.

758. Although a receipt may be varied by parol, yet where it contains a provision that the amount acknowledged thereby is received in settlement of a specified claim, the terms of settlement cannot be varied by parol evidence: *Stapleton v. King*, 33-28.

759. Assignment: Parol evidence is admissible to vary the amounts stated in an

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assignment to secure creditors, by showing that the indebtedness was different from the amount therein specified, where it appears that such amounts were merely regarded as approximate: *Platt v. Hedge*, 8-386.

760. Parol evidence is admissible to explain the purpose for which an assignment of account was made: *Cousins v. Westcott*, 15-253.

761. An assignment of a judgment, where the words used are a complete expression of the contract of the parties, cannot be shown by parol to have been intended as a satisfaction: *Evans v. Burns*, 67-179.

762. Signature: In an action against a tenant for unlawfully detaining the premises, the fact that the lease under which he is in possession was signed by him, although the signature was not that of his own name, may be shown by parol: *Simons v. Marshall*, 3 G. Gr., 502.

763. Miscellaneous cases: The written report of a committee appointed by a city council to adjust, after conference with the creditor, an indebtedness of the city, may be varied or added to in behalf of the creditor, in an action upon the debt, by parol evidence as to statements made by the creditor at the conference, he not having signed the report: *Porter v. Dubuque*, 20-440.

764. Where material for which a mechanic's lien is claimed was furnished under a written contract, parol evidence may be introduced to show the purpose for which it was furnished. Such evidence does not add to, vary or contradict the writing: *Neilson v. Iowa Eastern R. Co.*, 51-184.

765. Where, after knowledge of breach of warranty in the sale of a machine, the purchaser gave his note for the purchase price, *held*, that as the claim on the breach of warranty was a separate cause of action, defendant was not barred by the giving of the note from showing by parol that he did not thereby waive such cause of action: *Aultman v. Wheeler*, 49-647.

766. To vary or contradict a record: Parol evidence is not admissible to vary the recitals of a record: *State v. Clemons*, 9-534.

767. A record cannot be overturned and rendered nugatory by extrinsic evidence. So *held* in regard to the date of filing a motion as shown by the clerk's filing mark thereon: *Farley v. Budd*, 14-289.

768. A record cannot be contradicted to date of approval: *Brockway*, 55-4.

769. Parol proof add to the language plain and unambiguous: *S. C. R. Co.*, 20-3.

770. The party record by the parol cannot be shown by parol evidence in such copy: *Morgan*.

771. Where it appears that a proceeding that a party by consent, and it terminates whether it is prosecuted with diligence, *held*, that parol evidence explain the circumstance was given: *F* 261.

772. Where judgment agreement, *held*, that admissible between the parties was agreed that such first lien upon the parties: *Perry v. Miller*.

773. Parol evidence that a party to the party in a former proceeding which is introduced: *v. Vandebur*, 50-651.

774. Where a judgment in another state is in is competent to establish court had no jurisdiction: 429.

And see further, *J*

775. To show fraud: Parol evidence is admissible to show fraud or fraud in the making: *Hunt v. Carr*.

776. Cases of fraud exceptions to the general rule of evidence to vary or contradict but the mistake or fraud is entirely clear and establishing a fact: *Ring v.*

777. Parol proof is the defense of fraud in a contract, even though it is shown: *Hard v. McCarty*, *Morgan*.

778. Where fraud, *s*

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day were not given until the day following: *Hewett v. Chicago, B. & Q. R. Co.*, 63-611.

741. Private rules or customs of a lessor will not affect the lessee of mining lands unless he had knowledge thereof, and such fact is a question for the jury. If there is no knowledge of such custom or rules and no special contract, the rights of the parties would be regulated by law and the established and uniform custom: *Beatty v. Gregory*, 17-109.

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743. Or to show what the consideration for a written agreement was, and that such consideration has failed: *Scott v. Sweet*, 2 G. Gr., 224.

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747. Parol evidence is admissible to show a consideration for a written contract other than that expressed on its face: *Taylor v. Wightman*, 51-411.

748. Parol evidence is receivable, it seems, to show that the consideration of a deed is other than that recited therein, but whether it is admissible to contradict a deed by showing want of consideration, *quære*: *Day v. Lowen*, 51-364.

749. While it is competent to introduce parol evidence to show the real consideration of a conveyance of real estate, such evidence is not admissible to vary the terms of a written contract to convey, and show that as a part of the purchase price vendee agreed to pay off a certain mortgage: *Lewis v. Day*, 53-575.

Further as to oral evidence to show the consideration of a deed, see CONVEYANCES, §§ 108-116.

750. Subsequent modifications: Parol evidence is admissible to show that some subsequent arrangement was entered into with reference to the time, details or performance of a previous written contract: *Cox v. Carrell*, 6-350.

751. In an action upon a note claimed to have been altered, *held*, that although the note was not in the form contemplated in the contract in pursuance of which it was given, the party might prove a parol modification of such contract by which the terms of the note were changed: *Lister v. Clark*, 48-168.

752. Parol evidence of an agreement between the parties to a mortgage, entered into after the execution of the mortgage, by which the mortgagor was authorized to sell the property, *held* not incompetent as varying the written instrument: *Walker v. Camp*, 63-637.

753. Parol evidence of a subsequent agreement varying a written contract entered into without additional consideration cannot be received: *Jones v. Alley*, 4 G. Gr., 181.

754. Release: Parol evidence is admissible to show a release of a written obligation: *Hubbell v. Ream*, 31-289.

755. Settlement: A memorandum of a settlement *held* not to be a contract but merely a declaration designed as evidence of what was embraced in the settlement, so that parol evidence was admissible to show how it was made and what consideration passed: *Trowbridge v. Sypher*, 55-352.

756. A receipt may be explained by parol evidence: *Perkins v. Hodge*, 38-284; *Lowe v. Young*, 59-364.

757. Where county tax receipts were in evidence, *held* not error to allow the county treasurer to state the amount of a certain tax thereby shown to be receipted for: *Vaughn v. Stone*, 54-376.

758. Although a receipt may be varied by parol, yet where it contains a provision that the amount acknowledged thereby is received in settlement of a specified claim, the terms of settlement cannot be varied by parol evidence: *Stapleton v. King*, 33-28.

759. Assignment: Parol evidence is admissible to vary the amounts stated in an

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assignment to secure creditors, by showing that the indebtedness was different from the amount therein specified, where it appears that such amounts were merely regarded as approximate: *Platt v. Hedge*, 8-386.

760. Parol evidence is admissible to explain the purpose for which an assignment of account was made: *Cousins v. Westcott*, 15-253.

761. An assignment of a judgment, where the words used are a complete expression of the contract of the parties, cannot be shown by parol to have been intended as a satisfaction: *Evans v. Burns*, 67-179.

762. Signature: In an action against a tenant for unlawfully detaining the premises, the fact that the lease under which he is in possession was signed by him, although the signature was not that of his own name, may be shown by parol: *Simons v. Marshall*, 3 G. Gr., 502.

763. Miscellaneous cases: The written report of a committee appointed by a city council to adjust, after conference with the creditor, an indebtedness of the city, may be varied or added to in behalf of the creditor, in an action upon the debt, by parol evidence as to statements made by the creditor at the conference, he not having signed the report: *Porter v. Dubuque*, 20-440.

764. Where material for which a mechanic's lien is claimed was furnished under a written contract, parol evidence may be introduced to show the purpose for which it was furnished. Such evidence does not add to, vary or contradict the writing: *Neilson v. Iowa Eastern R. Co.*, 51-184.

765. Where, after knowledge of breach of warranty in the sale of a machine, the purchaser gave his note for the purchase price, held, that as the claim on the breach of warranty was a separate cause of action, defendant was not barred by the giving of the note from showing by parol that he did not thereby waive such cause of action: *Aultman v. Wheeler*, 49-647.

766. To vary or contradict a record: Parol evidence is not admissible to vary the recitals of a record: *State v. Clemons*, 9-534.

767. A record cannot be overturned and rendered nugatory by extrinsic evidence. So held in regard to the date of filing a motion as shown by the clerk's filing mark thereon: *Farley v. Budd*, 14-289.

768. A record imports absolute verity and cannot be contradicted by parol. So held as to date of approval of a stay bond: *Maynes v. Brockway*, 55-457.

769. Parol proof is inadmissible to vary or add to the language of a decree which is plain and unambiguous: *Ney v. Dubuque & S. C. R. Co.*, 20-347.

770. The party who attempts to prove a record by the production of a copy thereof cannot by parol evidence correct a mistake in such copy: *Monk v. Corbin*, 58-503.

771. Where it appeared by the record in a proceeding that a continuance was granted by consent, and it became important to determine whether such proceeding had been prosecuted with diligence by the plaintiff, held, that parol evidence was admissible to explain the circumstances under which consent was given: *Porter v. Sigler*, 1 G. Gr., 261.

772. Where judgment was entered by agreement, held, that parol evidence was admissible between the parties to show that it was agreed that such judgment should be a first lien upon the property of one of the parties: *Perry v. Miller*, 54-277, 282.

773. Parol evidence is admissible to show that a party to the action is the same as a party in a former proceeding, the record of which is introduced in evidence: *Carmichael v. Vandebur*, 50-651.

774. Where a judgment or decree rendered in another state is introduced in evidence, it is competent to establish by parol that the court had no jurisdiction: *State v. Fleak*, 54-429.

And see further, JURISDICTION, IV.

775. To show fraud, accident or mistake: Parol evidence is admissible to show mistake or fraud in the making of a written instrument: *Hunt v. Carr*, 3 G. Gr., 581.

776. Cases of fraud or mistake are exceptions to the general rule excluding parol evidence to vary or control a written instrument, but the mistake or fraud must be made entirely clear and established by the most satisfactory proof: *Ring v. Ashworth*, 3-452.

777. Parol proof is admissible to sustain the defense of fraud or illegality in a contract, even though it be under seal: *Stannard v. McCarty*, Mor., 124.

778. Where fraud, accident or mistake is

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alleged respecting a written instrument, parol evidence is admissible, although it may have the effect to vary or contradict the terms of the instrument itself: *Officer v. Howe*, 32-142.

779. It is competent to show by parol that because of the fraud of a party to the instrument it does not express the real agreement: *Hopkins v. Hawkeye Ins. Co.*, 57-203.

780. The fact that a contract is in writing does not prevent the party proving by parol evidence that it was procured by fraud: *Childs v. Dobbins*, 61-109.

781. It may be shown by parol either that a written contract, on account of the fraud of one of the parties, fails to express the entire terms of the contract, or that one party through the fraud of the other was deceived into making the agreement: *Rohrabacher v. Ware*, 37-85.

782. Therefore, in an action upon a written contract of warranty, *held*, that evidence was admissible to show that by false and fraudulent representations in respect to the article sold, the purchaser was induced to enter into a written instrument of sale without warranty, although such evidence tended to prove a parol warranty: *Ibid*.

783. Where it was alleged that in a sale of land by defendant to plaintiff, the plaintiff was induced by false and fraudulent representations to accept a deed which in fact conveyed only a portion of the lands, *held*, that the allegation was sufficient to admit evidence as to the terms and conditions of the contract and the quantity of the land sold: *Moore v. Brown*, 49-130.

784. Fraud and undue influence in the procurement of a deed may be shown by parol evidence although the effect will be to vary or contradict the instrument: *Day v. Loun*, 51-364.

785. Oral evidence is always competent to impeach the validity of an instrument on the ground of fraudulent alteration; and, where that fact is alleged, the oral agreement in pursuance of which the written instrument was executed may be proven as tending to show such alteration: *Coit v. Churchill*, 61-296.

786. Parol evidence is admissible to show fraud or mistake in a written instrument, although the other party to the contract be

not a party to the suit: *Fuller v. Lamar*, 53-477.

787. The rule excluding parol evidence which tends to vary the terms of a written instrument has no application where the writing either by accident or mistake does not contain the contract of the parties, and accident or fraud may be set up, proved and made available as a defense without in the first place having a formal reformation of the instrument: *Van Dusen v. Parley*, 40-70.

788. Where parties make an agreement for a conveyance and employ a scrivener to draw the conveyance, and he, by mistake, fails to express the contract in apt words by reason of a mistake in law as to the effect of the terms thus employed, equity will reform the writing, making it conform to the agreement previously entered into: *Courtright v. Courtright*, 63-356.

And see further, as to reformation of an instrument in case of accident or mistake, EQUITY, II, a.

789. To show that an instrument absolute in form is given only as security: In an action upon a policy of insurance which was to be void if the property was conveyed, the defense was made that plaintiff had assigned his insurable interest during the continuance of the policy; *held*, that parol evidence was admissible to show that the assignment, although absolute on its face, was given as security: *Ayres v. Home Ins. Co.*, 21-185.

790. Parol evidence is admissible in an action at law as well as in equity to show that a bill of sale absolute on its face was intended as a mortgage: *McAnnulty v. Seick*, 59-586.

791. Thus it may be shown that, notwithstanding a bill of sale absolute in form from one party to another, it was agreed between them that they should jointly hold the goods and sell them and apply the proceeds to the payment of a debt from the grantor to the grantee: *Ewaldt v. Farlow*, 62-212.

792. Parol evidence is admissible to show that an instrument of conveyance, absolute in form, was in fact intended as a mortgage: *Roberts v. McMahan*, 4 G. Gr., 34; *Green v. Turner*, 38-112.

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793. And such evidence is receivable not only as between the parties to the conveyance, but also when third parties are concerned, if they have not been misled by the transaction: *Hall v. Savill*, 3 G. Gr., 37.

794. Parol evidence is not admissible to change an absolute deed to one of trust unless the party alleges and seeks to prove fraud, accident or mistake: *Ratliff v. Ellis*, 2-59.

That parol evidence is admissible to show that a conveyance absolute in form is a mortgage, see MORTGAGES, II.

795. To show instrument of no effect: The rule that parol evidence is not admissible to contradict, vary or add to a written instrument is not infringed by the admission of such evidence tending to show the contract to be altogether void on account of fraud, or want of consideration, or that it never had any legal existence or binding force: *Bowman v. Torr*, 3-571; *Williams v. Donaldson*, 8-108; *First Nat. Bank v. Hurford*, 29-579.

796. Therefore, *held*, in an action on a note given for the purchase price of a machine, that parol proof was admissible to show a representation by the agent making the sale, and at the time of taking the note, that the machine would work according to warranty and that the note would not be binding unless it did: *Williams v. Donaldson*, 8-108.

797. To explain ambiguities: A patent ambiguity can never be removed by parol evidence. The circumstances under which the contract was made may be developed for the purpose of arriving at the intention of the parties, unless such intention clearly appears upon the face of the instrument, but the intention cannot be enforced unless consistent with the language used, and cannot be ascertained by bringing forward proof of declarations or conversations which took place at the time the instrument was made, or before or after, except in case of a latent ambiguity: *McClelland v. James*, 38-571.

798. Where an ambiguity is such that a perusal of the instrument shows plainly that something more must be added before the reader can determine what of several things is meant, the rule is inflexible that

parol evidence cannot be admitted to supply the deficiency: *Palmer v. Albee*, 50-429.

799. So where defendant had subscribed on a subscription paper, "twenty acres of land," *held*, that an action thereon could not be maintained: *Ibid*.

800. To apply contract to subject-matter: If the subject-matter, persons, etc., mentioned in the writing are indefinite, so that it is not known to which the contract relates, parol evidence is admissible: *Pinney v. Thompson*, 3-74.

801. Although parol evidence may be admitted to apply the language of the contract to the specific thing or person intended, it is not admissible for the purpose of varying the terms of the contract: *Hylar v. Wellington*, 57-413.

802. Where, by a written contract, plaintiff was to have his choice of lands owned by defendant to the amount of a certain number of acres, *held*, that parol evidence as to the amount of land owned by defendant was admissible, not as explaining the written contract, but as connecting it with the subject-matter: *Carlyon v. Eade*, 48-707.

803. Parol evidence is admissible to apply the description in a certificate of purchase or tax deed to its subject-matter, though not for the purpose of adding to or varying the description therein: *Judd v. Anderson*, 51-345.

804. Where a contract in controversy specified that the party should furnish a room improved and suitable for a particular purpose, *held*, that parol evidence was not receivable to show that it was understood that he should furnish a particular room, there being no ambiguity for the reason that the contract did not purport to apply to a particular thing: *Thompson v. Stewart*, 60-223.

805. Where oral evidence introduced to aid in the interpretation of a contract was balanced, *held*, that the court must rely wholly upon the language of the instrument: *Wilson Sewing Machine Co. v. Rutledge*, 60-39.

As to parol evidence of circumstances, customs, usages, etc., in the construction of contracts, see CONTRACTS, §§ 402-422.

Persons or things; photographs; experiments; examination; resemblance.

5. Persons or things as evidence; photographs; experiments; examination of person; resemblance.

806. Photographs: The photograph of a railroad wreck, testified to by a witness as being correct, *held* admissible in evidence in an action against the company for injuries received in such accident. As the jury might be permitted to inspect the place of the accident for the purpose of more readily understanding and properly applying the evidence, so they may examine the photograph for the same purpose: *Locke v. Sioux City & P. R. Co.*, 46-109.

807. So where plaintiff, in an action against defendant for damages for assault and battery by the latter with a rawhide, introduced a ferrotype of his back taken three days after the injury, accompanied by the testimony of the person taking the same that it was a correct representation, *held*, that as it would have been proper, if possible, for the jury to examine the condition of plaintiff's injuries at the time the ferrotype was taken, it was properly admitted in evidence: *Reddin v. Gates*, 52-210.

808. Wherever it is important that the *locus in quo* or any object be described to the jury, it is competent to introduce a photographic view: *Barker v. Perry*, 67-146.

809. Also *held* that it was not improper, in connection with the photograph, to supply the jury with a magnifying glass for its examination: *Ibid.*

810. Examination of the person: In an action for personal injuries wherein it was claimed that plaintiff had sustained permanent injuries, *held*, that it was improper to refuse an application by defendant to have plaintiff subjected to a personal examination by physicians as to the extent of his injuries: *Schroeder v. Chicago, R. I. & P. R. Co.*, 47-375.

811. In actions for personal injuries, injuries upon the person may be shown to the jury and inspected by them. The same is true in the trial of criminal assaults. Such practice has been too long sanctioned to be now called in question: *Barker v. Perry*, 67-146.

812. Experiments: Where the question in issue was whether a railroad engine attached to a train could pass over a certain portion of the track with steam shut off, *held*, that an experiment by running an engine connected with cars in that manner over such portion of the track in the presence of the jury on board of the cars was not necessarily improper: *Stockwell v. Chicago, C. & D. R. Co.*, 43-470.

813. Resemblance of child to putative father: In a bastardy proceeding, *held* not error to exhibit to the jury a child over two years of age whose paternity was in question, for the purpose of showing a resemblance between the child and defendant. Also *held* that it was not error to allow counsel for prosecution to call attention to alleged resemblances, the jury being instructed to the effect that if they did not clearly see the resemblance referred to, they should disregard all claims based thereon: *State v. Smith*, 54-104.

814. And in an action for criminal conversation, *held*, that an instruction to the jury that if they believed the child of plaintiff's wife shown to them during the trial resembled defendant, and their judgment and experience taught them that there was anything reliable in this appearance that would be sufficient to form an opinion on, they might consider it in corroborating the evidence of plaintiff's wife as to the paternity of the child, sufficiently limited the jury to the consideration of family resemblance and the likeness ordinarily seen between child and father: *Stumm v. Hummel*, 39-478.

815. But in a criminal prosecution for seduction, *held* error to exhibit to the jury an infant three months of age, claimed to be the result of the criminal connection, and to instruct the jury that if they found the child resembled the defendant as children resemble their fathers, and their judgment and experience should teach them that there was anything reliable in this appearance that it would be safe to form an opinion on, then they might consider such resemblance in corroboration of the prosecutrix and as testimony to connect defendant with the commission of the crime charged: *State v. Danforth*, 48-48.

Production and effect.—Burden of proof

III. PRODUCTION AND EFFECT OF EVIDENCE.

1. *Burden of proof; amount and preponderance of evidence.*

As to burden of proof and amount of evidence in criminal cases, see CRIMINAL LAW, III, 18, h.

816. Who has the burden of proof: The true test to determine upon whom is the burden of proof is to consider which party would have the verdict if no evidence is offered on either side. The burden of proof lies on the party to whom in such case the verdict ought to be given: *Veiths v. Hagge*, 8-163, 192; *Viele v. Germania Ins. Co.*, 26-9.

817. While it is true as a general proposition that the party having the affirmative of the issue has also the burden of proof, yet this is not always so, as, for instance, where in an action by the indorsee of a promissory note the defense of fraud in its inception is interposed, the burden of proof is upon plaintiff to show that he is a *bona fide* holder for value. So also where the grantee of one who has purchased in fraud of the rights of a prior purchaser, claims to have paid the consideration without notice of such fraud, the burden of proof is upon him, although the other party has alleged that such grantee is not a *bona fide* purchaser for value without notice: *Sillyman v. King*, 36-207.

See further as to the burden of proof in such cases, BILLS AND NOTES, §§ 367-376; NOTICE, III, b.

818. The question as to who has the burden of proof is properly a matter of practice, and the ruling of the court thereon will not be reviewed unless there is evidence of an abuse of discretion: *Viele v. Germania Ins. Co.*, 26-9.

819. As to allegations in answer: It is error to instruct the jury that as to affirmative defenses set up in the answer, the burden of proof is upon the defendant, where defendant has unnecessarily pleaded a matter, such as plaintiff's contributory negligence, as to which the plaintiff has the burden of proof: *Hawes v. Burlington, C. R. & N. R. Co.*, 64-315.

820. Allegations in reply: Such an instruction is also erroneous where there is an

affirmative defense confessed and avoided.

821. Where defendant denies an allegation of fact by the plaintiff in reply set off, the burden of proof was on plaintiff. Where the plaintiff's allegation of his reply is negative such as in *Wingham*, 50-307.

822. Fact within issue: Where a party who alleges the truth of any proposition lies upon the party who denies it, the burden of proof is upon the party who is supposed to be in the wrong. *Whipple*, 3 G.

823. In equity: Where a bill in equity is filed, the burden of proof is upon the plaintiff, and unless the bill is proved, the bill is dismissed. *Mitchell v. Sawyer*, 21.

824. Negligence: Where a party seeks to recover in an action for negligence, the burden of proof must be proved that the negligence of the person injured was not contributing to the injury. The burden is upon the plaintiff. *Illinois Cent. R. Co. v. Burlington, C. R. & N. R. Co.*

And further, see NEGLIGENCE, III, c.

825. Payment: Where a party seeks to establish that a party has paid, the burden of proof is upon the party who seeks to establish it. *Brinolf*, 32-265.

826. Proof as to payment: Where shares of a corporation are sold to a creditor upon condition that they be accepted as payment at a certain time, held, the burden of proof was upon the creditor to show that the shares were delivered to a third party, and where it appeared that the shares were delivered to a third party, he must show that such third party had authority to receive them, and that he delivered them to the creditor. *Thurlby*, 39-344.

827. Transmission of telegram: Where a telegram is incorrectly transmitted, the burden of proof is upon the telegraph company.

 Burden of proof; amount and preponderance.

that the error was caused by conditions that relieve it of responsibility: *Turner v. Hawk-eye Tel. Co.*, 41-458.

828. If the message is sent under a stipulation that the company will not be liable for mistakes unless the message is repeated, the plaintiff, to recover, must show not only the mistake, but some fault or negligence on the part of the company to render it liable: *Sweatland v. Illinois & Miss. Tel. Co.*, 27-433.

Further, see TELEGRAPHS.

829. **Opening and closing:** Where a party has insisted on the right to open and close, against the objection of the other party, and has been allowed by the court to do so, he cannot complain of an instruction that the burden of proof is upon him: *Lister v. Clark*, 48-168.

830. **Evidence in equilibrium:** Where the evidence is in equipoise, the party having the burden of proof must fail: *Hanson v. Stephenson*, 32-129; *Wadsworth v. Nevin*, 64-64.

831. **Weight of evidence:** Where the evidence is in conflict, the reasonableness of the respective conflicting statements should be taken into account, and it is error to instruct the jury that if the witnesses are equal in credibility and have equal means of knowledge, then the preponderance of testimony will be determined by the greater number: *Whitaker v. Parker*, 42-585.

832. The weight of testimony is not necessarily with the greater number of witnesses: *Crowley v. Burlington, C. R. & N. R. Co.*, 65-658.

833. Where a person claiming not to have heard a sound seeks to escape liability for negligence in not having heard it, evidence of other persons having equal opportunity to hear, that they did hear it, may be sufficient to overcome the direct testimony of the party: *Ford v. Central Iowa R. Co.*, 69-627.

834. Where the jury are directed that their verdict should be in accordance with the preponderance of evidence, they are simply directed that they should find for the party, upon any issue in the case, who adduces the greatest quantity of credible evidence as weighed in their own minds. When evidence is weighed according to the rules of law, the preponderance is with that side in

whose favor the scales of reason turn: *Bryan v. Chicago, R. I. & P. R. Co.*, 63-464.

835. It is not error to instruct the jury that they have a right to say whose testimony they will receive and whose they will disregard, in connection with the direction that they should not disregard any evidence without good cause for so doing: *Lanning v. Chicago, B. & Q. R. Co.*, 68-502.

836. An instruction to the jury, that if they cannot harmonize evidence they are at liberty to say whom they regard as truthful and honest, is not proper. The jury should not reject the evidence of any witness simply because it is in conflict with the evidence of other witnesses, but they should determine in the light of the story told, and all the circumstances, the very truth of the disputed proposition: *Drake v. Chicago, R. I. & P. R. Co.*, 70—.

837. **Written and oral evidence:** Where a witness testified from memory, six years after transactions referred to were said to have occurred, and there was a conflict between his evidence and certain books of original entry kept by the opposite party, held, that the written evidence was properly allowed to prevail: *Mattox v. Patterson*, 60-434.

838. **Disagreement of witnesses in minor points in their recollection and recital of transactions** does not necessarily militate against the candor of any of them. And unless there appears something which indicates a lack of candor, or untruthfulness on the part of the witness, the testimony of all the witnesses should receive proper and candid consideration by the jury: *State v. McDevitt*, 69-549.

839. The relative credibility of the respective parties in a prosecution for bigamy, in view of the character of each as shown by the evidence, considered: *State v. Nadal*, 69-478.

840. **Preponderance:** It is not necessary, in order to constitute a preponderance of evidence, that the mind be fully convinced of the truth of the testimony which controls the decision. In civil cases a fact may be found in accordance with a preponderance of the evidence, although the mind may be left in doubt as to the very truth: *Bryan v. Chicago, R. I. & P. R. Co.*, 63-464.

841. The expression "a fair preponderance

 Burden of proof; amount and preponderance.

of evidence" is not objectionable as meaning more than a mere preponderance: *Ibid.*

842. The party having the burden of proof in a civil case is not required to prove conclusively the truth of his allegations: *Middleton v. Middleton*, 31-151.

843. That evidence is sufficient and satisfactory which ordinarily satisfies an unprejudiced mind: *Gandy v. Chicago & N. W. R. Co.*, 30-420; *Babcock v. Chicago & N. W. R. Co.*, 62-593.

844. The law recognizes no such rule as that, in order to establish a conclusion by circumstantial evidence, the circumstances must have the force and effect, and produce the conviction in the minds of the jurors, of at least one credible witness, testifying positively to such facts. The preponderance of evidence may be determined by less testimony than what is equal in force and effect to the testimony of one witness: *Bixby v. Carskaddon*, 55-533.

845. Clear and satisfactory evidence: It is the established law of this state that questions of fact submitted to the jury in civil cases are to be determined by the preponderance of evidence, even though the question in issue is one which in equity requires clear, satisfactory and conclusive proof, as, for instance, when it is sought by parol to show that a deed absolute in terms is in fact a mortgage: *McAnnulty v. Seick*, 59-586.

846. In a civil action preponderance of evidence is all that is required to establish a fact in issue, and whatever amounts to a preponderance of evidence as to such fact may be regarded as clear and satisfactory proof thereof. Therefore, *held*, that preponderance of evidence was sufficient to establish a fraudulent alteration of a written instrument: *Coit v. Churchill*, 61-296.

847. The mind may be satisfied of the existence of any fact by less than what may be called clear proof. Therefore, *held*, that it was error in an action for seduction to charge the jury that the presumption in favor of the chastity of plaintiff could only be overcome by clear and satisfactory evidence: *West v. Druff*, 55-335.

848. It is error in a civil case to instruct the jury that a particular fact, as, for instance, that of forgery, must be "clearly and fairly proven," as such instruction requires

more than a mere preponderance of evidence: *Hall v. Wolff*, 61-559.

849. In an action to set aside a conveyance for fraud it is only necessary to establish the fraud by preponderance of testimony. Legal fraud may be made out without establishing fraudulent intent sufficient to render defendant guilty of a crime: *Lillie v. McMillan*, 52-463.

As to evidence of fraud, see further, FRAUD, §§ 24-35.

850. To overcome presumption: An instruction to the effect that the presumption that services were rendered for compensation and not gratuitously could be overcome by a preponderance of evidence, *held* not erroneous: *Rogers v. Millard*, 44-466.

851. Evidence of commission of crime: The rule of criminal law that a defendant can only be convicted upon proof of the crime charged beyond a reasonable doubt is not applicable in a civil action to recover damages for a criminal act, and in such case the plaintiff should be allowed to recover where the criminal act is established by preponderance of evidence. (Overruling *Barton v. Thompson*, 46-30): *Welch v. Jugenheimer*, 56-11; *Wood v. Porter*, 56-161; *Lewis v. Garretson*, 56-278; *Barton v. Thompson*, 56-571; *Kendig v. Overhulser*, 58-195.

852. So *held* in an action on an insurance policy, where it was alleged as a defense that plaintiff himself caused the fire in order to get the insurance: *Behrens v. Germania Ins. Co.*, 58-26.

853. In an action for false and fraudulent representations it is not necessary to prove the fact of fraud beyond a reasonable doubt, although intentional fraud might constitute a crime under the statute: *Faville v. Shehan*, 68-241.

854. In bastardy proceedings: The rule of criminal law requiring proof beyond a reasonable doubt is not applicable in favor of defendant in a bastardy proceeding: *State v. McGlothlen*, 56-544.

855. In civil actions for slander or libel in charging plaintiff with the commission of a crime, if defendant seeks to justify by pleading the truth of the charge, a preponderance of evidence of the commission of the crime is sufficient to support his defense. The criminal act need not be proven, as in

Presumptions; prima facie proof.

criminal cases, beyond a reasonable doubt, (Overruling *Bradley v. Kennedy*, 2 G. Gr., 231; *Forshee v. Abrams*, 2-571; *Fountain v. West*, 23-9; *Ellis v. Lindley*, 38-461; *Mott v. Dawson*, 46-533): *Riley v. Norton*, 65-306.

Weight of evidence is for jury: See INSTRUCTIONS, III, b.

856. Number of witnesses: The trial court has the power, in the exercise of a legal discretion, to control the number of witnesses that shall be examined to establish any fact: *Bays v. Herring*, 51-286.

And see, as to number of witnesses, *infra*, §§ 1266-1268.

2. Presumptions; prima facie proof.

As to presumption of intent in criminal cases, see CRIMINAL LAW, §§ 30-32.

857. Law and fact: Where the law holds that a certain presumption, unless overcome, will authorize conviction, it is a presumption recognized by the law and may therefore be termed a presumption of law. The term presumption of fact implies that from certain facts the law raises a presumption. Presumption of law or of fact may be used to express the same thought: *State v. Kelly*, 57 644.

858. Continuance of condition: Where a condition is shown to exist, it will be presumed until the contrary is shown by evidence or presumptions arising on the facts in the case: *State v. Jones*, 64-349.

859. Insanity: So held in regard to insanity: *Ibid*.

860. The fact that a person has been an inmate of an insane asylum and has been discharged in an improved condition, though not well, will not be sufficient to show existing insanity four years after such discharge, in the absence of other evidence thereof: *Ellis v. White*, 61-644.

861. Intoxication: Evidence of a condition of intoxication existing at 4 o'clock in the afternoon is not admissible to show the person's condition at 9 o'clock in the forenoon preceding: *State v. Hubbard*, 60-466.

862. Paternity: The presumption being in favor of the legitimacy of all children born during wedlock, held, in an action for seduction in which the paternity of a child born after the marriage of plaintiff was sought to

be fixed upon a person other than her husband, and the defendant sought to fix the paternity on the husband, that the burden of proof was upon the plaintiff: *Hopkins v. Mathias*, 66-333.

863. A child born in wedlock, whether begotten before or after marriage, is presumed to be the child of the husband, but such presumption may be rebutted by strong, satisfactory and conclusive evidence that the husband did not have access to the mother of the child when it was begotten. If a woman be pregnant at the time of marriage and the pregnancy be known to the husband, he will be conclusively presumed to be the father: *State v. Romaine*, 58-46.

864. Divorce: Where parties, who have been husband and wife, separate and the former lives with a woman claiming to be, and held out by him to be, and reputed to be, his wife, the presumption will be entertained that such cohabitation is legal, and that he has been divorced from his former wife, and this presumption will be entertained when the legality of a subsequent marriage by such former wife is called in question: *Blanchard v. Lambert*, 43-228.

865. Where acts are shown which would amount to a crime if a divorce from a previous marriage had not been obtained, such proof will be admissible to support an allegation of divorce, where by reason of destruction of records the record itself cannot be produced: *In re Estate of Edwards*, 58-431.

866. The presumption of divorce, in the absence of any record evidence thereof, can only be invoked in aid of innocence and the legitimacy of offspring, nor does it always obtain even in such cases; but such rule is not applicable in any case where neither party has been married again or has lived in cohabitation with another person as husband or wife. Therefore, held, that the mere fact of long separation would not defeat the wife's dower right: *Cruise v. Billmire*, 69-397.

And see ESTATES OF DECEDENTS, §§ 326-328.

867. Death: The presumption of the death of a party does not arise until he has been absent without intelligence concerning him for the period of seven years: *State v. Henke*, 58-457.

868. The provisions of the statute (Code, § 4010) that a party whose husband or wife

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has been absent for three years without such party knowing that such husband or wife are living shall not be deemed guilty of bigamy in remarrying, do not constitute a rule of evidence by which such subsequent marriage can be considered valid when sought to be established for the purpose of proving adultery on the part of the party to such second marriage: *Ibid*.

869. Letters of administration are presumptive evidence of all that they purport to show: *Milligan v. Bowman*, 46-55.

870. The granting of letters of administration cannot be considered a conclusive adjudication upon the fact of death. The issuance of the letters is *prima facie* evidence of the death of the party upon whose estate they are issued, but such presumption may be rebutted by slight evidence: *Tisdale v. Connecticut Mut. L. Ins. Co.*, 26-170.

871. The bare fact that a man was last seen alive at any time, however recent, prior to the granting of letters of administration upon his estate, will not, in an independent action in which the question is again raised, overcome the presumption of his death arising from the issuance of such letters: *Tisdale v. Connecticut Mut. L. Ins. Co.*, 28-12.

As to evidence of death, see *supra*, §§84-87.

872. Delivery of deed: In the absence of other proof it will be presumed that a deed was delivered at the date of its acknowledgment and execution: *Henry County v. Bradshaw*, 20-355.

873. Payment: While mere delivery of money by one to another may be presumptive evidence of the payment of an antecedent debt and not of a loan, explanatory circumstances may qualify the act and remove such presumption: *Dougherty v. Deeney*, 45-443. And see PAYMENT AND DISCHARGE, §1.

874. Negligence: In an action to recover damages for death caused by defendant's negligence, the jury, in determining whether deceased was engaged in doing anything which would constitute contributory negligence, may give due weight to the instincts which naturally lead men to avoid danger and preserve life: *Way v. Illinois Cent. R. Co.*, 40-341; *Burns v. Chicago, M. & St. P. R. Co.*, 69-450. As to presumption of negligence from accident, see CARRIERS, §§ 153, 154; RAILROADS, §§ 487, 488, 671.

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875. But when the facts of the transaction are proven by direct testimony, the question whether the party acted negligently or with care is to be determined from those facts: *Whitsett v. Chicago, R. I. & P. R. Co.*, 67-150.

876. The instinct of self-preservation may be allowed some weight in some cases as raising an inference of care, but where there is direct evidence of care, or the want of it, there is no room for mere inference: *Dunlavy v. Chicago, R. I. & P. R. Co.*, 66-435.

877. In the absence of proof to the contrary, the presumption is that men ordinarily in the course of business act correctly and with proper care: *Turner v. Hawkeye Tel. Co.*, 41-458.

878. Telegraph message: Thus, where a message is received by a telegraph company for transmission and is incorrectly transmitted, it will be presumed that by the exercise of proper care it would have been correctly transmitted, and the burden is upon the company to show facts relieving it from responsibility: *Ibid*.

879. Where a telegraph company entered into a contract to furnish market reports to a grain dealer, which reports it was understood were to be procured from another line, and the reports, as delivered, were erroneous, *held*, that the presumption would be that the error occurred on the part of the last company: *Ibid*.

880. Facts within party's own knowledge: Where a party relies upon a fact, the evidence of which is exclusively within his own knowledge and control, the presumption is against him until such evidence is produced: *Ibid*.

881. Failure to produce a written instrument, after notice by the opposite party to do so, does not raise the presumption that it contains something which would defeat the rights claimed under it by the party failing to produce it: *Hunt v. Collins*, 4-56.

882. Possession of property is *prima facie* evidence of title and casts upon the person claiming title adverse to such possession the burden of showing it: *Wallace v. Wallace*, 62-651.

883. Fraud: Evidence of fraud in a particular case *held* not sufficient to overcome the presumption existing in favor of as

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solemn an instrument as a deed executed and acknowledged in due form, and the presumption is against fraud: *Palmer v. Palmer*, 62-204.

884. **Presumption as to regularity of official acts:** Every legal presumption should be entertained that an officer has done his duty: *Cole v. Porter*, 4 G. Gr., 510; *Goodrich v. Beaman*, 87-563.

885. Such presumption will be entertained in the absence of any showing to the contrary: *Budd v. Durall*, 36-315; *Spittler v. Schofield*, 43-571.

886. Where it is the duty of an officer to do an act, it must be presumed that such duty has been performed: *In re Estate of Edwards*, 58-431.

887. There is a presumption that those charged with public trusts act honestly and in good faith: *Sioux City & St. P. R. Co. v. Osceola County*, 45-168.

888. An act of an officer which may have been within his official powers will be presumed to have been within such powers in the absence of all evidence to the contrary: *Winneshiek County v. Maynard*, 44-15; *Babcock v. Wolfe*, 70—.

889. Official acts, even though ministerial in their nature, must be regarded as *prima facie* correct: *Smith v. District T'p*, 42-522.

890. There is a legal presumption in favor of the due execution of papers emanating from a public office: *French v. Reel*, 61-143.

891. Where the return of an officer on a writ of attachment showed a levy upon property, but did not state that the property was that of defendant, *held*, that the presumption of regularity would obtain in favor of such return: *Rowan v. Lamb*, 4 G. Gr., 468.

892. A court will not presume that an officer in the service of process failed to discharge a plain duty imposed upon him by law, nor infer facts inconsistent with the return of the writ, in order to divest rights acquired under it, or defeat the judgment of a court of competent jurisdiction: *Pursley v. Hays*, 22-310.

893. Where a person in authority is required to do a certain act which could not be omitted without a neglect of duty, the performance of it will be presumed unless the contrary is proved: *Dollarhide v. Board of Commissioners*, 1 G. Gr., 158.

894. Therefore, where it was required by statute that commissioners for a particular purpose should be sworn, *held*, that although in this respect compliance with the statute did not appear in the report of such commissioners, it would be presumed that the law was complied with: *Ibid*.

895. It must be presumed that the officers of the court in any particular matter performed their duty unless the contrary appears. Therefore, *held*, that where the trial of a criminal case was had at a special term of the court, it would be presumed that notice of the holding of such term, as required by law, had been given: *Harriman v. State*, 2 G. Gr., 270.

896. Where the venue of an affidavit does not appear, it will be presumed that the justice of the peace signing it administered the oath in the county in which he was authorized to act: *Snell v. Eckerson*, 8-284.

897. **Innocence:** The presumption of innocence rather than guilt should be indulged: and where it was sought to establish a divorce, the record of which was claimed to have been destroyed, *held*, that proof of acts by the other party which would be criminal in the absence of such divorce, was competent to raise the presumption that the divorce had been obtained: *In re Estate of Edwards*, 58-431.

In criminal cases the presumption of innocence is entertained and defendant must be proven guilty beyond a reasonable doubt: See CRIMINAL LAW, III, 13, h.

898. **Jurisdiction:** Where it appears that a justice of the peace has rendered a judgment for more than \$100, as he may do by consent of the parties, it not being required that such consent shall appear of record, it will be presumed in favor of the judgment that there was such consent: *Schlisman v. Webber*, 65-114.

899. The proceedings of a board of supervisors in establishing a highway will be presumed regular, and if that tribunal determines that the essential steps to give it jurisdiction have been taken and makes such determination a matter of record, the presumption arises in favor of the correctness of the determination. But such presumption does not arise in favor of the jurisdiction of the tribunal in the absence of any deter-

Attendance of witnesses.—Rule for production of

mination that it had jurisdiction: *McBurney v. Graves*, 66-314.

900. Where it was provided by statute that certain proceedings might be had before the prosecuting attorney in case of the absence of the county judge or his inability to act, *held*, that a record showing such proceedings to have been had before the prosecuting attorney, but not showing the fact or cause of the inability of the county judge, was not properly admitted in evidence: *State v. Chicago, R. I. & P. R. Co.*, 50-692.

Further, see JURISDICTION, IV.

Judgments: As to the presumptions in favor of judgments, see JURISDICTION, IV, a.

Statutes of another state: As to the presumption that the laws of another state are the same as our own, see *supra*, §§ 563-566.

Alteration of instruments, when presumed from different ink, handwriting, etc., see ALTERATION OF INSTRUMENTS, III.

Possession of bill or note, presumption arising from, see BILLS AND NOTES, §§ 149-159.

3. Attendance of witnesses.

901. Subpoena; garnishee: The statutory limitation as to the distance beyond which witnesses cannot be required to attend upon subpoena in a civil case does not apply to garnishees, who may be compelled to attend from any distance within the state: *Westphal v. Clark*, 42-371.

902. Attendance of prisoner as witness: Defendant in a criminal action has no absolute right to demand the personal attendance of a convict in the penitentiary or county prison, under an order of court, but the exercise of the power of the court to require the production of such prisoner as provided by statute (Code, § 3678) is discretionary: *State v. Kennedy*, 20-372.

903. Mileage: By appearing, a witness waives the right to demand mileage before testifying: *Stockberger v. Lindsey*, 65-471.

904. A witness subpoenaed from without the state cannot have mileage for travel outside the state taxed as costs, but it seems that he might recover from the party causing him to be subpoenaed, a reasonable compensation for his time and expenses. The service of the subpoena outside the state might be regarded as a request giving rise to

an implied agreement: *Westfall v. Mac*

905. Fees for providing that witness between different *per diem* was not: *Meffert v. Dubu*

906. Fees of provision (Code, compensation to expert by the court, in case titled to such fee was called as an opinion founded on experience: *Snyder*

As to witness CRIMINAL LAW, §

907. Subpoena: is present in court called as a witness not been subpoena 334.

908. Service of In an action for defendant to respond to a subpoena as to the service, is not conclusive. The matter of fact, in return, that the witness served, also that *McCall v. Butterwe*

4. Rule for production

909. Discretionary rule provided for by the court for the production of evidence to the sound discretion of the court will not be reversed are before the supreme that such discretion *Mickel*, 40-19; *Allis*

910. Negligence of applying for the rule was offered therefor may for refusing the order

911. Notice: A party to produce in court without previous notice time for its production cannot be proved without its production 9-503.

Procuring affidavits.—Depositions; perpetuating testimony.

912. Production of telegraphic messages: The statutory provision (Code, § 1328) that any person employed in transmitting messages by telegraph shall be guilty of a misdemeanor in making known the contents of any such message to any person except the person to whom it is addressed, does not prevent the agent of a telegraph company, properly subpoenaed in a controversy between two parties, from producing messages which have passed between them in evidence: *Woods v. Miller*, 55-168.

5. *Procuring affidavits.*

913. Compulsory; contempt: Under a statute (Code, § 8693) providing that any officer competent to take depositions may, on application, if satisfied that the object is legal and proper, issue his subpoena to bring a witness before him, and upon his refusing to make affidavit of the facts within his knowledge to the extent required of him, proceed to take his deposition by question and answer, etc., the party subpoenaed cannot be excused from making the affidavit or answering the questions propounded, on the ground that the affidavit desired would not be legally admissible in proceedings for which it is sought. Neither the officer before whom the witness is brought, nor the witness himself, is allowed to determine that question in advance, and a failure to respond to the subpoena or to answer when brought before the officer may be punished as a contempt: *Robb v. McDonald*, 29-330.

914. A justice of the peace to whom such application is made has full power to pass upon the question of the legality or propriety of the affidavit sought, and is not without jurisdiction to issue a subpoena to compel such affidavit, though as a matter of law it appears on the face of the petition therefor that it could not, when taken, have any legal use. An order of the justice of the peace imprisoning a witness for contempt in refusing to make the affidavit when properly required will not be inquired into by the supreme court in a *habeas corpus* proceeding: *State ex rel. v. Seaton*, 61-563.

915. But the statutory provisions just referred to are not applicable where the affidavit is sought merely for information. The use for which the affidavit or deposition

may be taken is manifestly a legal use as evidence, and the officer should not issue a subpoena where the affidavit required is not ostensibly for such legal use, and if ostensibly for such use, the officer should still be satisfied that it is desired for such use in fact. Therefore, where the affidavit was sought, not for use in a pending proceeding but to procure information for the purpose of commencing an action, *held*, that the witness committed for contempt in refusing to obey the subpoena should have been discharged on *habeas corpus*: *Dudley v. McCord*, 65-671.

6. *Depositions; perpetuating testimony.*

916. Grounds for taking: If the deposition shows that the witness is a non-resident, that is sufficient, although the witness states that he expects to be present at the trial; and unless he is actually present the deposition should not be excluded: *Nevan v. Roup*, 8-207.

917. Whether the reason shown for taking the deposition is a valid one or not, if objection is not made to the taking, it may be read if the witness is not in court: *Cook v. Blair*, 50-128.

918. Where a deposition is taken upon notice, and the adverse party appears and does not object to the want of statutory ground, the objection for want of such ground for taking the deposition may be deemed waived, but the deposition of a witness or the transcript of his evidence, taken in shorthand on a former trial, are not admissible in a law action without some statutory ground for taking his deposition appears or such objection is waived: *Baldwin v. St. Louis, K. & N. R. Co.*, 68-37.

919. Where it is sought to show, for the purpose of rendering a deposition or transcript of the evidence of a witness on a former trial admissible on the ground that the witness has become a non-resident, such fact must be established by testimony of some one who can testify as to the fact, or circumstances justifying an inference of such fact. It cannot be found from common report or reputation: *Ibid*.

920. Upon notice or by commission: If the witness resides out of the county, but within the state, his deposition may be taken

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either on commission or on notice; if he resides out of the state, it can only be on commission; if within the county, it must be by notice: *Fabian v. Davis*, 5-456.

921. If the witness resides out of the state, but his deposition can be taken within the county where suit is pending, it may be taken on notice, and need not be by commission: *Anderson v. Easton*, 16-56.

922. Sufficiency of notice: Where the notice stated the place for taking the deposition as the office of "Squire Moore," and the certificate showed that it was taken at the office of "Enos Moore," held, that the notice was insufficient in that respect, and the deposition was properly suppressed: *McClintock v. Crick*, 4-453.

923. Objection to the sufficiency of the notice is waived by appearing and cross-examining the witness: *Nevan v. Roup*, 8-207.

924. Where a party to an action dies after notice is served to take depositions, but before they are taken, they are illegal and should be stricken from the files on motion: *Kershman v. Suhela*, 59-93.

925. When service is on a party, the additional days for the distance of travel as provided by statute are to be added to the five days; and, in all cases, in computing the time, the first day is to be excluded, and the last included: *Richardson v. Burlington & M. R. R. Co.*, 8-260.

926. The five days' notice referred to by statute is not intended to mean five clear days: *Bonney v. Cocke*, 61-303.

927. Where it does not appear that any travel is necessary from the place where the party lives or the place where notice is served to the place where the deposition is to be taken, it should not be suppressed for insufficiency of notice on account of want of allowance for time of travel: *Adams v. Peck*, 4-551.

928. The fact that depositions in a case where defendant makes default are taken, as authorized by statute, upon notice filed with the clerk and without cross-examination by defendant, will not prevent their being used on a retrial of the case on the application of defendant who appears and has his default set aside: *Watson v. Russell*, 18-79.

929. Parties who have been properly served with notice of the taking of a deposi-

tion cannot object were not notified:

930. Stating name of the witness who should be stated: *Branch of State B*

931. If there is between the name of the notice and that position is taken, the deposition is suppressed on motion: 565.

932. Where an action is taken to take the deposition of Sally held, that it was properly suppressed on motion: *Glenn v. G*

933. The fact that the clerk's name is stated in the notice while the deposition of his first name is not stated to justify the suppression: *Grimes v. Martin*, 10

934. The commission is not valid if the notice and the deposition are in the clerk's office on commission to issue having been served with interrogatories, the filing of the interrogatories is not necessary to file his cross-interrogatories seven days in issuing the notice: date fixed in the notice is not sufficient as to warrant the deposition when taken: *Be*

935. A commissioner or notary public within a county and state is not valid without the requirements of the statute: *Hull*, 37-174.

936. In a commission in the United States or in a territory to name the county or town where the commissioner resides, the name of the city or town is not necessary: 13-428.

937. A mistake in the name of the clerk in which the commission is issued, if the name of such clerk is not stated: *Smith*, 6-229.

938. Where the commission is issued to the "clerk of the district court," etc., and the clerk

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and certified by the "clerk of the court of common pleas" of that county, *held*, that the deposition should have been suppressed: *Plummer v. Roads*, 4-587.

939. But if it were made to appear in any sufficient manner that there was no district court such as that mentioned in the notice, and that the court of common pleas was a court of the same character and jurisdiction, the objection to the deposition would not be sufficient: *Ibid*.

940. Where a commission to take depositions was directed "To any notary public in and for the county of Baltimore, the state of Maryland," and the depositions were taken by a person designating himself as "a notary public of the state of Maryland, duly commissioned and qualified, residing in the city of Baltimore and the state of Maryland," *held*, that the depositions should be excluded, and that parol evidence was not admissible to show that notaries public in the city of Baltimore were notaries for the whole state: *State v. Cross*, 68-180.

941. It is not proper to select and direct a commission in the alternative to several of the officers mentioned by statute: *Levally v. Harmon's Adm'r*, 20-538.

942. If a notary, before whom depositions are taken, is such an officer *de facto*, they cannot be suppressed on the ground that he had not properly qualified, and was not such officer *de jure*: *Keeney v. Leas*, 14-464.

943. The taking of the deposition: A deposition in which the questions and answers were written out by the attorney of one of the parties was held to have been properly suppressed, where it appeared that the opposite party was not present and did not consent thereto: *Hurst v. Larpin*, 21-484.

944. Where the statutory provision, that neither a party nor his agent nor attorney shall be present at the examination of a witness whose deposition is taken upon written interrogatories unless both parties are present or represented, has been violated, prejudice will be presumed to result therefrom, at least, in the absence of a showing to the contrary: *Sheriff v. Hull*, 37-174.

945. Where the notice stated that the deposition would be taken between the hours of nine o'clock A. M. and six P. M., and it was in fact completed and the witness was

gone before eleven A. M., at which time the attorney for the opposite party was present to examine the witness, *held*, that it was receivable in evidence, no showing of bad faith or improper conduct being made, and it not appearing what the opposite party expected to prove by his cross-examination: *Scharfenburg v. Bishop*, 35-60.

946. Exhibits: A deposition should not be suppressed because of failure to attach as exhibits certain deeds and notes incidentally referred to by the witness but not in his control or forming the basis of the action and about the contents of which there is no dispute: *Lyon v. Barrows*, 13-423.

947. A witness may embody in his deposition, by way of exhibit, answers made in another deposition, although the opposite party was not a party to the taking of such other deposition: *Bixby v. Carsaddon*, 63-164.

948. Certificate: The certificate of the officer must show that the requirements of the statute with relation to the taking of depositions, such as, for instance, that the deposition has been read to the witness before signing, have been complied with; and *held*, that a certificate merely showing the fact of signing and swearing, and the time and place thereof, was not sufficient: *Ball v. Sykes*, 70—.

949. The person executing the commission and making a return of his doings should appear to be the person commissioned, and should so appear of record from the certificate appended to and returned with the commission; but where the commission was issued to *Fred. R—*, and the certificate was signed *F. A. R—*, *held*, that the presumption that the commission was sent to the person named therein, and the certificate signed by a name which might be that of the person to whom it was sent, were sufficient to show that the commission was properly executed; also, *held*, that the re-issuance of the commission on an order of the court, in order that the proper return might be made, was not error, no prejudice being shown: *Byington v. Moore*, 62-470.

950. Where it appears from the caption of a deposition that it was taken before the proper officer, in the proper county, and that the witness was first duly sworn, and from

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the certificate that the deposition was read over by said witness, and subscribed and sworn to by said deponent therein, it sufficiently appears that the statute has been complied with: *Vaughn v. Smith*, 58-553.

951. The officer taking the deposition may, if his certificate is defective in not showing facts essential to render the deposition receivable in evidence, return an amended certificate which, in the absence of any showing or complaint that it does not state the facts, may be accepted as true, and this may be done even after the filing of a motion to suppress the deposition for the defects in the first certificate: *McKinley v. Chicago & N. W. R. Co.*, 44-314.

That the certificate of a notary taking a deposition must be authenticated by his seal, see NOTARY PUBLIC, § 2.

952. Filing: Failure of the clerk to make entry on the appearance docket of the fact of filing a deposition will not prevent its being introduced in evidence: *Byington v. Moore*, 63-470.

953. Custody: Under a statutory provision prohibiting the deposition, when filed, from being taken from the clerk's office before the next term of court except by mutual written consent of the parties, *held*, that where depositions were allowed to be taken out in violation of such provision, but for an honest purpose, and the violation was merely technical and without prejudice, the subsequent admission of the deposition in evidence was not sufficient error to warrant a reversal: *Wolverton v. Ellis*, 18-413.

954. Under such statutory provision, it is not a ground for suppression of a deposition that it has been taken from the clerk's office by the attorney of the opposite party during the next term of court after filing: *Hogaboom v. Price*, 53-703.

955. Objections: An objection that a question propounded to the witness on the taking of his deposition is leading cannot be taken after the deposition is returned into court and offered in evidence. It should be made when the deposition is taken: *Keeney v. Chilis*, 4 G. Gr., 416; *Mumma v. McKee*, 10-107.

956. The better rule is to require that objections to the form of interrogatories proposed, where the deposition is to be taken by

commission, shall be made at the time of the commission issues: .

957. Motions required by statute to be filed at the commencement of the deposition: *10-591; Bays v.*

958. It is also a ground for suppression of a deposition other than irrelevancy shall motion, filed by day of the first time the deposition has been filed, provided it is filed three days before the deposition is taken: *Chicago, R. I. & N. W. R. Co.*, 44-314.

959. This requirement is not sufficient: *Johnson v. P. R. Co.*, 51-25.

960. This statute is not applicable to an objection to a deposition taken where it was objected to in the answer: *Harris Mfg. Co. v.*

961. An entry in the circuit court purporting to suppress depositions which a party has not limited the time for suppression of such depositions may be made after the deposition has been filed: *Acme v. R. Co.*, 70—.

962. An objection to a deposition in the notice, first introduced in evidence on cross-examination, although excluded, although notice before the deposition was taken: *Branch of State I.*

963. Where the deposition was taken at the cause was called, the deposition is to be taken by which to file objection

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the depositions had been on file more than thirty-six hours, and it did not appear but that the attorney had had knowledge of such fact, *held*, that his application was properly overruled: *Byington v. Moore*, 62-470.

964. Objection to the admissibility of the evidence of a witness who is incompetent, as where a husband or wife is called to testify against the other, should be made at the time the witness is called, and is too late if not interposed until the end of the deposition or when it is offered to be read in evidence on the trial: *Watson v. Riskamire*, 45-231; *Greedy v. McGee*, 55-759.

965. An objection to the competency of the deposition, where the witness is claimed to be incompetent because the action is by an administrator, made at the time of the trial, cannot be considered where the same deposition has been received in a previous trial in the same case without objection: *McMillan v. Burlington & M. R. R. Co.*, 56-421.

966. An objection to testimony on the ground that it relates to a personal transaction between the witness and decedent in an action by or against an administrator is an objection to competency, and therefore not within the statutory provision requiring that objections other than for incompetency or irrelevancy shall be made on the second day of the first term after the deposition is filed: *Burton v. Baldwin*, 61-288.

967. The objection that the witness, although examined before a notary public in this state, is not a resident of this state, must be deemed waived if not taken when the residence of the witness is first disclosed; and where the counsel for the adverse party has been present and interposed no objection to the taking of the deposition until it has been signed, the objection cannot be maintained: *Burrows v. Stryker*, 47-477.

968. Objection to a part of the deposition on the ground that it is not proper cross-examination is too late if not made until the deposition is offered in evidence: *Bixby v. Carskaddon*, 63-164.

969. Where exceptions to questions and answers were filed with the notary taking the deposition, but it did not appear that the same were brought to the attention of the court within the time required by statute,

held, that they could not afterwards be relied upon: *Neimeyer v. Cass County Bank*, 42-124.

970. Where a deposition is taken for use in a justice's court, objections thereto other than for incompetency or irrelevancy should be made in the justice's court and cannot be made for the first time when the case is tried on appeal: *Alverson v. Bell*, 13-808.

971. An objection relating to the legality of the proof at the time it is offered cannot be required to be made at the time of taking the deposition: *Horseman v. Todhunter*, 12-230.

972. **Exclusion of depositions:** The mere fact that depositions in an equity case are filed after the time within which by order of the court the party has been required to file them is not sufficient ground for striking them from the files in the trial of the case: *Sweet v. Brown*, 61-669.

973. It will not constitute reversible error, that a deposition is received which is taken after the time allowed to the party for taking depositions, when it appears that additional time was also allowed to the other party for the same purpose: *Gardner v. Trenary*, 65-646.

974. A deposition should not be excluded unless objection is made thereto: *Crick v. McClintic*, 4 G. Gr., 290.

975. A general objection to a deposition, a portion of which is properly admissible, is insufficient: *Whitaker v. Sigler*, 44-419.

976. A mistake merely clerical in the date named in the caption, *held* not sufficient to exclude the deposition; but a mistake in the commission as to the title of the court of which the commissioner was clerk and in the name of the clerk, *held* fatal: *Jones v. Smith*, 6-229.

977. The overruling of a motion to suppress a deposition is error without prejudice where the witness testifies in person on the trial and such testimony is more favorable to the party complaining than that contained in the deposition: *Curry v. Allen*, 60-387.

978. **Striking out portion of deposition:** The court cannot, upon motion, strike out a portion of an interrogatory in a deposition, leaving the answer standing: *Pelamourges v. Clark*, 9-1.

979. A question and answer in a deposition should not be suppressed entirely where

Depositions ; perpetuating testimony.—Competency

they are proper as to one matter referred to therein, but embrace something which is improper: *Adae v. Zangs*, 41-536.

980. Matters stated in answers to interrogatories in a deposition held to be such as not called for by the question and therefore subject to be stricken out on motion: *Hendricks v. Wallis*, 7-224.

981. The rule requiring an answer to be responsive to the interrogatory should be substantially enforced: *McCarver v. Nealey*, 1 G. Gr., 360.

982. Introduction of deposition: A deposition need not be introduced by the party taking it, but the other party may introduce it if he so desire: *Hale v. Gibbs*, 43-380; *Wheeler v. Smith*, 13-564; *Pelamourges v. Clark*, 9-1, 16; *Crick v. McClintic*, 4 G. Gr., 290.

983. Depositions properly taken may be introduced by either party for the purpose of establishing any material point in the case: *Brown v. Byam*, 65-374.

984. A stipulation that a deposition when taken shall be receivable in evidence upon the trial of any case pending in the court named, between the same parties, will render a deposition taken in one such case admissible in any other: *Holmes v. Budd*, 11-186.

985. The party on whose behalf a deposition has been taken cannot read a portion thereof and omit other portions. The entire deposition, so far as competent and pertinent, should be read or none: *Kilbourne v. Jennings*, 40-473.

986. A deposition taken by a party is under his control, and, although he cannot withdraw it from the files, he can withhold it at pleasure, or any part of it, but the opposite party may introduce it in evidence if he sees fit, or a portion thereof not introduced by the party taking it: *Hale v. Gibbs*, 43-380.

987. It is not error to allow a party to read a portion of the deposition of the opposite party taken by him, where it contains an admission: *Van Horn v. Smith*, 59-142.

988. One party may introduce a deposition taken by his adversary, but which such adversary declines to introduce. If the witness has been examined as to different transactions, a party introducing the deposition may introduce such portions of it as touch one or

more portions of to introduce it as be permitted to i to any given sub troduce all that th subject: *Citizens'*

989. Depositions may be introduced between the same parties such depositions w quent action: *Shaw*

990. Depositions be used in a subse privies of the part *Atkins v. Anderson*

991. But a party to use depositions u which have been t having filed them i proposes to use then the commencement them. Otherwise t not have the opport contemplates of taki ositions: *Searle v. R*

In criminal prose not be introduced for by defendant's counsel LAW, §§ 67, 68.

In equitable action taken by depositions: 43.

992. Perpetuating tion: Where, in a perpetuating testimony (under Cor petition stated the name of the corporation as the "C. B. C." that it was not a sufficient corporation whose name was Burlington and Quiney, so as to render the evidence proceeding afterwards such corporation: *Acc Q. R. Co.*, 70—.

7. Competency and perpetuation of deposition

a. Competency as affecting deposition

993. Power of legislation in the constitutional

¹ The fact that a witness is a party to or is interested in the result of a suit is, by itself, no longer a ground for excluding him as a witness, but such facts may be shown for the purpose of impeaching his credibility (Code, § 3387). As to credibility, see *infra*, §§ 1127-1141.

Competency as affected by interest.

petency of witnesses that takes from the general assembly the power to declare that interest in the event of a suit shall disqualify or shall not disqualify a witness, according as it shall in its wisdom think best: *Karney v. Paisley*, 13-89; *Donnell v. Braden*, 70—.

994. Interest, what sufficient to disqualify: If a party to the record has absolutely no interest, or where his interest is all against the party calling him, he is competent to testify. The tendency has been in later times and in later cases to refer the objection rather to the credit of the witness, and not to exclude the light unless there is a necessity for it: *Danforth v. Carter*, 4-230.

995. Whenever precedent will admit, the courts will let in the truth by holding objections to apply rather to the credit than the competency of the witness: *Adams v. Foley*, 4-44.

996. The true test of interest is that the witness will either lose or gain by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action: *Cutter v. Fanning*, 2-580.

997. But objections on the score of interest are not to be favored, and the safe rule is to admit the witness, when there is doubt on the fact, and allow the objection to apply to his credit rather than to his competency: *Ibid.*

998. The rule excluding parties from being witnesses applies to all cases where a party has any interest at stake in the suit, although it be only a liability to costs, as, for instance, in the case of a next friend, a guardian, an executor, or an administrator. And so, also, in case of trustees and officers of corporations, whether public or private, wherever they are liable in the first instance for the costs, though they may have a remedy for reimbursement out of a public or trust fund: *Cherry v. McCorkle*, 8-522.

999. The fact that a prosecuting witness may be liable for the costs of prosecution, and that he will be entitled to a portion of the penalty in case of conviction, will not render him incompetent on the ground of interest: *United States v. Everest*, Mor., 206.

1000. Under a statute not now in force making parties incompetent unless called by the opposite party, *held*, that upon being thus called as a witness, a party could not be

cross-examined or made a witness as to his own claim: *Arthur v. Blunt*, 12-200.

1001. The relation of parent and child between a party to the suit and the witness does not render the latter incompetent: *Cass v. State*, 2 G. Gr., 353.

1002. Under the common law rule rendering a person interested incompetent as a witness, *held*, that one of two defendants jointly indicted was not a competent witness for his co-defendant until he should be discharged: *State v. Nash*, 7-847, 883.

1003. But after the adoption of constitutional and statutory provisions making all persons competent except in certain specified cases, one of which exceptions was that of persons having a direct, certain and legal interest in the suit, *held*, that one of two defendants jointly indicted for a crime did not have such interest in the suit as to be incompetent to testify as a witness for his co-defendant upon a separate trial, although the witness had not yet been himself tried: *State v. Nash*, 10-81.

Further as to co-defendants and accomplices as witnesses for or against each other, see CRIMINAL LAW, III, 13, c.

1004. In an action by an executor, a person who is the sole heir is so far directly interested in the prosecution of the suit that he is precluded from being a witness: *Cushman v. Blakesly*, 3 G. Gr., 542.

1005. Where several defendants are sued jointly for a tort, if after the testimony of the plaintiff is closed no evidence has been offered showing the guilt of one or any of them, they may have a verdict in their favor and then be introduced as competent witnesses for their co-defendant; but they cannot become competent witnesses so long as they are parties on the record and liable for costs: *Forshee v. Abrams*, 2-571.

1006. A release by a person not a party to the suit cannot operate to remove the disqualification of a party to the suit as a witness: *Wise v. Patterson*, 3 G. Gr., 471.

1007. Where one of two joint defendants allows judgment to be entered against him, he thereupon becomes a competent witness in behalf of his co-defendant: *Greenough v. Sheldon*, 9-503.

1008. Where a party to a suit in his answer fully confesses the cause of action, and

Competency as affected by interest.

so far as he is concerned interposes no objection to a judgment against him, he becomes a competent witness for his co-defendant: *Arms v. Stockton*, 12-327.

1009. But where defendant, although making default, has not suffered judgment to go against him, he does not become so far disinterested as to become a competent witness: *Williams v. Soutter*, 7-435.

1010. Nor will a mere offer to allow judgment to be entered, made by one defendant without the actual entry of such judgment, and while it remains possible for him to reap the advantage of the defense of his co-defendants, render him competent: *Keys v. Holmes*, 11-139.

1011. The grantor of a deed may be called on the side opposite to his interest, or where his interest is balanced. The mere fact that he is grantor is not sufficient to disqualify: *Robb v. Lefevre*, 7-150.

1012. In a particular case, held, that the interest of a witness was in equilibrium as between the parties and he was therefore not incompetent: *Kingsbury v. Buchanan*, 11-387.

1013. The execution debtor is a competent witness for the garnishee upon an issue raised upon his answer claiming the money is that of a third person instead of that of the execution defendant: *Tyler v. Coolbaugh*, 7-474.

1014. Defendant in an action in which garnishment proceedings are commenced to subject a debt due him to the payment of a claim against him is indifferent in interest as between the garnishee and plaintiff, and is therefore a competent witness: *Randolph Bank v. Armstrong*, 11-515.

1015. Under a previous statute providing that only a direct, certain and legal interest in the suit should be sufficient to render the witness incompetent, held, that it was not sufficient that the effect of the judgment would be only to establish a claim for or against the witness, which could be reached only in another action, or to create an interest in the record as an instrument of evidence in some other suit or to create a liability over: *Cook v. Lyon*, 10-433.

1016. The wife or husband of a legatee in a will has not such interest therein as to render

such wife or husband incompetent to the will: 443; *Bates v. Office*.

1017. Interest, interest of a witness *aliunde*, he should *dire*; but if he is interested for the purpose of the test, and by his testimony no interest, the party's interest is bound: *v. Turner*, 3 G. Gr.

That defendant is incompetent in a criminal case: LAW, III, 13, b.

1018. Objection how taken: Object a witness should, in he is examined in chief, taken at any time during the trial if it is interposed as so covered. If discovery in chief, it is an objection then: *Ved*.

1019. Objection a witness cannot be raised after the close of the case: *Mumma v. McKee*, 11-187.

1020. Objection to of incompetency shown by witness is first called it is presumed to be made afterwards: K 11-387.

1021. It is too late in the cross-examination to show the incompetency of a witness to his testimony until the opposite party has submitted the case, to testimony of such witness count of incompetency: 1 G. Gr., 257.

b. Incompetency of a witness regard to personal or communications of a deceased or interested person.

1022. The statutory rule regarding persons interested in the outcome of a case.

¹ Code, § 3639. No party to any action or proceeding, nor any person interested in the outcome of a case, shall be a competent witness for or against any person from, through, or under whom any such party or interested person derives his interest.

Incompetency in actions by or against administrator, etc.

lar case specified, is not unconstitutional as in violation of the provision of Const., art. 1, § 4, with relation to competency of witnesses. Under the constitutional provision it is still competent for the legislature to declare that interest in the event of a suit shall or shall not disqualify the witness: *Karney v. Paisley*, 13-89; *Donnell v. Braden*, 70—.

1023. To what actions the provision is applicable: The disqualification provided for in this section is not limited to actions brought by an executor, assignee or guardian, but applies also in actions against such parties. It extends, however, only to cases where the witness is examined as against such executor, assignee or guardian, and not to cases where he is examined by such party: *Leasman v. Nicholson*, 59-259.

1024. This section is applicable to a controversy between the heirs of deceased: *Neas v. Neas*, 61-641.

1025. Where an administrator, though a party, was not a necessary party, and the suit was dismissed as to him, *held*, that the testimony of plaintiff as to a personal transaction between himself and decedent was competent: *Campbell v. Mayes*, 38-9.

1026. The section is not applicable in an action against an administrator *de bonis non* where the transaction as to which the witness is called to testify was with a prior administrator since deceased: *Dunne v. Deery*, 40-251.

1027. In a controversy between creditors as to which was entitled to property in the hands of an administrator, who was joined as a party defendant, *held*, that the case was not one in which such administrator was a party, so as to prevent one of the creditors who was a party to the suit from testifying as to transactions with decedent: *Gordon v. Kennedy*, 36-167.

1028. Who excluded as parties: The statutory provision given in the foot-note excludes as to certain matters the testimony, first, of *parties* to the action, and, secondly,

of *persons interested therein*; that a party is shown not to have any interest in the matter will not render him competent: *Williams v. Barrett*, 52-637.

1029. The testimony of a party to an action brought by an heir or administrator and relating to a personal communication between himself and deceased is not competent, although such party has no interest in common with the other defendants against such heir or administrator: *Burton v. Baldwin*, 61-283.

1030. Where one of the parties defendant in an action by an administrator had entered into a stipulation for judgment against him to a particular amount, *held*, that he was no longer a party to the action in such sense as to be disqualified from testifying under this section, although judgment had not yet been formally rendered: *Conger v. Bean*, 58-321.

1031. What interests sufficient to disqualify: The interest of an administrator no longer disqualifies him from testifying in an action to which he is a party. But if the adverse party is an executor, so as to bring the case within the statutory provision heretofore given, the administrator cannot testify: *Schmid v. Kreismer*, 31-479.

1032. The interest which disqualifies must be a legal, certain and immediate interest. If it be a doubtful one, the objection goes to the credibility of the witness: *Birge v. Rhinehart*, 36-369.

1033. The true test of such interest is, that the witness will either gain or lose by the direct, legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. If the interest is of a doubtful nature, the objection goes to the credit of the witness, and not to his competency: *Wormley v. Hamburg*, 40-22.

1034. The interest contemplated as sufficient to exclude a witness is such as would, at common law, disqualify him. Where the witness has equal interest on both sides, he

assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane, or lunatic; against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or guardian, shall be examined on his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence.

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will not be disqualified: *Goddard v. Leffingwell*, 40-249.

1035. The interest sufficient to disqualify must be present, certain and vested. It will not be sufficient that at a prior time the witness might have been the holder of an equitable interest in the property in controversy: *Zerbe v. Reigart*, 42-229.

1036. In an action by an administrator against a person to recover property of the estate wrongfully appropriated, an heir of decedent who would be entitled to a distributive share of the estate not required for the payment of debts is an interested witness unless it appears that the estate is insolvent: *Ivers v. Ivers*, 61-721.

1037. In such case a mere disclaimer by the witness of any interest in the estate will not render him competent, as such disclaimer will not operate to release his interest: *Ibid.*

1038. In an action by the widow and administratrix of a deceased person to recover from the heirs property claimed to belong to the estate, testimony of the heirs as to a gift to them of the property by deceased during his life-time is not admissible: *Samson v. Samson*, 67-253.

1039. In such case, *held*, that the husband of one of the heirs, who was present during the transaction, and, at his wife's request, joined with her in an undertaking to make payments to her father in consideration of the property received, was not a competent witness as to the transaction: *Ibid.*

1040. But the wife of one of the heirs, who was present at the time of the transaction with such heir, but was not a party to such transaction, *held* a competent witness: *Ibid.*

1041. In an action by a corporation against the executor of the decedent, *held*, that a stockholder of plaintiff could not be allowed to testify as to a contract between plaintiff and deceased: *First Nat. Bank v. Owen*, 52-107.

1042. The statute is not to be construed as applicable only to witnesses who are interested in favor of the party introducing them: *Donnell v. Braden*, 70—.

1043. A person whose liabilities would not be affected by the result of the action, *held* not incompetent to testify under this section: *Fuller v. Lendrum*, 58-353.

1044. Under pr (Rev., § 3982), while of the adverse party executor, as to facedent's death, *held* note in controversy, the plaintiff as a go maturity, had no int thereon against th maker of the note s from testifying: *Bur*.

1045. The facts i not to show any ir witness disqualifyi missions made to hir *Wormly*, 44-347.

1046. What deer tions: It is only as between himself and is, under Code, § 3638 fying: *Sypher v. Save v. Alcott*, 57-171.

1047. The paymen ceased is a personal meaning of this sectio 45-102.

1048. The delivery to decedent is a perso the meaning of this *Wood v. Broliar*, 40-5

1049. In an action ag on a note claimed to decedent to plaintiff fo plaintiff's wife for dea mony of the wife resp labor performed by her admissible: *Ashworth* 1

1050. Where it is sou an administrator for v the knowledge or assent way as to raise an implic seeking to recover can the work done: *Peck Smith v. Johnson*, 45-30 52-44.

1051. In an action by upon a note executed ment between deceased : that evidence of defend curred at the time of suc admissible: *Wileox v. Ja*

1052. Where plaintiff upon his own testimony,

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an administrator for services alleged to have been rendered decedent under contract, that he had never received payment for such services, *held*, that the evidence was properly rejected: *Van Sandt v. Cramer*, 60-424.

1058. In a suit against the wife in respect to the homestead for the purpose of enforcing a claim under a conveyance of the same in which she joined with the husband, her testimony as to what was said to her by her husband at the time of the conveyance, he being since deceased, is not admissible: *Palmer v. Palmer*, 62-204.

1054. Where a defendant, in an action by an executor on a note, attempted to show that such note was not the property of deceased, but of a third person, for whom deceased acted as agent, for the purpose of rendering admissible evidence by defendant of payment made to deceased on such note, *held*, that such evidence of payment was not to be received until defendant had satisfied the court of the relation of agency as claimed: *Williams v. Brown*, 45-102.

1055. The testimony of an heir is not incompetent as to conversations which he heard between deceased and defendant: *Sweezey v. Collins*, 40-540.

1056. The personal transactions and communications which, under this section, may not be testified to by the wife, are those had between her and the deceased, personally. She is not incompetent to testify thereto, if had between the deceased and her husband; therefore, *held*, that she might testify in regard to conversations between her husband and deceased, as to which she was a mere listener: *Johnson v. Johnson*, 52-586.

1057. The section does not forbid testimony as to personal transactions and communications between deceased and another person than the witness. The personal transaction or communication must be had with the witness in order to make his testimony inadmissible: *Lines v. Lines*, 54-600.

1058. In an action by an administrator, *held*, that defendant was not incompetent as a witness to testify as to the payment of money to a third person upon a lien as to which deceased appeared also to have made payment, the transaction being with the third person and not with deceased: *Wormley v. Hamburg*, 46-144.

1059. The doing of certain acts in the presence of deceased, not depending for their value as evidence upon his presence, *held* not to be a personal transaction with him in such sense as to prevent the wife of the party from testifying in respect thereto: *Dougherty v. Deeney*, 41-19.

1060. In an action by an administrator against defendant to recover a subscription alleged to have been paid by deceased to trustees and by said trustees to defendant, *held*, that defendant was a competent witness as to the transaction between himself and such trustees: *Sypher v. Savery*, 39-258.

1061. That a party defendant, in an action by an administrator, after stating that he signed the note sued on in his own house, was allowed to state who were in the house at that time, was *held* not error under this section: *Conger v. Bean*, 58-321.

1062. In an action by an administrator on a note executed to intestate, the party executing the note is not precluded from testifying as to the date on which the note was actually made: *Barlow v. Buckingham*, 66-169.

1063. Acts and conduct of legatees in a will towards testator do not constitute a personal transaction between legatee and testator as to which the legatees cannot be called to testify in a proceeding to probate the will: *Parsons v. Parsons*, 66-754.

1064. The husband of the legatee under the will is a competent witness to testify as to the mental condition of testator. Such condition does not relate to a personal transaction within the meaning of this section: *Severin v. Zack*, 55-28.

1065. It is not necessary that the testator should proclaim or state to the subscribing witnesses to his will that the instrument is his will. And it is wholly unnecessary that there should be any personal transaction between the testator and the subscribing witnesses: *Bates v. Officer*, 70—.

1066. In particular cases, *held*, that the facts testified to by witness did not involve a transaction between the witness and decedent within the meaning of the section: *Mayer v. Turley*, 60-407; *Miller v. Dayton*, 57-423.

1067. In rebuttal: A plaintiff coming within the terms of this section cannot testify

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as to personal transactions between himself and deceased, even to rebut the testimony of decedent's widow: *Canaday v. Johnson*, 40-587.

1068. Removal of prohibition by testimony of administrator, heir, etc.: The prohibition prescribed in this section does not extend to any transaction as to which the administrator has been examined in his own behalf: *Ivers v. Ivers*, 61-721.

1069. In an action by a husband against the heirs of his deceased wife to set aside a conveyance made by him to her during her life-time, *held*, that the fact that defendant was introduced as a witness would only remove the prohibition against the testimony of plaintiff with reference to such transactions as were testified to by defendant: *Wood v. Broliar*, 40-591.

1070. The fact that the executor or administrator testifies as to one transaction does not entitle the opposite party to testify in reference to other transactions with the decedent: *Luehrsmann v. Hoings*, 60-708.

1071. The contestants of a will, in an action to probate the same, having testified only as to their relations with deceased, *held*, that it was not competent for one of the proponents to testify as to matters proposed to be proved by him: *Sisters of Visitation v. Glass*, 45-154.

1072. The statute contemplates that when the administrator or other representative of the deceased testifies as to a personal transaction and describes it, then a party may also testify in relation thereto and give his version of the transaction; but the fact that the administrator refers to a personal transaction as possible does not open the way for the admission of such testimony: *In re Estate of Edwards*, 58-431.

1073. When the executor testifies in his own behalf, but not as to a personal transaction, and his testimony is not adverse to the opposite party, the fact of his being a witness does not remove the prohibition as to personal transactions: *Ibid*.

1074. Where the administrator testifies as to transactions between defendant and deceased raising an implied promise or obligation on the part of defendant to pay,

defendant may arrangement was *v. Keyes*, 52-90.

1075. Where a by reason of th parties to the sui wards dismissed become competen common law rule witness, by which tent on account of taken, will always not apply: *Campb*

1076. But if the is incompetent, wh being a party, it is at the time it is witness has chang party: *Burton v. B*

1077. The object not to the competen the competency of t

1078. Under pre ions,¹ the administr incompetent as a wit brought by him to r session of property *ley v. Kavanagh*, 12

1079. So in a proc to enforce a claim th competent; *Stiles v.*

1080. The widow incompetent to testi the administrator c compensation for su widow during the lif *Romans v. Hay's Ad*

1081. And therefo plevin suit for goods was not placed in death of the plaintiff that he became inco *Bevan v. Hayden*, 13-

1082. Where an against a defendant, and whose administr tuted, *held*, that a taken before defenda missible in evidence: &

1083. Also *held*, th applicable to a case

¹ The provisions of the Revision of 1860, § 3932, were quite different from those of t referred to, and the following decisions are only indirectly applicable to the latter.

Competency of husband or wife.

ceased was merely a trustee and the person beneficially interested was living: *Watson v. Russell*, 18-79.

1084. The fact that matters sought to be proved by a witness who is defendant in a suit brought against him as surviving partner for contribution, by the administrator of his deceased partner, are connected with transactions of the firm, and that the surviving member is a witness, cannot have effect to annul the statutory provisions with reference to such testimony: *Hosmer v. Burke*, 26-353.

1085. In an action between a surviving member of a partnership and a creditor of a deceased member, *held*, that defendant was not incompetent to testify as to a personal transaction between him and such deceased member: *Brown v. Allen*, 35-306.

1086. In an action by an assignee in bankruptcy of a surviving partner against a supposed debtor of the firm, *held*, that defendant was not prohibited from testifying as to personal transactions with the deceased partner: *Ruddick v. Otis*, 33-402.

1087. Where in an action against an executor the only question was as to the amount of money contained in an express package which never reached the deceased, the testimony of plaintiff was competent to prove the amount of money contained in such package, when deposited by him in the express office, such evidence, for the specific purpose for which it was offered, being competent from the necessity of the case: *Sykes v. Bates*, 26-521.

1088. In an action against the executor of a deceased person, *held*, that the wife of plaintiff was not incompetent, the exclusion of the wife as a witness against her husband not having been made on the ground of interest: *Wendeling v. Besser*, 31-248.

1089. Parties who were competent witnesses at common law in the cases referred to in the statutory provision are not rendered incompetent by it: *Cummins v. Hull's Adm'r*, 35-253.

1090. And therefore evidence of a party to facts and circumstances relating to the

loss of a paper was held receivable as preliminary proof in order to warrant secondary proof of its contents: *Keech v. Cowles*, 34-259.

1091. The statutory provisions *held* not to operate to exclude the testimony of a party who was made a competent witness by statute, as to prove usury in a contract: *Rinehart v. Buckingham*, 34-409.

c. Competency of husband or wife.¹

1092. Where husband and wife are joint defendants, the wife may be called to testify for plaintiff. In such case she is not a witness against her husband, within the meaning of this section: *Richards v. Burden*, 31-305.

1093. A wife, summoned as garnishee in an action against her husband, is not exempt from answering interrogatories touching her indebtedness to him. The subjection of such indebtedness to the payment of claims against him cannot be regarded as against his interests: *Thompson v. Silvers*, 59-670.

1094. In an action against a wife to subject property conveyed to her by her husband to the payment of his debts, the husband is not a competent witness to testify, for the purpose of defeating such conveyance, that he was insolvent at the time the conveyance was made. There is no warrant for engrafting upon the statute the rule that the husband may be allowed to testify against his wife if his testimony is against himself also: *Stephenson v. Cook*, 64-265.

The husband is entitled to the evidence of his wife in his favor where she is a co-defendant in a criminal prosecution: See CRIMINAL LAW, § 1485.

1095. Within the provisions of the statute above referred to, allowing the husband or wife to be a witness against the other in a criminal proceeding for a crime committed by one against the other, the husband or wife, as the case may be, is a competent witness against the other in a prosecution for adultery: *State v. Bennett*, 31-24; *State v. Hazen*, 39-648.

¹ Sec. 3641. Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other; but they may in all civil and criminal cases be witnesses for each other.

[The foregoing was, by 15 G. A., ch. 33, substituted for the original section of the Code.]

Competency of husband or wife.—Privileged com

1096. In a prosecution for adultery, the wife is a competent witness to prove the marriage: *State v. Hazen*, 89-648.

1097. Also in bigamy, which is a crime by the one against the other within the meaning of the statutory provision: *State v. Sloan*, 55-217; *State v. Hughes*, 53-165.

1098. Under Rev., § 3983, which prohibited the husband or wife being witnesses for or against each other, except in criminal cases, *held*, that this was a privilege which rested with the other party to the marriage relation, and might be waived by such party under Rev., § 3986 (present Code, § 3643, last clause), and was not intended for the benefit of the opposite party in the suit: *Russ v. Steamboat War Eagle*, 14-363; *Blake v. Graves*, 19-312 (explaining *Karney v. Paisley*, 13-89).

The wife being a competent witness for the husband in a criminal prosecution, it is error to charge that her evidence should be received with great caution, or that it should be given but little weight: See CRIMINAL LAW, §§ 1486, 1487.

1099. The objection that the wife was a witness against her husband before the grand jury, upon the finding of an indictment, cannot be raised for the first time after conviction upon such indictment: *State v. Houston*, 50-212.

1100. Testifying for or against herself and the heirs, by a widow, after the death of the husband, is not the same as testifying for or against the husband if alive, nor is her evidence as to a conversation had between plaintiff and her husband inadmissible on the ground of confidential communications between herself and husband: *Pratt v. Delavan*, 17-307.

1101. Objection, when taken: An objection to the husband or wife, when called as a witness against the other, is an objection to the competency of such witness and should be taken at the time when the witness is sworn or it is proposed to examine such witness and not afterward. If the objection is not interposed until after the close of the examination, it will be deemed waived: *Watson v. Riskamire*, 45-231.

d. Privilege

1102. Between offer of a claim between not a communication the statutory provision communications be privileged: *Hanks*

1103. Exclamation upon the killing of *held* not communication and wife within the *State v. Middleham*

1104. To a physician, under some circumstances, a communication to a physician, in will be privileged, in that it was not *Guptill v. Verback*,

1105. Statements to the cause of the physician called to treat question by the physician jury occurred, are disclosed by the physician were made: *Raymond & N. R. Co.*, 65-152.

1106. It would mar of the statutory provision communications to prevent close a communication to his partner: *Ibid.*

1107. Juror not present a person has been a juror the case cannot prevent evidence, at a subsequent served at such former *linton*, 42-315.

As to how far testimony received as to what has room, see NEW TRIALS,

1108. Attorney and made in the presence of necessarily be considered communications as to which *Shaffer v. Mink*, 60-754.

1109. Although communication attorney and client ma

¹ Code, § 3443. No practicing attorney, counselor, physician, surgeon, minister of any denomination shall be allowed in giving testimony to disclose any confidential communications intrusted to him in his professional capacity, and necessary and proper to enable him to transact his office according to the usual course of practice. Such prohibition shall not apply to the party in whose favor the same are made waives the rights conferred.

Competency depending upon capacity.—Particular testimony.

by the attorney or his clerk, others in whose presence such communications are made are not forbidden nor excused from testifying as to them: *State v. Sterrett*, 68-76.

1110. Previous threats against the life of a party, for whose murder defendant was on trial, made to an attorney whom defendant was consulting in regard to a civil suit against such party, *held* not to be a privileged communication: *State v. Mecherter*, 46-88.

1111. In a garnishment proceeding against an attorney, *held*, that his relations to his client would not excuse him from answering to whom and under what conditions he had paid over money of his client sought to be reached by the garnishment: *Williams v. Young*, 46-140.

1112. A communication to one supposed to be an attorney, but who was not such at the time, but was studying and was soon after admitted, *held* not privileged: *Sample v. Frost*, 10-286.

1113. That a person to whom communications were made was an acting magistrate and usually did the business of defendant, and frequently gave him advice and counsel, *held* not sufficient to make a communication to such person privileged: *Pierson v. Steortz*, Mor., 136.

1114. An attorney is competent to testify where it appears that he was not the attorney of the party with reference to any matters about which he testifies, and that no information respecting such matters was obtained from him through the confidential relation of attorney and client: *Reinhart v. Johnson*, 62-155.

1115. A party to a suit, who is also a witness, cannot be called on to state a confidential communication made to his attorney: *Barker v. Kuhn*, 38-392.

As to evidence of an attorney in general, see ATTORNEYS, VI.

e. Competency of witness depending upon capacity.

1116. The statutory provision (Code, § 3636) as to competency of witnesses, requiring them to be human beings of sufficient capacity to understand the obligation of an oath, is not in conflict with the provision of the constitution, art. 1, § 4, that any

person not disqualified on account of interest may be called as a witness, such a qualification being assumed in the constitutional provision: *Kilburn v. Mullen*, 22-498.

1117. Where a little girl of less than nine years of age was not allowed to testify, it not appearing what other inquiry was made as to her capacity, the supreme court refused to interfere with the action of the lower court: *Ibid*.

f. Competency of particular testimony.

1118. As to a conversation: The fact that a witness, called to testify as to a conversation, did not hear all of it will not render him incompetent to testify as to what he did hear, but will only go to the credibility of his testimony: *Mays v. Deaver*, 1-216.

1119. A witness may be allowed to testify as to a part of the conversation which he has heard, although there was a part which he did not hear nor understand: *State v. Elliott*, 15-72.

1120. The testimony of a witness as to a conversation should not be excluded because he cannot recall the entire conversation: *Nash v. Gibson*, 16-305.

1121. A witness who cannot remember the exact words of a conversation to which he is called to testify may give the purport of the conversation and his impressions received and ideas formed therefrom: *State v. Donovan*, 61-278; *Walker v. Camp*, 63-627.

1122. Sufficiency of witness' knowledge: In an action against a common carrier for damages sustained by goods while in its possession, *held*, that evidence of a witness that he saw a part of the goods when unloaded and that the same were damaged was admissible, although he could not testify as to the condition of other portions of the goods: *Winne v. Illinois Cent. R. Co.*, 31-583.

1123. Where a wife testified as to her husband becoming intoxicated at a certain place, *held*, that the fact that he brought home goods procurable there, and afterwards found charged there to him, was sufficient to warrant such statement: *Rafferty v. Buckman*, 46-195.

1124. As to reputation: While a witness testifying as to reputation must show his competency by showing that he knows what

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that reputation is, still this fact need not appear by any set phrase or in answer to any categorical question. Where it appears that the witness resides in the same neighborhood as the party whose reputation is in question and has known such person since childhood, the competency of the witness to testify as to such reputation is sufficiently shown: *State v. Deitrick*, 51-467.

1125. As to character: Witnesses testifying as to the good character of accused may speak of such fact as within their own knowledge and are not confined to testifying as to his general reputation in the community: *State v. Cross*, 68-180.

As to evidence of character or reputation of a witness, see *infra*, §§ 1142-1155.

As to evidence of character in general, see *supra*, §§ 73-80.

1126. As to agency: Where plaintiff sought to establish the fact that a third person was an agent of defendant in the transaction in question, *held*, that such third person was competent to testify on behalf of defendant in denial of such agency: *McFarland v. Lowry*, 40-467.

Former trial: As to the competency of a witness to testify as to the evidence on a former trial, see *supra*, §§ 137-140.

g. Credibility.

1127. As affected by religious belief: Lack of belief in God, or future conscious existence, does not render a witness incompetent, nor does it render incompetent a party's dying declaration; but proof of such fact is admissible to lessen the credibility of his testimony or of such declaration: *State v. Elliott*, 45-486.

1128. The fact that a witness does not believe in a God, and that He will reward or punish us according to our deserts, may be shown as affecting the credibility of the witness, but it is erroneous to confine the evidence to a belief in future rewards and punishments: *Searcy v. Miller*, 57-613.

1129. The facts as to belief are not to be brought out by cross-examination, but by proof of declarations, etc.: *Ibid*.

1130. A witness cannot be required to testify to his want of belief in any religious tenet nor to divulge his opinions on matters of religious faith for the purpose of affecting

his credibility by showing that he does not believe in a future conscious state of existence: *Dedric v. Hopson*, 62-562.

1131. As affected by interest: The statutory provision (Code, § 3638) that no person offered as a witness shall be excluded by reason of his interest in the event of the action or because he is a party, except as is otherwise provided, would have been broad enough to give defendant in a criminal case the right to testify in his own behalf, had it not been for other statutory provisions limiting such right: *State v. Gigher*, 23-818. (By subsequent statutory provision, 17 G. A., ch. 168, § 1, defendants in criminal cases are now allowed to become witnesses.)

As to the credibility of defendant in a criminal case as a witness, see CRIMINAL LAW, § 1445.

1132. Under our statute, the interest of a witness does not disqualify him, but can only be shown for the purpose of lessening his credibility, but the rules relating to the admissibility of evidence showing the interest of the witness are the same as at common law: *Erickson v. Bell*, 53-627.

1133. Therefore, *held*, in accordance with the rule of the common law, that testimony to establish declarations of a witness, to the effect that he is interested in the event of the suit, is not admissible: *Ibid*.

1134. Interest of a witness in behalf of one of the parties should be considered as affecting his credibility and for no other purpose: *Holloway v. Griffith*, 32-409.

1135. The jury may properly be instructed to consider the interest of a witness, his hopes and fears, etc.; and in an action against a railway, *held*, that such instruction was not erroneous as tending to reflect upon the credibility of railroad employees: *Hatfield v. Chicago, R. I. & P. R. Co.*, 61-434.

1136. As affected by mental condition: The credibility of a witness may be impeached by showing an abnormal condition of the mind, caused by disease or habits which impair the memory: *Alleman v. Stepp*, 52-626.

1137. The fact that a witness was under the influence of liquor at the time of the occurrence with reference to which he testifies will not destroy the credibility of his testimony with reference thereto, although it will undoubtedly impair it, and if he is

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corroborated as to the occurrences, or his recollection appears distinct and clear, he may be entitled to belief: *State v. Castello*, 62-404.

1138. As affected by moral character: The common law rule that the moral character of a witness could not be shown for the purpose of impeaching his credibility, but only his reputation for want of truth and veracity, is changed by statute (Code, § 3849), which provides that his general moral character may be proved for the purpose of testing his credibility, and, therefore, the general reputation may now be shown, but not the witness' character as known to the impeaching witness independent of his reputation: *State v. Egan*, 59-686.

1139. Aside from the statutory provision, the general character of a witness could not be shown for the purpose of impeachment, and the evidence to impeach must be confined to the witness' character for veracity to be proven by his general reputation as to veracity in the community in which he lived, and it was not proper for another witness to give his opinion as to the character of the witness in these respects, nor to testify as to particular facts for the purpose of proving such character: *Carter v. Cavanaugh*, 1 G. Gr., 171.

1140. The truthfulness of a witness is always presumed, and evidence is not admissible for the purpose of establishing his credibility, as, for instance, that he has held public office, etc., where no attempt to impeach him has been made: *Walter v. Chicago, D. & M. R. Co.*, 39-83.

1141. Suppression of facts: Failure of a party as a witness to give a full and fair statement of matters involved in the issues of the case may be regarded as affecting the credibility of his testimony. Intentional suppression of facts is to be regarded in the same light as false statement of facts of like bearing: *Lee v. Cresco*, 47-499.

Preponderance of evidence, see *supra*, §§ 830-855.

Credibility of impeached witnesses, see *infra*, III, 7, i.

h. Impeachment.

As to the impeachment of a defendant in a criminal case who makes himself a witness, see CRIMINAL LAW, § 1442.

1142. Evidence of reputation for truth and veracity: A man's reputation for truth and veracity is what is said of him in the community in which he lives, and the testimony should not be limited to what is said of him by persons who deal and associate with him: *Dance v. McBride*, 43-624.

1143. It is improper to admit, as testimony sustaining the character of a witness whom it is sought to impeach, evidence as to what his reputation, etc., is "among the business men with whom he deals:" *Bays v. Herring*, 51-286.

1144. It is competent for a witness, whose reputation for general morality and truth is assailed, to sustain his character by showing that those having the best opportunity of knowing his reputation have heard nothing said respecting his character; and in a particular case, *held*, that although certain language of the court indicating that evidence of this kind was the best evidence of good reputation was erroneous, yet that such error was, under the circumstances, without prejudice: *State v. Nelson*, 58-208.

1145. It is proper to ask a witness whether he is acquainted with the general moral character of the witness whose character it is sought to impeach, in the vicinity in which he resides. Such question calls for the general reputation and not the witness' personal knowledge of the defendant's character: *State v. Froelick*, 70—.

1146. Specific vice: Proof of a specific vice, as want of chastity, is not competent for the purpose of discrediting the competency of a witness: *Kilburn v. Mullen*, 22-498.

1147. Evidence of particular immoral acts is not admissible. Where evidence is introduced showing the general moral character of the witness to be bad, and the witness attempts to explain away such bad reputation by showing the circumstances out of which they arose and that such circumstances were merely equivocal in character and not necessarily inconsistent with his morality, he cannot go further and introduce other testimony to show that he was not guilty of such immorality, but will be confined to evidence of his general moral character: *State v. Woodworth*, 65-141.

1148. Where the moral character of the witness has been impeached in the usual way,

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the party offering him cannot destroy the impeaching evidence upon cross-examination of the impeaching witness by showing that the bad reputation to which he testifies is limited to some particular vice. A person cannot be said to have a good moral character when he has a reputation as to any particular vice. The word "general" as used in this section was designed to indicate the mode of proof, and not as implying that a person's general moral character is good, which is bad only in one respect: *Ibid.*

1149. Where a witness is called in rebuttal to testify as to plaintiff's general character for honesty, the court may properly receive on cross-examination evidence of specific transactions, or call out declarations of the witness in relation to acts in the plaintiff's life, for the purpose of showing the credit or weight due the testimony. But it is not a legal right, and rests largely in the discretion of the trial court: *Little v. Martin*, 28-558.

1150. **Proof of general character:** An indictment for assault and battery is not proper to be shown in evidence as bearing upon the moral character of a witness to affect his credibility: *Kitteringham v. Dance*, 58-632.

1151. A witness cannot be impeached by asking upon cross-examination if he were not successfully impeached in the trial of another case: *State v. Wooderd*, 20-541.

1152. The fact that a witness is shown to have acted dishonestly in view of the facts as he testifies them to have been is not sufficient to destroy his evidence: *Wilson v. Patrick*, 34-362.

1153. Where a witness had admitted that he had been guilty of horse-stealing, *held*, not proper to ask him how long he had been engaged therein, as such fact would have no bearing on his moral character: *State v. McIntire*, 58-572.

1154. *Held* not proper, upon cross-examination of a witness introduced to impeach the character of plaintiff, who had testified on her own behalf, to ask such witness whether plaintiff had not been a very hard-working woman, devoted to business and the rearing of her family, etc.: *Herzman v. Oberfelder*, 54-83.

1155. Where a witness who it appeared had known the witness sought to be impeached, and resided in the town where he

was raised, testified in response to a proper question that such witness' general moral character was bad, *held*, that the testimony was proper, and it would be presumed that the witness used the word character in the same sense in which it is used in the statute: *State v. Hart*, 67-142.

As to evidence of character, or reputation, see, also, *supra*, §§ 68-80, 1124, 1125.

1156. **Impeachment of defendant or co-defendant as witness:** Where one of two co-defendants is called to testify for the other in a criminal case, he may be impeached as any other witness: *State v. Hardin*, 46-623.

1157. Where defendant in a criminal prosecution becomes a witness in his own behalf, evidence tending to show that his moral character is bad is admissible, as in the case of any other witness: *State v. Kirkpatrick*, 63-554.

1158. The number of witnesses to be called for the purpose of impeaching the same witness may be limited by the court: *Bays v. Herring*, 51-286; *Bays v. Hunt*, 60-251.

And as to limiting number of witnesses generally, see *infra*, §§ 1266-1268.

1159. **Proof of contradictory statements:** The fact that a witness has made statements on other occasions at variance with those made at the trial may be shown for the purpose of impeaching him if his attention is called to the time and place and the proper foundation is thus laid: *Glenn v. Carson*, 3 G. Gr., 529.

1160. A witness may be cross-examined as to statements in a conversation with a particular person named, at a particular time and place, and relating to the subject-matter of his testimony in chief, for the purpose of laying the foundation for impeachment, and showing that he has made statements outside of court contrary to what he testifies to at the trial: *Nelson v. Chicago, R. I. & P. R. Co.*, 38-564.

1161. **Laying foundation for impeachment:** Where it is sought to impeach a witness by proving statements or declarations previously made by him inconsistent with his testimony, he must first be asked whether he ever made such statements, and his attention must be called to the time and place where and the person to whom the statements inquired about were claimed to have been

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made: *Strunk v. Ochiltree*, 15-179; *State v. Kinley*, 43-294; *State v. McLaughlin*, 44-82.

1162. The declarations of a person not a party to the record are admissible only for the purpose of impeachment, and before such declarations can be received in evidence, the attention of the witness must have been directed to the time, place and circumstances: *State v. Hamilton*, 32-572.

1163. Whilst declarations out of court of a party to the record may be introduced as an admission of a fact, yet, in order that such declarations may operate as an impeachment of his character as a witness, his attention must be directed to the time, place and person involved in the supposed contradiction: *Conway v. Nicol*, 34-533.

1164. In a particular case, where a witness was asked, on cross-examination, if he had not made certain statements, *held*, that, in view of the answer made and the fact that the subject was not further pursued, the failure to exclude the question because not in proper form was not prejudicial error: *McGowen v. Myers*, 60-256.

1165. Foundation for introduction of writing to impeach: In order that a letter may be received for the purpose of impeaching the testimony of a witness by showing statements therein inconsistent with his statements on the stand, it is necessary not only that the letter be shown to him and that he admit the handwriting and signature, but he must be allowed to read the same or have his attention called to that part which it is claimed is in conflict with his testimony on the stand, so as to give him an opportunity to explain it: *Morrison v. Myers*, 11-538.

1166. It is not proper to call witness' attention to the signature of a letter and ask whether it is his signature and then ask him whether certain statements are contained therein. He should not be asked whether he wrote a letter with certain contents without being first shown the letter itself. The letter is the best evidence of its contents: *Glenn v. Gleason*, 61-28.

1167. Where it is sought to impeach a witness by a paper written by him, the paper must be shown to him and he must be asked if he wrote it: *Peck v. Parchen*, 52-46.

1168. It is not proper to ask a witness what

he thought he made oath to in a certain writing as foundation for impeachment. The correct practice is to show the witness the paper and then ask him if he made oath to it: *Callanan v. Shaw*, 24-441.

1169. Explanation: Where, for the purpose of impeachment, the attention of a witness was called, on cross-examination, to a communication furnished by him to a newspaper, *held*, that he was properly allowed to explain the circumstances under which it was written: *Smith v. Weeks*, 54-411.

1170. Proof of contradictory statements in depositions: The rule that before a witness can be discredited by proof of former conflicting statements, he must be asked about them and given an opportunity to explain, applies to impeachment by means of other depositions of the witness: *Samuels v. Griffith*, 13-103; *State v. Shannehan*, 22-435.

1171. In a particular case, where two depositions were admitted of the same party and the first suppressed for informality, *held*, that a reference to the first in the second, and the statement that the answers in the first were correctly written out, did not obviate the necessity of calling the witness' attention to such statements, before reading such deposition, for the purpose of impeaching the testimony of the witness given in the second: *Samuels v. Griffith*, 13-103.

1172. The fact that the deposition of a witness was read for the purpose of impeaching his testimony given on the stand without having first given him an opportunity to examine the deposition and explain his testimony therein, *held* not error, where the witness was immediately further examined and had full opportunity of explanation: *Johnson v. Chicago, R. I. & P. R. Co.*, 58-348.

1173. Where, in cross-interrogatories propounded to a witness whose deposition was to be taken on commission, he was asked whether he had not committed a crime in connection with the subject-matter of the suit, and such cross-interrogatories were not answered, *held*, that the party propounding them had no right to have them read and the fact that they were not answered brought to the attention of the jury: *Slocum v. Knosby*, 70—.

1174. Other similar cases: So where, for the purpose of defeating a continuance asked on account of the absence of a witness, the opposite party admitted that the witness if present would testify to the matter set out in the application for continuance, *held*, that statements made by such witness out of court in conflict with the statement of his testimony given in the application for continuance could not be shown by way of impeachment, there being no foundation laid therefor: *State v. Shannehan*, 22-485; *Williamson v. Peel*, 29-458.

1175. Where it is sought to impeach a witness by proof of conflicting statements in the evidence given on a preliminary examination, his attention must be drawn to the time, place and person involved in the supposed contradiction, and without such foundation being laid, the minutes of his testimony on such examination cannot be received for the purpose of impeachment: *State v. Collins*, 32-36.

1176. Recalling to lay foundation: While a witness cannot, after the close of his cross-examination, be recalled by the party cross-examining for the purpose of asking him a question on which to impeach him, yet where the cross-examination of witnesses had been irregular, *held*, that the testimony of the witness when recalled might be considered as a continuance of his cross-examination: *Ross v. Hayne*, 3 G. Gr., 211.

1177. A party may not in all cases, if he may in any, recall a witness who has before testified, for the purpose of laying a foundation for impeachment by contradicting his testimony: *Peschongs v. Mueller*, 50-237.

1178. The question whether a witness may be recalled for this purpose is one peculiarly within the discretion of the trial court: *Huff v. Aultman*, 69-71.

1179. Where evidence was introduced of statements, made by plaintiff suing for services rendered as a physician, tending to impeach plaintiff, and also show a lack of skill on his part, *held*, that plaintiff should have been allowed to be recalled as a witness to explain to what he referred in the statements charged to have been made by him and the sense in which he used the terms therein employed: *Robinson v. Campbell*, 47-625.

1180. Matter of opinion: Where a witness testifies as an expert as to a matter of opinion, he may be impeached by a showing that on a former action he expressed a different opinion: *Miller v. Mutual Benefit L. Ins. Co.*, 31-216.

1181. But it is not competent to impeach the testimony of a witness as to facts stated in the testimony by proving statements by him of his opinion as to such facts: *State v. Maxwell*, 42-208.

1182. Declarations made soon after the event in issue occurred, as well as opinions or impressions formed from such conversations, are not admissible to strengthen the testimony of a witness where it is not claimed that the relationship of the witness to the case or the parties interested discredits him, or that he designedly makes false statements on account of such relationship, and the object is to show that the declarations were made before such relations existed: *Boyd v. First Nat. Bank*, 25-255.

1183. Collateral or immaterial matters: The law does not permit a witness to be interrogated upon a collateral matter merely for the purpose of contradicting his statement thereon: *Wau-kon-chaw-neek-kaw v. United States*, Mor., 332.

1184. A witness cannot be impeached upon an immaterial matter: *State v. Maxwell*, 42-208; *Williams v. Niagara Ins. Co.*, 50-561.

1185. A witness cannot be examined as to any matter which is collateral and irrelevant, merely for the purpose of contradicting him by other evidence: *Peck v. Parchen*, 52-46.

1186. It is only as to matters which are relevant that a witness can be contradicted for the purpose of impeachment: *Clark v. Reiniger*, 66-507; *Eikenberry v. Edwards*, 67-14.

As to contradicting answers on cross-examination with reference to irrelevant and immaterial matters, see *infra*, §§ 1323-1326.

1187. Bill of exceptions and minutes of evidence for the purpose of impeachment: A bill of exceptions prepared on a former trial is not admissible to impeach a witness whose evidence is claimed to be embraced therein, by contradicting him at a subsequent trial: *Boyd v. First Nat. Bank*, 25-255.

1188. Minutes of evidence before a grand jury or on preliminary examination are not

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admissible for the purpose of impeachment: *State v. Hayden*, 45-11.

1189. Whether, with proper identification, the testimony of a witness upon a former trial taken by a shorthand reporter, and which is properly made part of the record, can be introduced as impeaching evidence, *quaere*. Under particular facts, *held*, that the testimony was not sufficiently identified to be so used: *Case v. Burrows*, 54-379.

1190. Party cannot impeach his own witness: Where a party voluntarily calls a witness to testify in his own behalf, he is thereby estopped from assailing the truth and veracity of the witness, but he is not precluded from showing that the facts are otherwise than as testified to by his witness, even in direct contradiction to the testimony of such witness: *Thorn v. Moore*, 21-285; *Clapp v. Peck*, 53-270.

1191. A party cannot impeach his own witness, but he may make the requisite inquiries for the purpose of aiding the witness to recollect and testify to the truth: *Humble v. Shoemaker*, 70—.

1192. A party is not bound absolutely by what the witness introduced by him states. He can show a different state of facts by another witness; he may, if taken by surprise, ask his witness if he has not stated differently to the party or his counsel: *Ibid*.

1193. Where a witness on direct examination gave no testimony to the benefit of either party, but on cross-examination testified to a new matter adverse to the party calling him, *held*, that such party was not precluded from contradicting him in this respect by other testimony, and that as to such matter he was to be treated as the witness of the party cross-examining: *Artz v. Chicago, R. I. & P. R. Co.*, 44-284.

1194. Where one party makes the other party his witness, he cannot be heard to say that such witness is unworthy of belief: *Hunt v. Hoover*, 34-77.

1195. It is not competent for a party to introduce testimony to contradict admissions made by himself as a witness: *Hinkson v. Morrison*, 47-167.

1196. The rule that a party calling a witness is not thereby estopped from proving the truth of any particular fact by any other competent testimony in direct contradiction

to what such witness has testified is applicable in case of written instruments: *Dowdell v. Wilcox*, 58-199.

1197. Where the prosecution in a criminal case introduced proof of certain testimony given by defendant on a former trial, *held*, that it was not bound by such testimony as proved: *State v. Lucas*, 57-501.

1198. Proof of motives or feelings: The rule that, before impeaching a witness by proof of declarations inconsistent with his testimony, his attention must have been called to such declarations, is not applicable where he has testified as to the absence of enmity and ill-will in the commission of the assault, and it is then proposed to prove his declarations indicating a different state of feelings: *Lucas v. Flinn*, 35-9.

1199. In showing the bias of a witness the party against whom he has testified is limited to a cross-examination, and cannot introduce other evidence of statements made by the witness, not having the effect of contradicting anything which he has testified to in his examination in chief or bearing on any issue raised in the case: *State v. Townsend*, 66-741.

1200. The right to make inquiry as to the motive of a witness is within the discretion of the court, depending upon whether he appears to be a willing witness or not; and where it is not shown that the discretion has been abused, the action of the lower court will not be interfered with on appeal: *Devine v. State*, 4-443.

1201. It is not proper for defendant on cross-examination to ask plaintiff's witness whether he has received any communication from citizens requesting him or urging him to attend at the trial, it appearing that he has attended from a distance, beyond the state: *State v. Reinhartz*, 69-224.

1202. *Held*, also, that it was not error to refuse to require the witness to state whether he had received communications from citizens holding out to him special inducements to come, it already appearing that there was no arrangement for additional compensation or other pecuniary consideration: *Ibid*.

1203. Impeaching evidence not to be considered for any other purpose: Although statements made by a witness, when not under oath, may be admitted on the trial to

impeach the testimony of such witness, when given on oath, relative to the same subject-matter, still, in the absence of any other evidence, direct or circumstantial, to sustain such statements, they will be disregarded, and the statement taken under legal provisions sanctioned by oath must prevail: *Burrows v. Goodhue*, 1 G. Gr., 48.

1204. Testimony which is admissible for the purpose of impeachment of a witness cannot be introduced or relied upon by the party who has introduced such witness: *Corbin v. Reed*, 43-459.

i. *Credibility of interested or discredited witness.*

1205. Not to be entirely rejected: Matters which affect the credibility of evidence are not grounds for its entire rejection: *State v. Porter*, 84-181.

1206. Jury, judges of credibility: While it is true that the jury must judge of the credibility of witnesses, they must, in doing so, exercise judgment aided by the rules for discovering truth and not merely their own will or discretion: *State v. Fowler*, 52-103.

1207. An instruction as to the rules to govern the jury in regard to the credibility of witnesses, held correct in a particular case: *Little v. McGuire*, 43-447.

1208. Falsity as to one fact: The fact that a witness has sworn falsely as to one material fact ought to cast suspicion upon the rest of his evidence, but if the jury is satisfied that he has sworn to the truth with reference to other material facts, his evidence should not be disregarded: *McCrary v. Crandall*, 1-117.

1209. Where it was found that the witness had testified falsely as to one matter, held, that his credibility was thereby greatly impaired upon other points: *Sweney v. Davidson*, 68-886.

1210. The maxim, *falsus in uno, falsus in omnibus*, is applied only in cases where the witness wilfully and knowingly gives false testimony. If the witness from want of intelligence or otherwise is incompetent, the court will not permit him to testify, but when he does testify, all questions of credibility are for the jury alone, and in weighing his testimony, they may consider the

manner of the witness in testifying and his demeanor, conduct and appearance before them. The evidence of a witness, who is not credible, if corroborated and reasonable, or of a witness who testifies falsely, unless knowingly and wilfully false, ought not to be disregarded: *Callanan v. Shaw*, 24-441.

1211. It is not correct to instruct the jury that testimony of an impeached witness is entitled to weight and credibility only on those points on which he is corroborated. He may testify so consistently and deport himself in such a manner and be so corroborated in material facts that the jury might feel justified in believing him on some points on which he is not corroborated: *Green v. Cochran*, 43-544.

1212. An instruction that, if the jury believe a witness knowingly and intentionally testifies falsely to a material fact, all his testimony may be disregarded, is not erroneous, and it is not necessary that the jury be satisfied of the falsity of his testimony beyond a reasonable doubt. From such an instruction the jury would not find that, if corroborated, the part of the testimony not shown to be false would be regarded as wholly valueless: *State v. Wells*, 46-662.

1213. Perjury not presumed: The court will hardly be justified in believing that any witness commits perjury, if his testimony can be reconciled by any reasonable explanation: *Warder v. Pattee*, 57-515.

1214. Effect of interest: The fact that a witness is interested in the result of a suit will not warrant the jury in disregarding his evidence entirely, where it is not corroborated: *Woodward v. Squires*, 39-435.

1215. Where the evidence of a party in interest is contradicted by that of a party who has no interest in the action, it is for the jury to determine from all the circumstances which is entitled to the most credit: *Brown v. Jefferson County*, 16-339.

1216. An instruction that "when two witnesses swear differently and one is a disinterested witness and the other a party to the suit, then, other things being equal, the evidence of the disinterested witness should prevail over that of the party to the suit," held not to be approved: *Sullivan v. Collins*, 18-228.

1217. An instruction to the effect that the

testimony of witnesses having no interest in the event of the suit, if otherwise of equal credibility, is entitled to more weight than the testimony of interested witnesses, *held* not erroneous, though of doubtful propriety: *Bonnell v. Smith*, 53-281.

1218. Testimony of impeached witness: It is not for the court to say that the evidence of a witness whose character the opposite party has sought to impeach shall be disregarded. That question is for the jury: *State v. Mylor*, 46-192.

1219. Where it is shown that the reputation of a witness for truth is bad, his evidence is not necessarily destroyed, but is to be considered under all the circumstances and given such weight as the jury believe it entitled to, and disregarded if believed to be entitled to no weight: *State v. Miller*, 53-209.

1220. Every witness is presumed in the outset to be truthful. If impeaching evidence is introduced and evidence in rebuttal of the impeaching evidence, the jury must consider whether they still consider the witness to be a truthful person, and the belief of each juror in this respect will determine whether, in his judgment, the witness has been successfully impeached or not: *State v. Ormiston*, 66-143.

1221. Effect of proof of contradictory statements: It is error to instruct the jury that "a witness whose statements out of court have been proven to be different from those made in court under oath is not entitled to much credit as a witness." Whether he is entitled to much credit or not must depend upon circumstances, and the jurors must be the sole judges on that question: *Barr v. Hack*, 46-308.

1222. It is for the jury to determine what effect they shall give to statements of a witness proven for the purpose of impeaching him, in view of the circumstances under which such statements were made, and it is error to instruct them as to the effect or consequences of their findings as to the circumstances: *State v. Johnagen*, 53-250.

1223. Corroboration: The doubt thrown upon the credibility of a witness by proof of bad moral character may be removed by corroborating evidence: *Snediker v. Poorbaugh*, 29-488.

1224. Even though the witness is discred-

ited, his testimony may be corroborated in such a way that it cannot be disregarded: *Wilson v. Patrick*, 34-362.

1225. If the jury is satisfied that the witness speaks the truth as to matters in which he is corroborated by unimpeached witnesses, this will be ground for giving him credit in matters in which there is no corroboration: *State v. Bixby*, 89-465.

1226. Where the credibility of a witness is impeached by direct testimony of his want of reputation for truth, or of his general moral character, or by proof of his having made and testified to conflicting statements, he cannot be supported by evidence that statements of facts made by him before the trial correspond with his evidence. But the following are exceptions to the rule: If the witness is charged with a design to misrepresent, on account of his changed relation to the parties or the cause, evidence of like statements before his change of relation may be admitted. So, if it is attempted to be shown that the evidence is a recent fabrication, or when long silence concerning an injury is construed against the injured party, it is proper to show that the witness made similar statements soon after the transaction in question: *State v. Vincent*, 24-570.

1227. Where a witness had, in different causes, given contradictory evidence, *held*, that proof of statements made about the time of giving the first evidence, and explaining the reason for giving it, were sufficient to corroborate the true evidence subsequently given: *Green v. Cochran*, 48-544.

1228. The general rule is that evidence of what a witness has said out of court is not admissible to corroborate or fortify his testimony, and while it is sometimes held that when an attempt is made to discredit a witness on the ground that he was influenced in giving his testimony by some motive prompting him to give a false or colored statement, it may be shown that he made the same statement when the contributory motive did not exist, yet when there is simply conflicting evidence as to the matters testified to by the witness, the fact that such witness at a previous time out of court made the same statements with reference to such matters is not admissible: *Rhutael v. Stephens*, 63-627.

8. Order and method of introduction.

a. Introduction.

How introduced in equitable proceedings, see PRACTICE, II, d.

1229. In conflict with stipulations: Where upon the trial a party sought to introduce evidence in contravention of a stipulation in writing as to particular facts, which was duly signed and filed in the case, *held*, that such evidence was properly refused: *Van Horn v. Burlington, C. R. & N. R. Co.*, 69-239.

1230. Order discretionary: The order in which the proof of facts shall be received is in the sound discretion of the court: *Cannon v. Iowa City*, 34-203; *Woolheather v. Risley*, 38-486; *Carman v. Roennan*, 45-135; *Duffees v. Judd*, 48-256; *State v. Fry*, 67-475.

1231. And in the absence of any proof of prejudice to the appellant or of abuse of discretion by the court, the supreme court will not feel justified in interfering, on appeal, with the exercise of such discretion: *Pearson v. South*, 61-232.

1232. A decision of the court in such matter will not be overruled on appeal, unless manifest abuse of such discretion is shown: *Samuels v. Griffith*, 13-103; *Donaldson v. Mississippi & M. R. Co.*, 18-280.

1233. The supreme court will not be justified in interfering with the exercise of this discretion by the lower court, unless in a clear case of its abuse, even where it is exercised in excluding evidence which is not strictly rebutting in its character, after the original case for that party has been closed: *Boals v. Shields*, 35-231.

1234. It is within the discretion of the court to permit a witness at any time during the trial to correct the evidence previously given. If the opposite party is taken by surprise and he is unable to controvert the new evidence, because of the absence of witnesses, he should at least apply for a continuance: *Miller v. Hartford F. Ins. Co.*, 70—.

1235. Out of regular order: In the exercise of its discretion, and in accordance with common practice, the court may admit testimony the relevancy or competency of which is not at the time apparent, on the promise of the party offering it, and with the understanding that he will introduce other testi-

mony by which its competency or relevancy shall become apparent, and that otherwise it shall be ruled out; but the court may, in its discretion, require the evidence to be introduced in its proper order: *Rutledge v. Evans*, 11-287; *Cramer v. Burlington*, 42-815.

1236. Where the pleadings of defendant alleged that he had fully complied with the conditions of a title bond, which he offered in evidence, *held*, that an objection to the introduction of such bond offered in evidence because defendant had showed no title or interest therein, was properly overruled, defendant being permitted first to introduce the bond and then to show his title and interest in it: *Van Orman v. Spafford*, 16-186.

1237. The record in another case may be introduced in evidence to prove a prior adjudication without previous proof that the former action was between the same parties or involved the same rights. Those facts might be established by evidence afterwards: *Searle v. Richardson*, 67-170.

1238. It is not error to admit secondary evidence of an instrument claimed to be lost before there is evidence authorizing the introduction of such secondary evidence, if afterwards facts are shown in the testimony of either party rendering the introduction of such secondary evidence proper: *Cook Mfg. Co. v. Randall*, 62-244.

1239. Where it is sought to prove by parol evidence a sale which is taken out of the statute of frauds by part performance, evidence of the sale may be first introduced, to be followed by proof of part performance: *Campbell v. Ormsby*, 65-518.

That a written instrument may be introduced before proof of signature thereof is made, see *supra*, §§ 602, 603.

1240. Additional evidence in chief after party has rested: The entire subject of the examination of witnesses and the order of production of testimony rests very largely in the discretion of the judge trying the cause, and it is within his discretion, in the furtherance of justice, to admit new testimony on the part of the affirmative after the testimony on the part of the negative has been closed: *Hubbell v. Ream*, 31-289.

1241. Unless an abuse of discretion is shown, the action of the court in allowing the plaintiff on rebuttal to introduce evidence

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which is not strictly rebutting, furnishes no ground of reversal: *Hess v. Wilcox*, 58-380.

1242. So where defendant, under the allegations of his answer, introduced testimony upon a point as to which the burden of proof was properly upon plaintiff under the pleading, *held*, that it was not error in the court to then allow plaintiff to introduce adverse evidence, although it was not in rebuttal: *Crane v. Ellis*, 31-510.

1243. Although the matter of the order of introducing evidence is largely in the discretion of the court, yet where evidence was allowed out of its proper order and the court refused to allow additional evidence in rebuttal, *held*, that there was such error as to require reversal: *McDonald v. Moore*, 65-171.

1244. Testimony offered merely for the purpose of corroborating a witness may properly be excluded until the testimony of the witness has been impeached: *State v. Rorabacher*, 19-154.

Further as to rebuttal, see *infra*, §§ 1337-1348.

1245. Additional evidence after evidence is closed: The admission of testimony after both sides have rested their case is so much a question of discretion that it will not be interfered with on appeal without a showing of abuse of discretion or prejudice to appellant: *Tisdale v. Connecticut Mut. L. Ins. Co.*, 28-12.

1246. The court may in its discretion allow the introduction of additional evidence after the evidence has been closed and the arguments of counsel have been made: *Darland v. Rosencrans*, 56-122.

1247. It is the common practice in trial courts to permit parties to introduce material evidence at any time before the verdict, which has been omitted by mistake or inadvertence: *Meadows v. Hawkeye Ins. Co.*, 67-57.

1248. Under statutory provision (Code, § 2799), that at any time before the case is finally submitted a party may be permitted to give further testimony to correct an evident oversight or mistake, *held*, that it was in the discretion of the court to allow a party to introduce testimony as to a certain point claimed to have been omitted by oversight, although the case had been partially argued to the jury; *McManus v. Finan*, 4-283.

1249. So *held*, also, where a party was allowed to introduce evidence after the conclusion of the argument of one of the counsel for the opposite party: *McCormick v. Holbrook*, 22-487.

1250. But *held*, in a particular case, that the refusal of the court to allow defendant to introduce additional evidence after the opening argument in the case had been made was not sufficient ground for reversal, it not appearing that the court's discretion had been abused: *Kemerer v. Bournes*, 53-172.

1251. This statutory provision is applicable to a case where a witness is by accidental delay prevented from reaching the place of trial in time for the introduction of his testimony at the proper time: *Smith v. State Ins. Co.*, 53-487.

1252. Even if the power of the court under this provision is discretionary, the abuse of such discretion in refusing to admit testimony in a proper case, will be ground for reversal: *Ibid*.

1253. In a case tried in equity upon depositions, *held*, that the party should be allowed, after the announcement of the decision of the court and before entry of judgment, to introduce oral evidence to correct a misstatement in the witness' deposition: *Eggspießer v. Nockles*, 58-649.

1254. Courts may receive evidence out of its regular order in other cases than those where there is surprise or where it is necessary in order to promote justice: *Huey v. Huey*, 26-525.

1255. Where plaintiff had omitted to prove title necessary to make out his case, *held* not error to allow him to introduce proof thereof after the evidence had been closed: *McNichols v. Wilson*, 42-385.

1256. Where an issue is finally submitted to the court and determined, it is too late afterwards to introduce additional evidence bearing thereon: *Byington v. Moore*, 62-470.

1257. Recalling witness: Although the statutory provision relates only to civil cases, yet in criminal cases also, under some circumstances and for some purposes, a witness may be recalled after the evidence is closed, and in the absence of a showing to the contrary it will be presumed that he was properly recalled: *State v. Shean*, 32-88.

1258. The privilege of recalling a witness

to re-examine him upon the same subject-matter, for the purpose of explaining an apparent contradiction, is a matter within the discretion of the court: *State v. Rorabacher*, 19-154.

1259. Evidence to rebut counter-claim: After defendant has introduced proof to establish a set-off, plaintiff should be allowed to introduce evidence to show that defendant's claim has been paid. He is not called upon to introduce such evidence until after defendant has introduced the evidence on his part: *Luke v. Bruner*, 15-3.

1260. Preliminary statement: The introduction of evidence is not to be precluded by the statement of the case to the jury by the attorney in opening. Admissions thus made are not binding on the party: *Frederick v. Gaston*, 1 G. Gr., 401.

1261. Introduction of written evidence: Where a case was being tried on the written report of evidence offered on a former trial, *held*, that a party might on his own motion withdraw or withhold a portion of the evidence offered by himself on such trial: *Henderson v. Chicago, R. I. & P. R. Co.*, 48-216.

That a party may withhold all or a portion of depositions taken by him, see *supra*, §§ 982-988.

1262. Introduction of record: It is not necessary to constitute a full introduction of the record in evidence that it be actually handed to the jury: *Fabian v. Davis*, 5-456.

1263. Where a written instrument is offered in evidence and no objection is made thereto, it is to be regarded as introduced: *Stephens v. Pence*, 56-257.

1264. Where a party made an oral statement that he offered a certain copy of a book in evidence, but did not file it in the case nor produce it on the trial, *held*, that it could not be considered as a part of the evidence received, and that the right to a trial *de novo* on appeal could not be defeated by the fact that the record did not contain such copy: *Palo Alto County v. Harrison*, 68-81.

1265. Inspection of instrument: When a note is introduced in evidence the opposite party has a right to inspect the same, but if, taking advantage of such temporary possession, he fails to return it or puts it out of his power to return it, a copy may be introduced and used: *Selman v. Cobb*, 4-534.

b. Number of witnesses.

1266. The trial court is authorized to exercise a discretion as to the number of witnesses that shall be introduced to a particular point or to establish any particular fact: *Kesee v. Chicago & N. W. R. Co.*, 30-78; *Bays v. Herring*, 51-286; *Bays v. Hunt*, 60-251.

1267. Where the court, in advance, informed the respective parties that the number of witnesses as to a particular point (the value of property in an appeal from an assessment for damages for right of way) would be limited to five on each side, *held*, that such action was not erroneous: *Everett v. Union Pacific R. Co.*, 59-243.

1268. In the absence of manifest abuse of such discretion, the appellate court will not interfere with the action of the lower court with reference thereto: *Kesee v. Chicago & N. W. R. Co.*, 30-78.

c. Examination of witnesses.

1269. Separation: It is within the discretion of the court trying the cause to order a separate examination of witnesses, and such an order is rarely withheld when asked: *Hubbell v. Ream*, 31-289.

1270. But an exception to the rule authorizing a court to exclude witnesses in its discretion, upon application, arises in case of a party to the action. A party has the right to be present during the trial: *Jemison v. Gray*, 29-537.

1271. Supervision of the court: It is right and proper for the court, when objections are made to questions asked the witness, to state what the court deems as the proper course to be taken, nor is it improper for the court upon its own motion to indicate to the witness what matters should be considered in answering the question: *Britton v. Des Moines, O. & S. R. Co.*, 59-540.

1272. Assumption of fact: A question is improper which requires the witness to construe an agreement in controversy or which assumes that the agreement is not complied with: *McClay v. Hedge*, 18-66.

1273. That the question asked assumes a fact will not constitute error if the fact is stated merely for the purpose of calling the

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witness' attention to the subject of his testimony: *Boothby v. Brown*, 40-104.

1274. Argumentative answer: It does not follow that an answer is bad for argumentativeness, because a witness gives a reason for doing a particular thing after he has stated the fact. Such testimony is not objectionable: *Burlington Gas Light Co. v. Greene*, 28-289.

1275. How far party bound by answer: While a party is bound, ordinarily, by what a witness introduced by him states, he should not be prejudiced by the refusal of the witness to answer questions which the court cannot compel him to answer: *Slocum v. Knosby*, 70—.

That a party cannot impeach his own witness, see *supra*, §§ 1190-1197.

1276. Leading questions: Questions leading in form are justifiable when they are necessarily framed in that manner in order to direct the attention of the witness to the subject upon which he is required to testify: *Lowe v. Lowe*, 40-220.

1277. The test of a leading question is to consider whether an answer by yes or no would be conclusive upon a matter at issue or any material part of the issue. A question is objectionable as leading when it suggests the answer to it and not when it merely directs the attention of the witness to the immediate subject referred to: *Pelamourges v. Clark*, 9-1; *Sessions v. Rice*, 70—.

1278. A question is not leading in which the witness is asked whether or not a certain fact is true. Such a question does not suggest the answer desired, and therefore is not objectionable: *Woolheather v. Risley*, 38-486.

1279. A question in which witness was asked as to what, if anything, was said by plaintiff at a particular time about a certain matter, was held not objectionable, as leading: *Hurst v. Chicago, R. I. & P. R. Co.*, 49-76.

1280. A question which directs the attention of the witness to a particular time, and asks what was said as to a particular matter at that time, but does not suggest the desired answer to the mind of the witness, is not objectionable, as leading: *State v. Schilling*, 14-455.

1281. An objection that the question is leading will not be considered as valid, un-

less made at the time the question is asked, and an opportunity is given to the party putting it to propound it in the proper form: *Adams v. Foley*, 4-44.

1282. Where a leading question is not answered by yes or no, and the witness subsequently testifies as to facts tending to support his first answer, no substantial prejudice being shown, the error will not be considered sufficient to warrant a reversal: *Hubbell v. Ream*, 31-289.

1283. In a particular case, held, that a question, while probably slightly leading, was not of such a character as to be prejudicial to the opposite party: *State v. Jones*, 64-349.

1284. It being proper, under certain circumstances, to permit leading questions to be asked, it will not be presumed that there was error in allowing such questions, unless the absence of such circumstances is shown by the record. It rests in the sound discretion of the court to permit leading questions, and such discretion cannot be reviewed on appeal unless it be shown that it was abused: *State v. Bodekee*, 34-521; *State v. Moelchen*, 53-310; *Hall v. Farmers', etc., Savings Bank*, 55-612.

1285. To warrant a reversal for error in improperly allowing leading questions to be asked, it must appear from the answer of the witness that he was influenced in making it by the form of the question: *Reddin v. Gates*, 52-210.

1286. The overruling of objections to questions as leading upon an inquiry not vital to the case is not ground for reversal: *Henry v. Sioux City & P. R. Co.*, 66-52.

1287. Although much is left to the discretion of the court with reference to leading questions, yet when a party is put upon the stand as a witness and his counsel persists in instructing him upon vital points of the case, by questions which are plainly improper, and the court upon objection does not interfere, a new trial should be granted. When a leading question is improperly asked, an objection by the opposing counsel, even if sustained, does not prevent the mischief. Whatever injury or prejudice there may be to the opposite party is accomplished by asking the question: *Ibid.*

1288. Criminating questions: It is not alone left to the witness to determine whether

the answer would tend to criminate him. While he is not required to explain how the answer would criminate him, the court may determine whether the answer can directly or indirectly have that effect by furnishing direct evidence of his guilt, or by establishing one or many facts which together constitute a chain of testimony sufficient to warrant his conviction, one part of which in itself would not be sufficient to accomplish such result: *State v. Duffy*, 15-425.

1289. Where it is apparent to the court that the answer to the question could not criminate the witness, he may be compelled to answer: *Richman v. State*, 2 G. Gr., 582.

1290. Where it reasonably appears that the answer of a witness would expose him to a penal liability or a criminal charge or any kind of punishment, he should not be compelled to answer: *Printz v. Cheeney*, 11-469.

1291. In an action for seduction, plaintiff, as a witness, may refuse to answer as to whether she had previous illicit intercourse with other men, as the matter sought to be elicited would subject her to public ignominy: *Brown v. Kingsley*, 38-220.

1292. Where a witness, who has taken advantage of his privilege, is afterward prosecuted, the fact that he so refused to testify cannot be given in evidence against him: *State v. Bailey*, 54-414.

1293. Where a peace officer objected to a question as to whether he knew of any place where spirituous liquors were sold in the county, and refused to answer on the ground that an answer in the affirmative would criminate him by showing a neglect of duty in failing to make information for such violation of the law, *held*, that as present knowledge would not impute to him any violation of law in not having made information, the question was not criminating: *Hunt v. McCalla*, 20-20.

1294. The privilege of refusing to answer a criminating question is one which a witness may waive, and if he consents to testify to any matter tending to criminate himself, he must testify in all respects relative to the matter material to the issue: *State v. Fay*, 43-651.

1295. And where a witness testified that defendant, in a conversation at which several persons were present, admitted the crime

charged, *held*, that he could not refuse to answer the further question as to who were present when such admission was made: *Ibid*.

1296. An employee cannot refuse to answer questions on the ground that answers thereto would tend to criminate his employer. This rule applies even when the employer is a corporation: *United States Ex. Co. v. Henderson*, 69-40.

1297. Where cross-interrogatories propounded to a witness whose deposition was to be taken on commission asked witness whether he had or had not committed a crime, and such cross-interrogatories were not answered, *held*, that the party propounding such cross-interrogatories had no right to have them read and the fact that they were not answered brought to the attention of the jury: *Slocum v. Knosby*, 70—.

1298. Using memorandum to refresh memory: Though a witness may, for the purpose of refreshing his recollection, use a memorandum previously made, such paper does not itself become evidence, but the witness must rely upon his recollection after having it refreshed by referring to the paper: *Hull v. Alexander*, 26-569.

1299. Where a writing is used for the purpose of refreshing the recollection of the witness, the opposite party is to be permitted to examine such memorandum: *McKivitt v. Cone*, 30-455.

1300. Although entries made by a witness at a previous time, which do not so refresh his recollection that he is able to testify from memory, but which he testifies he knew to be correct at the time they were made, should be produced, yet they do not become independent evidence, and their production is only for the purpose of enabling the other party to cross-examine, and that he may have the benefit of refreshing the memory of the witness therefrom: *Adae v. Zangs*, 41-536.

1301. There is no rule requiring that the writing examined by a witness to refresh his recollection shall be made by his own hand, and on the trial of a criminal case, *held*, that a witness might use the minutes of his evidence before the grand jury in the same case for that purpose: *State v. Miller*, 53-154; *State v. Miller*, 53-209.

1302. Where plaintiff, in testifying as to

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the correctness of items of account, for the purpose of refreshing his memory referred to a book in which he claimed that he had entered a part, but not all, of such items, *held*, that on cross-examination he might properly be asked whether any such items were found in his book: *McKivitt v. Cone*, 30-455.

d. Cross-examination.

1808. To effect justice: Cross-examination offers one of the most effective means of detecting falsity and discovering truth, and the rules governing it should be applied in a broad and liberal spirit, with a view of effecting substantial justice: *Upton v. Knoll*, 82-121.

1804. What allowable: Therefore, where plaintiff sought to recover an amount alleged to have been paid on account and not credited on final settlement, and defendant sought to prove errors in such settlement against him, *held*, that a witness testifying as to the books of plaintiff and the manner in which the mistake claimed by plaintiff was made might be asked as to other items of charge and credit in the account, with a view to showing that such books were improperly kept, and that if properly kept they would show a balance for defendant: *Ibid*.

1805. An answer to a question on cross-examination of defendant which might disclose a complete defense to the action, and is proper cross-examination, and is pertinent to the issues made, cannot be excluded without error: *Direly v. Cedar Falls*, 21-565.

1806. Plaintiff in an action of forcible entry and detainer having shown by a witness on his direct examination that defendant entered into possession of the property under a written lease, *held* competent and proper for defendant to show by cross-examination what lease it was under which he entered, and for that purpose to introduce the lease in evidence, without first showing that such lease was binding upon plaintiff: *Goldsmith v. Boersch*, 28-351.

1807. Where plaintiff testified as to what defendant had said to him when a certain note was presented by the former to the latter, *held* proper to elicit from plaintiff that his business was loaning money on notes and ask him how many notes he had, for the purpose of showing that he had so many that

his memory could not be implicitly trusted as to what defendant said about that particular note: *Smith v. Wagaman*, 58-11.

1808. Where a party who becomes a witness in his own behalf claims ownership of property in controversy, he may be cross-examined as to the source of such ownership: *Wallace v. Wallace*, 62-651.

1809. Where a witness was asked on direct examination as to whether certain notes introduced in evidence were executed by a certain person, whose name was signed as maker, *held*, that it was proper on cross-examination to ask the witness as to any facts tending to rebut the fact that the notes were signed by such party, for instance that there was no consideration for them, also as to where and under what circumstances they were signed and why they were so signed: *Glenn v. Gleason*, 61-28.

1810. Questions asked of a witness, not for the purpose of testing the truth of any of his statements in chief, or with the view of eliciting further information than had been given in his examination in chief on subjects upon which he was examined, but calculated and intended, no doubt, to elicit evidence of an independent fact which plaintiff's counsel deemed material to his case, *held* not proper: *Whitsett v. Chicago, R. I. & P. R. Co.*, 67-150.

1811. Where the cross-examination is not entirely foreign to the testimony given in chief, but has no tendency whatever to impair its credibility, the rejection of it will not constitute reversible error: *State v. Neimeier*, 66-634.

1812. Confined to matters in direct examination: A party has no right to cross-examine a witness except as to facts and matters stated in the direct examination: *Cokely v. State*, 4-477.

1813. It is not proper to cross-examine a witness in regard to a conversation not referred to in the direct examination: *Wilhelmi v. Leonard*, 13-330.

1814. The cross-examination should be confined to an inquiry as to particular questions arising in the case: *Winklemans v. Des Moines Northwestern R. Co.*, 62-11.

1815. Where the object of evidence sought to be elicited on cross-examination is to prove an independent fact not explanatory of nor

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inconsistent with the testimony given, but to render the fact testified to consistent with the fact sought to be established in the case, such evidence may properly be excluded as improper cross-examination, being in the nature of rebutting evidence: *State v. Jones*, 64-349.

1316. Where the question in issue was as to plaintiff's physical condition at a certain time, *held*, that it was not proper to ask a witness on cross-examination as to the cause of such condition: *Rice v. Des Moines*, 40-638.

1317. Where a witness had stated in direct examination certain facts as to his opportunity to observe the condition of a party alleged to be insane, and that he observed nothing unusual, *held*, that on cross-examination he could not be asked if he thought himself competent to give an opinion as to the party's sanity: *State v. Mewherter*, 46-88.

1318. To test credibility, etc.: Although, in a cross-examination, the court in the exercise of its discretion may permit great latitude, the privilege cannot be so far extended as to allow the introduction of illegal and improper testimony. The rule permitting this latitude is rather for the purpose of testing the memory and credibility of the witness than to enable a party to get before the jury testimony which would be inadmissible if offered in a direct examination: *Gordon v. State*, 3-410.

1319. It is proper on cross-examination to test the accuracy of a witness' statements by calling his attention to former testimony: *Farmers', etc., Bank v. Young*, 36-44.

As to laying a foundation for impeachment on cross-examination, see *supra*, §§ 1159-1169.

1320. It is proper on cross-examination to inquire into facts which will throw light upon the motive of a witness in giving testimony: *Dance v. McBride*, 43-624.

1321. It is proper on cross-examination to ask questions calculated to test the accuracy of the witness' observation: *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 56-440.

1322. In an action by a private person under the intoxicating liquor law to recover a penalty for the benefit of the school fund, *held* improper to ask plaintiff on his cross-examination, as a witness, why he instituted the suit: *Cobleigh v. McBride*, 45-116.

1323. Answers as to collateral matters conclusive: When a question is put to a witness on cross-examination which is collateral and irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but it is conclusive against him: *Cokely v. State*, 4-477.

1324. A witness may not be impeached or discredited as to matters about which he is interrogated on cross-examination for the purpose of testing his credibility and which are not relevant to the issue: *State v. Falconer*, 70—.

1325. But the fact that the witness is unfriendly and hostile to the party against whom he testifies is relevant and material, and the witness' answers on cross-examination as to statements or declarations tending to show such a hostile feeling may be contradicted by other evidence: *Powell v. Martin*, 10-568.

1326. While it is the rule that questions may be propounded to the witness on cross-examination and evidence elicited which tends to show his feelings and relations to the parties, the answers, however, being conclusive upon the party asking the questions, yet when it was sought in this manner to show that defendant had been the agent in carrying out a fraud of the opposite party, which fact was wholly irrelevant to the issues, *held*, that the evidence of the witness was improperly admitted: *Madden v. Koester*, 52-692.

That a witness may not be contradicted on collateral or immaterial matters, for the purpose of impeachment, see *supra*, §§ 1183-1186.

1327. As to fraud: Where fraud was alleged in the purchase of certain real property, and the plaintiff testified in direct examination as to such purchase, *held*, that he might be asked upon cross-examination as to the purchase of other property from the same party at the same time, the value and description of such property, etc.: *Lillie v. McMullan*, 52-463.

1328. A good deal of latitude should be allowed on the cross-examination of parties where it is sought to establish a fraudulent conveyance of property: *Dent v. Smith*, 53-262; *Clark v. Reiniger*, 66-507.

1329. Opinions: It is not competent, on cross-examination of a witness whose testi-

mony is intended to uphold the legality of a transaction, to ask him whether he has not stated at a previous time that the transaction was a swindle all the way through, such question calling for a mere matter of opinion: *Sunberg v. Babcock*, 66-515.

1330. It rests in the discretion of the court to permit a witness to be recalled for further cross-examination: *Sweet v. Wright*, 57-510.

That a witness cannot be recalled in order to lay a foundation for impeachment, see *supra*, §§ 1176-1179.

1331. **Discretion:** The general course of cross-examination of a witness is subject to the discretion of the judge, and where an objection to a question has been sustained on the ground that it is not proper cross-examination, and the party has been given permission to make the witness his own and ask the question if he desires it, the supreme court will not interfere on appeal: *Davis v. Simma*, 14-154.

1332. The latitude to be allowed on cross-examination must rest somewhat in the sound discretion of the trial court, and where there seems to be no abuse of discretion and no prejudice has resulted, the supreme court will not interfere on that ground: *State v. Porter*, 84-131.

1333. The court is vested with a discretion as to what questions shall be allowed on cross-examination, and unless prejudice is shown, error in the exercise of such discretion will be disregarded: *Armil v. Chicago, B. & Q. R. Co.*, 70—.

1334. Where an attorney was allowed to cross-examine a witness as to matters not called out in direct examination and thus elicit answers to leading questions, *held*, that in view of the fact that the testimony of the witness indicated a strong purpose to sustain the opposite party, there did not appear to be such substantial error in the action of the court as to warrant a reversal: *Lowe v. Young*, 59-364.

1335. As to what are and what are not circumstances connected with the evidence in chief in such sense that a cross-examination with reference thereto will be proper is a question sometimes difficult to determine, and unless the trial court has so far overstepped the bounds as to admit that in cross-examination which clearly has no connection

with the direct testimony, an appellate court will not be justified in reversing a judgment on such grounds, especially when the cross-examination is upon facts competent to be proved in the case. In such case very much must be left to the discretion of the trial court: *Glenn v. Gleason*, 61-28.

1336. The extent to which the cross-examination of witnesses may be allowed is peculiarly within the discretion of the court, and a cause will not be reversed for error unless it appears that the court has abused its discretion and that the complaining party has been greatly prejudiced thereby: *Player v. Burlington, C. R. & N. R. Co.*, 62-728.

e. Rebutting evidence.

1337. **What proper:** Evidence in rebuttal must be confined to the issues raised: *Miller v. Chicago & N. W. R. Co.*, 66-364.

1338. A party cannot introduce in rebuttal evidence which should properly have been introduced in chief: *Manning v. Burlington, C. R. & N. R. Co.*, 64-240.

Still the court may, in its discretion, allow new evidence to be introduced after the evidence in chief is closed: See *supra*, §§ 1240-1244.

1339. **Cumulative evidence:** Where the state introduces the prosecuting witness in a criminal case and rests, and the only evidence offered by defendant is directed against such witness' reputation for veracity, the state cannot, in rebuttal, prove by another witness the facts charged: *State v. Parish*, 22-284.

1340. Where one party has introduced evidence of a fact in issue, sufficient to establish it in the absence of evidence to the contrary, and the other party has then introduced evidence to disprove the existence of such fact, the first party may, in rebuttal, introduce cumulative evidence to overcome that introduced by his adversary: *Davidson v. Overhulser*, 3 G. Gr., 196; *Lawson v. Campbell*, 4 G. Gr., 413.

1341. **Rebuttal of immaterial or irrelevant evidence:** Where defendant introduced a subject in the examination of a witness, and plaintiff cross-examined on the same subject, *held*, that other evidence to rebut that of the witness on cross-examination might be intro-

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duced by plaintiff and defendant could not object that it was incompetent: *Artz v. Chicago, R. I. & P. R. Co.*, 44-284.

1342. Where a party has himself testified as to certain matters, he cannot claim that rebutting testimony as to the same matters is inadmissible: *Hale v. Philbrick*, 47-217.

1343. A party may introduce evidence to rebut evidence introduced by the opposite party although the inquiry itself is irrelevant: *Stafford v. Oskaloosa*, 64-251.

1344. Where the court allows immaterial evidence to be introduced under proper objection, it is error to exclude evidence to rebut the same: *Frost v. Rosecrans*, 66-405.

1345. A party who permits immaterial evidence to be introduced by the opposite party without objecting does not thereby become entitled to introduce other evidence in rebuttal of that thus introduced: *Manning v. Burlington, C. R. & N. R. Co.*, 64-240.

1346. The fact that a party introduced testimony to rebut testimony introduced by the other party over his objection to its competency does not constitute a waiver of such objection: *Sims v. Moore*, 61-128.

Further as to evidence rendered competent by reason of the admission of other evidence, see *supra*, §§ 89-106.

1347. Rebuttal as to matters not shown in chief: Plaintiff may in rebuttal introduce evidence to contradict that of defendant, with reference to a matter as to which evidence was not introduced by the plaintiff in chief: *Lanning v. Chicago, B. & Q. R. Co.*, 68-502.

1348. Where defendant as a witness attempted to explain the testimony of a witness for the prosecution with reference to certain statements made by him, by testifying as to other statements made by such witness in the alleged conversation, held, that the previous witness might be recalled for the purpose of denying that he made such statements: *State v. Cross*, 68-180.

9. Objections to evidence.

1349. Testimony not objected to: Error in admitting testimony cannot be complained of if introduced without objection: *State v. Smith*, 46-670; *State v. Hamilton*, 82-572.

1350. Grounds must be stated: The ground of objection to evidence should be distinctly stated: *State v. Wilson*, 8-407.

1351. The degree of particularity required in pointing out objections to testimony when offered must depend very much on the kind of testimony and the circumstances and attitude of the case: *Rindskoff v. Malone*, 9-540.

1352. Where testimony was received "subject to all legal objections," and no objection was made at the trial nor in the motion for a new trial, held, that the objection that papers were thus introduced without proper authentication, or that records were used without accounting for the absence of the originals, were not objections which could be first made on appeal: *Guest v. Byington*, 14-80.

1353. Objection to evidence as "incompetent, irrelevant and immaterial" does not raise the question of the competency of the witness to testify as to a question of value: *White v. Smith*, 54-288.

1354. Nor does such objection raise the question as to whether the evidence offered is the best evidence: *Iowa Homestead Co. v. Duncombe*, 51-525; but *contra*, see *Hunt v. Higman*, 70—.

1355. An objection to evidence "as incompetent under the law" raises the objection that the examination of the witness in the manner proposed is not authorized by law as well as that the evidence sought to be introduced is inadmissible. Therefore, held, that such an objection was sufficient to raise the point that a witness could not be cross-examined as to his belief as to a future state of existence for the purpose of discrediting his testimony, although other evidence of the fact would be admissible: *Dedric v. Hopson*, 62-562.

1356. A party's right to the relief asked in his pleading, or objections to defects in his pleading, cannot be raised by objections to evidence: *Jones v. Marcy*, 49-188.

1357. In trial to court: It is error to overrule a proper objection to a question and the answer thereto, even though the trial be to the court and not to the jury: *Williams v. Soutter*, 7-435.

1358. When objection taken: An objection to a question which goes to the form

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and not to the substance of the inquiry must be made at the time, or it cannot afterwards be raised: *Mills v. Mabon*, 9-481.

1359. Objections to evidence for incompetency must be made before the evidence is admitted and cannot be made afterwards: *State v. Moore*, 25-128.

1360. Where evidence is admitted without objection, a party cannot afterwards complain that the matter to which it relates is not put in issue by the pleadings: *Wilson Sewing Machine Co. v. Bull*, 52-554.

1361. An objection that an instrument offered in evidence is not properly stamped cannot be raised by an instruction after the cause has gone to the jury, but must be made when the instrument is offered in evidence: *Thomson v. Wilson*, 26-120.

1362. Such an objection cannot be interposed, if not made when the instrument is offered in evidence: *Chamberlin v. Robertson*, 81-408.

1363. Objection to the admission of evidence cannot be made for the first time in a motion for a new trial: *Manning v. Burlington, C. R. & N. R. Co.*, 64-240.

1364. Part; estopped from objecting: A party cannot object to testimony which he himself has introduced: *Walker v. Stannis*, 8 G. Gr., 440.

1365. One who has obtained a ruling as to the evidence in a cause sustaining an objection cannot afterwards object to the application of the rule in another instance: *Crawford v. Wolf*, 29-567.

1366. A party who offers evidence with knowledge of its incompetency cannot afterwards object to its competency as proving any facts recited therein, and this rule is applicable to documentary evidence. So *held* as to a void judgment introduced and relied on by one of the parties: *Phillips v. Blair*, 38-649.

1367. Where defendant objected to evidence, and it was admitted only for a specified purpose for which it was legally admissible, *held*, that defendant could not, in the face of such objection, make the point, on appeal, that it was admissible for other purposes and should not have been limited: *Henderson v. Chicago, R. I. & P. R. Co.*, 48-216.

Interest: As to objections on the ground of incompetency by reason of interest, see *supra*, §§ 1018-1021.

Relationship: As to an objection on the ground that the witness and the opposite party are husband and wife, see *supra*, § 1101.

1368. Waiver of objection: Where a party excepts to the admissibility of evidence and afterwards demurs thereto or moves to dismiss for insufficiency of the evidence, he must be deemed to have waived his exception as to its admissibility: *Wilkins v. Germania F. Ins. Co.*, 57-529.

1369. Admissibility for particular purpose: If evidence is competent and admissible for any purpose, it cannot be rejected because it may be considered by the jury for an improper purpose. Under such circumstances, the party must guard himself against prejudice by requesting an instruction limiting the testimony to its legitimate purpose: *Allison v. Chicago & N. W. R. Co.*, 42-274; *Marion v. Chicago, R. I. & P. R. Co.*, 64-568.

1370. Where evidence is admissible for one purpose and no other, and is of such character that there is danger that it will not be restricted in its application to its particular object, as it cannot be excluded, the court may be required to caution the jury by instructions as to the proper purpose for which it is to be considered: *Parhill v. Brighton*, 61-108.

1371. Where certain tax deeds were offered in evidence by plaintiff and excluded by the court, but after an amendment of plaintiff's petition were admitted, *held*, that under such subsequent admission they could be considered for the purpose of establishing any facts for which they were competent, and their previous exclusion would not amount to error: *Walker v. Beaver*, 50-504.

1372. Instructions withdrawing or limiting evidence: Error in the admission of evidence may be cured by excluding it by an instruction from the consideration of the jury: *State v. Davis*, 56-203; *Ham v. Wisconsin I. & N. R. Co.*, 61-716; *Davis v. Danforth*, 65-601.

1373. Where improper evidence was admitted against objection, but was afterwards by the court expressly withdrawn from the consideration of the jury, *held*, that there was not sufficient error to require a reversal of the case: *State v. Spurbeck*, 44-607.

1374. Improper admission of evidence, or

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refusal to strike it out on motion, is not cured by an instruction to the jury withdrawing it from their consideration: *Wicks v. De Witt*, 54-180.

1375. Evidence admitted without objection cannot be first objected to and withdrawn from the consideration of the jury by an instruction: *State v. Pratt*, 20-267; *Becker v. Becker*, 45-239.

1376. Where evidence which is incompetent in any event is introduced, even without objection, it may properly be excluded on motion or the jury instructed to disregard it entirely; but where secondary evidence which may be made competent is introduced without objection, it ought not to be withdrawn by an instruction: *Davis v. Strohm*, 17-421.

1377. Where a question calls for testimony, some of which is material, but is objectionable in being too broad, the opposite party should not object to the whole of the question, but ask that it be limited: *State v. Day*, 60-100.

Further as to what objections may be raised by INSTRUCTIONS, see that title, IV, f.

1378. Motion to exclude: Where objectionable evidence has slipped in, the party injured thereby should raise the objection by motion to exclude, and if he does not do so he cannot urge his objection on appeal: *Ibid*.

1379. The entire evidence of a witness will not be excluded upon motion on the ground that it contains improper matter where the objecting party fails to ask the court to instruct the jury as to the effect of the improper evidence: *Smalley v. Iowa Pacific R. Co.*, 36-571.

Exceptions to rulings on admission of evidence, see EXCEPTIONS, §§ 20-27.

EXCEPTIONS.

I. WHEN NECESSARY; HOW TAKEN.

II. BILLS OF EXCEPTIONS; WHEN REQUIRED; WHAT SUFFICIENT; HOW PROCURED.

As to bill of exceptions in criminal cases, see CRIMINAL LAW, §§ 1668-1671.

I. WHEN NECESSARY; HOW TAKEN.

1. Exceptions necessary: The supreme court will not review, on appeal, a ruling of

the lower court to which exception is not duly taken: *Chapman v. Lobey*, 21-300; *Holton v. Butler*, 22-557; *Appanoose County v. Walker*, 23-26; *Redding v. Page*, 52-406.

2. The fact that exception was properly taken must affirmatively appear: *Beason v. Jonason*, 14-399.

3. This rule is not affected by the statutory provision (Code, § 3169) dispensing with the necessity of a motion for new trial: *Eason v. Gester*, 31-475.

4. The supreme court will not review a case on appeal where the record presents no finding of facts by the court below, or motion for a new trial or other exception taken to its ruling: *Marshall v. Richards*, 19-571.

5. Where no exceptions were taken save to the ruling on a motion for new trial, and the record contained nothing to show the truth of the grounds assigned for new trial, the judgment was affirmed: *Kline v. Moore*, 20-599.

6. Where no exceptions are taken on the trial of an equity case, and the proper steps are not taken to have the case tried anew in the supreme court, there is nothing which the court can consider on appeal: *Richards v. Hintrager*, 45-253.

As to the necessity for exceptions to final judgments in law or in equity, see *infra*, §§ 58-61.

7. Time for taking: An exception to a decision or ruling must be taken at the time the decision or ruling is made. The only departure from this rule is that authorized by statute in regard to instructions. (See *infra*, §§ 31-41): *Joliet Iron, etc., Co. v. Chicago, C. & W. R. Co.*, 50-455; *Nagel v. Guittar*, 62-510; *Boardman v. Beckwith*, 18-292.

8. By whom taken: An exception by the party who is the real party in interest in the appeal, although not technically the party appealing, will be sufficient to save the question for review: *Fries v. Porch*, 49-351.

9. Waiver of exception: An exception properly taken, but afterwards expressly waived upon appeal, cannot be taken advantage of by the opposite party: *Fortney v. Jacoby*, 51-95.

10. Waiver of necessity for exception: Where upon the transfer of a cause by agreement from one court to another for trial, it was stipulated that the judgment to be

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rendered should be entered in the court from which the transfer was taken, as of the previous term, and that either party should have the right to appeal, *held*, that such stipulation amounted to a waiver of the necessity of excepting to the judgment: *Wolf v. Smith*, 36-454.

11. Successful party need not except: The successful party cannot, in any way, be prejudiced by the failure to except to any action of the court adverse to him: *Baird v. Chicago, R. I. & P. R. Co.*, 61-359.

12. Therefore where, on appeal, a judgment was reversed because the verdict was contrary to an instruction given, and the cause was remanded for a new trial, and the unsuccessful party then moved for judgment on special findings, on the theory that under the doctrine of the instruction he was entitled to judgment on such findings, *held*, that the successful party might controvert the correctness of such instruction although he had not excepted thereto, and that the instruction was not binding on the court: *Ibid.*

13. Ruling on motion or demurrer: Appeal cannot be taken from the ruling upon a demurrer unless such ruling is duly excepted to: *Cain v. Story*, 15-378.

14. Where a party in an equitable suit stands upon the ruling upon a motion or demurrer, and desires to appeal therefrom, he should except thereto as in a law action: *Powers v. O'Brien County*, 54-501; *Patterson v. Jack*, 59-632; *Phipps v. Penn*, 23-30; *Hodgin v. Toler*, 70—.

15. An exception to the overruling of a demurrer is all that is necessary to preserve the party's right of appeal from such ruling. It is not necessary for him to except again when the final judgment is entered: *Jordan v. Kavanaugh*, 63-152.

16. Where a motion for continuance was made by defendant, but overruled, and judgment entered against him by default, and no exception was made to the ruling on the motion, nor was any motion made to set aside the default, *held*, that there was nothing which could be reviewed on appeal: *Carter v. Griffin*, 54-62.

17. The action of the court in ordering a change of place of trial should be excepted to or it cannot be made a ground for objec-

tion on appeal; if not known to the appellant in time for taking proper exceptions, he should move to set aside the order on that ground and except to the action of the court if adverse to him: *Scott v. Neises*, 61-62.

18. Objections to a referee's report cannot be urged on appeal unless exceptions to the report have been filed in the trial court: *Blake v. Dorgan*, 1 G. Gr., 547.

19. But such objections may first be taken in the court appointing the referee; it is not necessary they be made before the referee: *Eduards v. Cottrell*, 43-194; *Washington County v. Jones*, 45-260; *Hodgin v. Toler*, 70—.

Further as to exceptions to referee's action or report, see REFERENCE, §§ 20-23, 41-48.

20. To admission or rejection of evidence: When exception is taken to the admission or exclusion of evidence, the ground of objection must be stated, otherwise the ruling cannot be reviewed on appeal: *Peck v. McKean*, 45-18; *Davidson v. Smith*, 20-466; *Thompson v. Blanchard*, 2-44.

That no objection can be considered on appeal except such as is raised by objection made, see APPEALS, IV, 1.

As to what the record must show to enable the exception to a ruling upon evidence to be considered, see APPEALS, IV, 3.

21. A general objection to the introduction of evidence, specifying no ground upon which it is raised, cannot be taken advantage of on appeal: *Gelpecke v. Lovell*, 18-17; *Carleton v. Byington*, 18-483; *Davidson v. Smith*, 20-466; *O'Hagan v. Clinesmith*, 24-249; *Chase v. Walters*, 28-460; *Keough v. Scott County*, 28-337; *Williams v. Meeker*, 29-292; *Snyder v. Nelson*, 31-238; *Lake v. Miller*, 31-596; *State v. Bengé*, 61-658.

22. Where the party appealing has made a general objection to the admission of evidence, the ground of which does not appear of record, and it is *overruled*, such ruling cannot be reviewed upon appeal, for the reason that, in presenting such objection, he might have relied upon an insufficient ground, and should not be allowed, upon appeal, to rely upon another and sufficient ground. But where the successful party makes a general objection which is *sustained*, if the appellant can show that there could be no legal or

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possible ground upon which such ruling can be sustained, he will be entitled to a reversal: *Clark v. Connor*, 28-311; *Engleken v. Webber*, 47-558.

23. When the bill of exceptions does not disclose the ground of objection to a question, but the objection is sustained, the court will, on appeal, if the question is vulnerable to any objection, presume that such was the one made and rightfully sustained: *Hoben v. Burlington & M. R. R. Co.*, 20-562.

24. What sufficiently specific: An exception on the ground of incompetency is sufficiently specific: *Greenleaf v. Dubuque & S. C. R. Co.*, 30-301.

25. Where testimony was introduced to impeach a witness by showing bad moral character, held, that an objection to such testimony as incompetent and improper was not sufficiently specific to raise the objection that the testimony related to a specific vice and not to the general moral character: *Kilburn v. Mullen*, 22-498.

26. Motion for new trial is not necessary to enable the court to pass upon a ruling as to the admission or exclusion of evidence, where such ruling is duly excepted to, and virtually disposes of the whole case: *McCoy v. Julien*, 15-371.

27. Time for taking: Objection to the introduction of evidence must be made at the time it is offered: *Boardman v. Beckwith*, 18-292; *State v. Bengt*, 61-658.

28. To the giving or refusing instructions: The action of the trial court in giving instructions cannot be reviewed on appeal unless exceptions thereto have been duly taken in the trial court: *Kelleher v. Keokuk*, 60-473; *Todd v. Branner*, 30-439; *Norton v. Swearengen*, 19-566; *Cadwallader v. Blair*, 18-420; *State v. Moran*, 7-236.

29. So held, also, as to refusal to give instructions: *Morse v. Close*, 11-93.

30. The record must show that exception to the giving of instructions was duly taken: *May v. Wilson*, 21-79; *Wilcox v. McCune*, 21-294.

And as to what the record must show, see also APPEALS, §§ 259-270.

31. Time for excepting to instructions: Under statutory provisions,¹ exceptions to the giving or refusal of instructions may be taken within three days after verdict, but it is not sufficient to take them after that time, even in a bill of exceptions allowed and signed: *Bailey v. Anderson*, 61-749.

32. The ruling of the court in giving or refusing instructions cannot be reviewed when such ruling was not excepted to at the time or within three days after verdict: *Mazon v. Chicago, M. & St. P. R. Co.*, 67-226.

33. Exceptions taken in a motion for new trial filed within the three days after verdict allowed by statute, the grounds of objection being set out, are sufficient: *Deere v. Needles*, 65-101; *Parker v. Middleton*, 65-200.

34. But if the motion is not filed within the three days, the exceptions cannot be regarded: *Gardner v. Jaques*, 42-577; *Kirk v. Woodbury County*, 55-190; *Ewaldt v. Farlow*, 62-212.

35. If objections to instructions are not taken at the time but are taken in a motion for a new trial, the ground of objection must be stated: *Parsons v. Parsons*, 66-754.

36. Prior to the statutory provisions allowing three days for taking exceptions to instructions, it was held that objections to the giving or refusal of instructions must be taken at the time of giving or refusal, and the record should so show to enable the supreme court to pass upon such objections: *Rawlins v. Tucker*, 3-213.

37. Therefore it was held that it was not sufficient to first assign the giving or refusal as error in a motion for new trial: *Snyder v. Eldridge*, 31-129; *Snyder v. Nelson*, 31-238; *Garland v. Wholebau*, 20-271.

38. And it was not sufficient to make the giving or refusal of instructions ground of motion for new trial, and then except to the ruling on the motion: *McKell v. Wright*, 4-504; *Whitney v. Olmstead*, 5-873; *Curtis v. Hunting*, 6-536.

¹ Code, § 2787. If the giving or refusal be excepted to, the same may be without any stated reason therefor, and all instructions demanded must be filed, and shall become a part of the record.

§ 2789. Either party may take and file exceptions to the charge or instructions given, or to the refusal to give any instructions offered, within three days after the verdict, and may include the same in a motion for a new trial, but in either case the exceptions shall specify the part of the charge or instruction objected to and the ground of the objection.

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39. It was also held that in order to make the omission to give an instruction available on motion for new trial, it must have been excepted to before the jury returned their verdict: *Evans v. Burlington & M. R. R. Co.*, 21-374.

40. Exceptions to instructions preserved during the course of the trial may be considered on appeal, although the motion for a new trial in which they are also incorporated is stricken from the file because filed too late: *Beems v. Chicago, R. I. & P. R. Co.*, 53-150.

41. A claim that it is the practice in a trial court to regard all instructions as excepted to will be of no avail in the supreme court if the fact of the existence of such practice does not appear in the record: *Steyer v. Curran*, 48-580.

42. Statement of grounds: Under the statutory provisions above referred to, grounds of exception to the giving or refusal of instructions need not be stated if exceptions are taken at the time of giving or refusal: *Van Pelt v. Davenport*, 42-308, 314; *Johnson v. Chicago, R. I. & P. R. Co.*, 51-25; *Williams v. Barrett*, 52-637; *Williamson v. Chicago, R. I. & P. R. Co.*, 53-126; *Boyce v. Wabash R. Co.*, 63-70.

43. If exceptions are not taken when the instructions are given, such exceptions must specify the ground of objection: *Hale v. Gibbs*, 48-380, 384.

44. In such case the ground of objection that "they are not applicable" is not sufficiently specific where it is urged that the instructions are essentially erroneous: *Miller v. Gardner*, 49-234.

45. So, where the exception was first taken in the motion for a new trial, no ground being alleged, *held*, that error in the instructions could not be considered on appeal: *Stevens v. Taylor*, 58-664.

46. An exception stating that "the court misdirected the jury in a matter of law," *held* too general, where the exception was not taken at the time the instruction was given: *Benson v. Lundy*, 52-265.

Where grounds are stated, no others can be considered on appeal: See APPEALS, § 180.

47. What sufficiently specific as to the instructions objected to; exception *en masse*: A general exception *en masse* to all

the instructions given is sufficient if no portion of the charge is correct: *Eddy v. Howard*, 23-175.

48. But if any portion of the instructions given is correct, such an exception *en masse* will not be regarded. (The rule being different under the present statutory provision from that announced in *Eyser v. Weissgerber*, 2-463, decided under a former statute.) *Davenport Gas, etc., Co. v. Davenport*, 13-229; *Loomis v. Simpson*, 13-532; *Jack v. Naber*, 15-450; *Armstrong v. Pierson*, 15-476; *Cousins v. Westcott*, 15-253; *Lyons v. Thompson*, 16-62; *Shepard v. Brenton*, 20-41; *Spray v. Scott*, 20-473; *Verholf v. Van Houwenlengen*, 21-429; *Carpenter v. Parker*, 23-450; *Redman v. Malvin*, 23-296; *McCaleb v. Smith*, 24-591; *Mershon v. National Ins. Co.*, 34-87; *Cook v. Sioux City & P. R. Co.*, 37-426; *Bartle v. Des Moines*, 38-414; *Moore v. Gilbert*, 46-508; *Ruter v. Foy*, 46-182; *Pitman v. Molsberry*, 49-339.

49. And it was held that an instruction to the charge in the words, "to the giving of each of which instructions the defendant excepted," was not sufficient: *Davenport Gas, etc., Co. v. Davenport*, 13-229.

50. Where but one instruction was given, only a portion of which was considered objectionable, *held*, that an exception to the entire instruction was not sufficiently specific: *Brown v. Scott County*, 38-140.

51. Designation by number sufficient: An exception to instructions which specifies them by number is sufficiently definite as to the part objected to: *Miller v. Gardner*, 49-234.

52. An exception to all the instructions between certain numbers, "and to each of them," is sufficiently specific: *Mann v. Sioux City & P. R. Co.*, 46-637.

53. An exception to the refusal to give instructions, as follows, "to which said refusal as to each of said instructions separately the defendant at the time excepted," *held* sufficient, even if exception to refusal to give was required to be specific, which it is not: *Williamson v. Chicago, R. I. & P. R. Co.*, 53-126.

54. An exception to the giving of each and every instruction given, taken at the time the instructions are given, is sufficient. A change in the statute since the decision in *Daven-*

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port Gas, etc., Co. v. Davenport, 18-229, renders the rule of that case to the contrary no longer applicable: *Hawes v. Burlington, C. R. & N. R. Co.*, 64-815; *Eikenberry v. Edwards*, 87-14.

55. Single proposition: If there is but a single proposition stated in the charge, an exception thereto is sufficiently specific: *Boyce v. Wabash R. Co.*, 63-70.

56. A general exception to the refusal to give several instructions is sufficient: *Davenport Gas, etc., Co. v. Davenport*, 18-229; *Harvey v. Tama County*, 53-228; *Williamson v. Chicago, R. I. & P. R. Co.*, 53-126, 143.

57. Particular exception construed: Where the judge refused certain instructions which he had before announced that he would give, to which exception was taken, and gave in their place another instruction in which a specific question was submitted to the jury, *held*, that an exception to this instruction sufficiently called in question the correctness of the action of the court, not only as to the time and manner of giving the instruction, but also as to the matter thereof: *Eddy v. Howard*, 23-175.

As to method of noting exceptions to instructions and making them part of the record, see *infra*, §§ 85-90.

58. To judgments and decrees: No objection to a judgment not excepted to in the court below can be considered upon appeal: *Redding v. Page*, 52-406; *Soup v. Smith*, 26-472.

59. Not necessary in equity: An exception to a final decree in an equitable action is not necessary where the party is entitled to a trial *de novo* on appeal. (So provided by Code, § 2831): *Dicken v. Morgan*, 59-157; *Gately v. Kniss*, 64-537.

60. Prior to this statutory provision it was not settled whether an exception to a final decree in equity was necessary when the case was brought up on appeal for trial anew: *Phipps v. Penn*, 23-30.

61. But where the case, though in equity, was one triable on appeal only upon writ of error (under peculiar provisions of Rev., §§ 2999, 3000, not now in force), an exception to the decree was necessary: *Dumont v. Barrall*, 19-567; *Moore v. Daniels*, 20-596; *State v. Orwig*, 27-528.

62. What sufficient: An exception to the overruling of a motion for a new trial is a sufficient exception to the judgment: *Gullisher v. Chicago, R. I. & P. R. Co.*, 59-416.

63. Where a motion asking for judgment on the findings of a special verdict was overruled, and proper exception taken, held, that it was not necessary to except to the judgment afterwards rendered: *Aldrich v. Price*, 57-151.

64. Where the judgment is founded upon a conclusion of law which is duly excepted to, it seems that such exception will be sufficient to entitle the party to have the correctness of such conclusion determined upon appeal, although no exception to the final judgment appears: *Barnhart v. Farr*, 55-366.

65. Time: Exception to a judgment must be taken at the time it is rendered: *Nugel v. Guittar*, 62-510.

66. How shown: An oral exception entered of record at the end of the decision excepted to is sufficiently taken: *Cramer v. White*, 29-336.

67. An exception thus entered need not be embodied in a bill of exceptions: *Laub v. Paine*, 46-550; *Winet v. Berryhill*, 55-411.

68. An exception to the conclusion of law in the judgment, held sufficient to raise a question whether the conclusion reached from the facts found was correct: *Henkle v. Keota*, 63-334.

II. BILLS OF EXCEPTIONS; WHEN REQUIRED; WHAT SUFFICIENT; HOW PROCURED.

As to bill of exceptions in criminal cases, see CRIMINAL LAW, §§ 1668-1671.

69. When necessary; what deemed part of record: Previous to present statutory provisions, it was held that a summons or other writ was no part of the record unless made so by bill of exceptions: *Childs v. Risk*, Mor., 439.

70. Also that a motion and affidavit in support thereof did not become part of the record unless embodied in the bill of exceptions: *Abbee v. Higgins*, 2 G. Gr., 535; *Cook v. Steuben County Bank*, 1 G. Gr., 447.

71. But under present statutory provisions (Code, § 8184) a motion properly filed becomes part of the record: *Lemons v. French*, 4 G.

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Gr., 123; *Mays v. Deaver*, 1-216; *Ellsworth v. Moore*, 5-486.

72. The fact that a matter is recited in a motion which is made a part of the record does not make the matter itself of record unless expressly made so: *Herring v. State*, 1-205; *Pharo v. Johnson*, 15-560.

73. Garnishee's answer: The answer of a garnishee does not become a part of the record unless embodied in a bill of exceptions: *Brainard v. Simmons*, 58-464.

74. Affidavits introduced on the hearing of an application for a temporary injunction in resistance thereof are no part of the record, unless preserved by bill of exceptions or otherwise: *Hart v. Foley*, 67-407.

75. It is not necessary that affidavits which have been presented on a motion for change of venue be preserved and made matter of record by a bill of exceptions. When filed they become part of the record and may be certified by the clerk on appeal in the same manner as other matters of record: *McGovern v. Keokuk Lumber Co.*, 61-265; *Winet v. Berryhill*, 55-411.

76. An affidavit for publication, when filed, becomes part of the record: *Bradley v. Jamison*, 46-68, 73.

77. Evidence taken in short-hand: It is the better practice to preserve evidence which is taken down in short-hand by a bill of exceptions. Whether it may be done by filing the original notes and making certified transcripts therefrom, *quære*. At any rate the record must be made up in the court below: *State v. Hessian*, 58-68.

78. The stenographer's report of the evidence may be incorporated into the bill of exceptions by a reference thereto, and becomes a part of such bill of exceptions without being transcribed. A transcript of such notes will only be necessary where a transcript of the record is required: *Hampton v. Moorhead*, 62-91.

79. The provisions of Code, § 3777, as amended, with reference to the taking down of evidence by a stenographer, do not dispense with formal bill of exceptions, and such bill filed within the proper time, and referring to the original notes or transcript, is necessary in order to make the evidence a part of the record on appeal: *McCarthy v. Watrous*, 69-260.

80. The only way oral evidence introduced on the trial of the cause can be preserved and identified for the purposes of an appeal is by bill of exceptions signed by the trial judge. A paper purporting to contain a portion of the evidence introduced on the trial, and certified to by the official reporter, but not embodied in the bill of exceptions, cannot be recognized as a part of the transcript: *State v. Hemrick*, 62-414.

81. The stenographer's notes, when filed with the clerk as a part of the record of the case, may be amended or corrected by the court when it is ascertained in a proper proceeding that they do not fully or correctly embody the action or proceeding of which they were intended to be the record: *Mahaffy v. Mahaffy*, 63-55.

82. The filing of the stenographer's original notes and the subsequent incorporation of them into the bill of exceptions, and the insertion of a duly certified copy thereof in long-hand in the transcript, is sufficient to make the evidence of record: *McAnnulty v. Seick*, 59-586.

83. To render a short-hand report of the evidence a part of the record, it must be filed with the clerk together with the reporter's transcript thereof. It cannot be made of record by being merely referred to in the bill of exceptions, without being filed: *Lowe v. Lowe*, 40-220.

84. Where the exception refers to the evidence taken in the case by the official reporter, and certified to by the judge, "and marked Exhibit A," the fact that neither the original nor the translation of such notes is marked Exhibit A will not prevent its being considered a part of the record, it being otherwise sufficiently identified: *Miller v. Chicago, M. & St. P. R. Co.*, 70—.

85. In order to make a transcript of the reporter's notes a part of the record, they should be certified by him to be a correct transcript. A certificate of the judge to such notes is not sufficient: *Richards v. Lounsbury*, 65-587.

And see further, APPEALS, §§ 1061-1065.

86. Instructions: By statutory provision (Code, § 2789), instructions and the action of the court thereon in giving or refusing them constitute a part of the record, and need not be set out in the bill of exceptions in order to

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bring them before the supreme court: *Roberts v. Leon Loan, etc., Co.*, 68-76.

87. The instructions when filed become a part of the record and may be certified by the clerk: *Parker v. Middleton*, 65-200.

88. Where the giving and refusal of instructions and exception to such rulings are noted on the margins of the instructions, the supreme court can review such rulings, although they are not preserved by a bill of exceptions: *Wells v. Burlington, C. R. & N. R. Co.*, 56-520.

89. While it is not essential that instructions should be preserved by bill of exceptions, when they have been filed and made part of the record, yet it is essential that they be certified by the clerk of the trial court to the supreme court; and if they cannot be made a part of such transcript, error in the giving of them cannot be considered: *Bonney v. Cocke*, 61-303.

90. Before the enactment of the statutory provision above referred to, it was held that instructions were not a part of the record unless made so by a bill of exceptions: *Parker v. Pierce*, 4 G. Gr., 452; *Claussen v. La Franz*, 1-226; *Ewing v. Scott*, 2-447; *Pierce v. Locke*, 11-454.

91. And it was held that the fact that they were set out in the motion for a new trial did not render them matter of record so as to dispense with a bill of exceptions: *Harmon v. Chandler*, 3-150.

92. When not required: A bill of exceptions makes that a part of the record which was not so before. If the error appears without it, there is no necessity for it: *Eyser v. Weissgerber*, 2-463.

93. It is not necessary to preserve by a bill of exceptions the decision on a demurrer, or the judgment of the court: *State v. Strong*, 6-72.

94. A written agreement of facts signed by the parties and filed becomes a part of the record without being embodied in a bill of exceptions: *Black v. Howell*, 56-630.

95. Written instruments; certificate of clerk: To make writings, etc., a part of the record, they should be incorporated into the bill of exceptions or plainly identified thereby. They cannot be made a part of the record by the mere certificate of the clerk: *Garber v. Morrison*, 5-476; *Reed v. Hubbard*, 1 G. Gr.,

153; *Jordan v. Quick*, 11-9; *State ex rel. v. Jones*, 11-11; *Harmon v. Chandler*, 3-150.

96. A paper which is not of itself a part of the record cannot be made a part of the record by being certified to by the clerk and inserted in his transcript. It must be preserved by a bill of exceptions. An entry by the judge in his private calendar, or even by the clerk in his record, that a ruling was made and that an exception was taken to the ruling, is not such an exception as is contemplated by law: *State ex rel. v. Jones*, 11-11.

97. Papers not identified by a bill of exceptions are not properly a part of the record although embraced in the transcript: *Green v. McFaddin*, 5-549.

98. Exceptions entered by a judge upon his calendar and not otherwise preserved are not sufficiently made of record: *Lewis v. May*, 22-599.

99. In all cases where a written instrument is referred to as connected with the action of the court to which exception is taken, it should be contained in the bill of exceptions: *Reed v. Hubbard*, 1 G. Gr., 153.

100. Identification of instruments or evidence: It is the safer practice, when exceptions are taken in relation to any instrument in writing, to copy the same into the bill of exceptions, but if this is not done, it should be so particularly described and referred to in the bill as to enable the clerk to copy the same without mistake into the record and to enable the supreme court to refer to it with positive certainty: *Humphry v. Burge*, 1 G. Gr., 228.

101. A paper sought to be incorporated into a bill of exceptions by description must be designated and identified with clearness and certainty: *Sands v. Wood*, 1-263; *Bryan v. State*, 4-349.

102. The reference in a bill of exceptions to papers on file, not otherwise identifying them, is not sufficient to make them a part of the bill of exceptions: *Freher v. Geeseka*, 5-472.

103. The statement in a bill of exceptions that the plaintiff offered in evidence "the transcript sued on" is not sufficiently definite to identify the instrument offered in evidence, although it was in fact the instrument attached to the petition: *Smith v. Taylor*, 11-214.

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104. The fact that the bill of exceptions refers to depositions marked as exhibits cannot be sufficient to identify and make part of the record depositions which are not identified by the certificate of the clerk or the judge, or by any exhibit marks, as depositions read upon the trial: *Pierce v. Locke*, 11-454.

105. Where the bill of exceptions stated that the party filed a certain motion with affidavits attached, etc., *held*, that the mention in the affidavits was not sufficient to make them a part of the record: *Moffit v. Rogers*, 15-458.

106. Writings referred to in the bill of exceptions should be copied at length in their proper place in the transcript: *Ibid*.

107. Although, if attached and clearly identified, the writings referred to may be embodied in the transcript without being copied out in the bill of exceptions, the sufficient and better plan is to follow the course laid out and insert them in the bill: *Lyons v. Thompson*, 16-62.

108. If the evidence or other papers attached to the bill of exceptions are not sufficiently identified therein, they will be disregarded: *Van Orman v. Spafford*, 16-186.

109. When the testimony is not in the body of the bill of exceptions, and there are discrepancies in the paging or references made, the supreme court will disregard it: *Burlington Gas Light Co. v. Green*, 21-385.

110. Skeleton bills: A bill of exceptions which does not contain the evidence, but directs the clerk to "insert all the evidence, rulings, objections and exceptions," does not sufficiently identify such evidence, and it may, upon motion, be stricken from the files: *Hill v. Holloway*, 52-678.

111. A skeleton bill of exceptions which does not identify the evidence which is to be inserted, but merely directs the clerk to insert all the evidence, or "plaintiff's evidence" and "defendant's evidence," is not sufficient. The clerk has no power to determine what is to be inserted under such a direction. The bill must so identify the evidence that a mistake of the clerk as to what is to be inserted in the transcript may be readily corrected: *Tootle v. Phoenix Ins. Co.*, 62-362; *Wilson v. Tenant*, 61-194.

112. A bill of exceptions directing the

clerk to copy as a part thereof the evidence and the instructions given and refused, leaving the clerk to determine what he shall copy, and giving no means of identification whereby he may be directed what papers he shall copy, and whereby errors, if any should be made, could be corrected, is not sufficient to make the evidence thus referred to a part of the record. The bill should identify the different papers intended to be made a part of the record: *Wells v. Burlington, C. R. & N. R. Co.*, 56-520.

113. A bill of exceptions in which the clerk is merely directed to insert the evidence, without such evidence being otherwise identified, is not sufficient: *Lockard v. Chicago, St. P., M. & O. R. Co.*, 66-250; *Williams v. Williams*, 69-715; *Parks v. Council Bluffs Ins. Co.*, 70—.

114. A bill of exceptions, though a skeleton bill in form, is sufficient if it only refers to the short-hand report of the evidence, and directs the evidence thus referred to to be inserted: *Glenn v. Gleason*, 61-28.

115. A skeleton bill of exceptions which sufficiently identifies the evidence which is to be inserted therein, as, for instance, by a proper reference to the notes or transcript of the evidence as taken down by the short-hand reporter and filed with the clerk, will make such evidence a part of the record: *McCarthy v. Watrous*, 69-260.

116. Where the bill of exceptions directed the clerk to insert the transcript of the evidence produced and offered by plaintiff, contained in the reporter's notes, filed in the office of the clerk of the court, *held*, that such identification was sufficient, although the transcript was not on file when the bill of exceptions was signed, it being filed, however, when the bill was filed: *Gardner v. Burlington, C. R. & N. R. Co.*, 68-588.

117. A bill of exceptions referred to the evidence in the following manner: "The following rulings were had and reduced to writing by said reporter, being all the testimony in said trial. Here insert evidence in full:" *held* to sufficiently identify the evidence: *Wilson v. First Presb. Church*, 60-112.

118. Where the bill of exceptions directed the clerk to insert the instructions given by the court on its own motion, and such instructions were incorporated by the clerk

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in the transcript, *held*, that it would not be presumed that instructions were given by the court other than on its own motion, and therefore that it would be considered that all the instructions given were before the court, and that the identification of the instructions in the skeleton bill of exceptions was sufficient: *King v. Barber*, 61-674.

119. The evidence may be sufficiently incorporated into the bill of exceptions by reference to the stenographer's report of the evidence, whether such report is certified by the reporter or not. A transcript or extension in long-hand of the reporter's notes is not necessary to complete the bill of exceptions, and is not necessary unless a transcript is required: *Hampton v. Moorhead*, 62-91.

120. Where the original notes of the reporter are filed, and the reporter has therein marked and identified, in writing, the papers offered in evidence, and the clerk is directed to insert in the bill of exceptions all exhibits referred to and identified by said reporter, the written evidence offered is sufficiently identified to become a part of the record: *Manson v. Ware*, 63-845.

121. **Certificate of judge:** A certificate of the judge showing the several rulings made during the trial as to the admission or exclusion of evidence, and that the same were duly excepted to, is sufficient as a bill of exceptions: *State v. Fay*, 43-651; *Hay v. Frazier*, 49-454.

122. While a certificate of the judge to the evidence, that it is all the evidence offered and received on the trial of the case, is a sufficient compliance with the statute respecting bills of exception, yet this certificate must be filed within the time prescribed, and if not so filed will be disregarded and stricken from the record: *Gibbs v. Buckingham*, 48-96; *State v. Newcomb*, 56-335; *McCarthy v. Watrous*, 69-260.

123. **Upon judge's own motion:** A judge may, on his own motion and without the request of either party, make and file a bill of exceptions, but the party should have notice of it. Such notice, however, will be presumed in the absence of a contrary showing: *Shepherd v. Brenton*, 15-84.

124. **Bill cannot be contradicted:** A bill of exceptions, when signed and filed, becomes a part of the record, and the judge cannot

change or modify it by a contradictory statement or certificate. Where a party has excepted to rulings upon the evidence when made and has not waived his objection, and his bill of exceptions is filed within the time allowed by law or agreed upon between the parties, it is competent for him to embody in it all grounds of objection upon which he desires a review of the cause, and to waive such others as he sees fit: *Dedric v. Hopson*, 62-562.

125. The record entry of a verdict by the clerk is higher evidence thereof than the bill of exceptions embodying such verdict. It is not strictly the office of the bill of exceptions to show the amount of the verdict: *Cook v. United States*, 1 G. Gr., 56.

126. Where there are affidavits and counter-affidavits as to the action of the court, the recitals of the bill of exceptions will be relied upon as stating the facts: *Shepherd v. Brenton*, 15-84.

127. **Not certified:** A paper purporting to be a bill of exceptions and not certified as a part of the record cannot be considered: *Conrad v. Baldwin*, 3-207.

128. **Impeachment:** A witness' testimony, as embodied in a bill of exceptions, cannot be introduced on a subsequent trial to impeach him: *Boyd v. First Nat. Bank*, 25-255.

129. **Time for filing:** It is not error to refuse to stop a trial for the purpose of allowing a party to prepare a bill of exceptions, when time is granted within which to prepare the same: *Anson v. Dwight*, 18-241; *Hanan v. Hale*, 7-153.

130. Where, pending the argument of a motion for a new trial by the party applying therefor, the court adjourned without giving an opportunity to file a bill of exceptions, *held*, that the action of the court could not be reviewed on affidavits: *Campbell v. Ayres*, 4-353.

131. Where a motion in arrest and for a new trial has been continued to a succeeding term, it is sufficient to embody the exceptions into one bill and have it signed by the judge, unless dissent of the opposite party is shown: *Courtney v. Carr*, 11-295.

132. In the absence of an express agreement or consent, the judge has no power to sign a bill of exceptions after the final adjournment of the term (Code, § 2831): *Clag-*

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gett v. Gray, 1-19; *State v. Orwig*, 84-112; *Hahn v. Miller*, 60-96; *Gates v. Brooks*, 59-510; *Gibbs v. Buckingham*, 48-96.

133. A bill of exceptions may, by agreement of parties, be settled and signed after the conclusion of the term: *Harrison v. Charlton*, 42-573; *Dedric v. Hops:n*, 62-562.

134. If time for filing the bill of exceptions is extended by consent, it must be filed within the time so given, and will not be considered if filed afterwards: *Lynch v. Kennedy*, 42-220; *Lloyd v. Beadle*, 43-659; *St. John v. Wallace*, 25-21; *Frost v. Senior*, 44-706; *Parmenter v. Elliott*, 45-317; *Deland v. Weddington*, 54-698; *Hahn v. Miller*, 60-96; *Mineral Ridge Coal Co. v. Smith*, 68-561.

135. A bill of exceptions signed after the expiration of the term or after the time allowed for that purpose, if the time has been extended, will be stricken out on motion in the supreme court: *Lynch v. Kennedy*, 42-220; *Gibbs v. Buckingham*, 48-96; *Templin v. Exchange Bank*, 69-149; *McCarthy v. Watrous*, 69-260.

136. If not filed within the time prescribed in the order of court extending the time, the bill will be disregarded, or stricken from the record: *McFarland v. Folsom*, 61-117.

137. Where thirty days was agreed upon to settle a bill of exceptions, and no showing was made of a proper effort to settle the same within the time fixed, *held*, that without such showing a party could not have the benefit of exceptions signed by the judge after that time, and that he was in no better position when it was thus signed by bystanders: *St. John v. Wallace*, 25-21.

138. **Filing:** The time when a bill of exceptions was filed by the clerk is immaterial, if it duly appears that such bill was ordered by the court to be made a part of the record: *Jones v. Hockman*, 12-101.

139. Under an agreement to prepare exceptions by a given time, *held*, that the presentation of exceptions to the judge was sufficient, although they were not filed until within a few days after the time had expired: *Humphry v. Burge*, 1 G. Gr., 223.

140. Where the time was extended to a day beyond the term, by consent, for signing and filing a bill of exceptions, and the bill was signed by that date, but not filed, *held*, that it was not valid, and the judge could

not, by order made in vacation at the time of signing, direct that it be made a part of the record: *Cobb v. Chase*, 54-196.

141. Where it appears that within the time allowed for settling and filing a bill of exception said bill was signed, but it does not appear, except by statement in the abstract, not based upon matter of record, that such bill was filed with the clerk, the supreme court cannot consider it: *Anderson v. Leaverich*, 70—.

142. **Change of entry at succeeding term:** The subsequent verbal alteration of an order or judgment made on approving it at a subsequent term will not entitle the party to a bill of exceptions at that term, including objections raised at the trial: *State v. Orwig*, 84-112.

143. **What sufficient signing:** A bill of exceptions, signed with the last name of the judge, the final designation "judge" being added, if properly certified by the clerk, will be presumed to have been signed by the judge and filed in the case in which the certificate is given: *Mays v. Deaver*, 1-216.

144. **Presumption:** Where it appears that the bill of exceptions was signed within proper time and it is made part of the transcript, it will be presumed, in the absence of all showing to the contrary, that it was filed within the proper time: *Wilson v. First Presb. Church*, 60-112.

145. Where the bill of exceptions is silent as to when it was settled, it will be presumed that it was taken in trial term regularly, or settled by agreement without reference to the time of filing; and if consent to an extension of time beyond the term is shown, it will be presumed that the bill was reduced to form and made part of the record within the time contemplated by law. But if it appears to have been taken in vacation, and assent is not shown, the bill will be stricken from the record upon objection properly made: *Claggett v. Gray*, 1-19.

146. **Refusal of judge to sign:** It is not proper, by proceedings in *mandamus*, to control the discretion of the trial judge in regard to proceedings which are to be shown by bill of exceptions. If the parties have agreed to extend the time for filing a bill until it is too late to have a bill signed by bystanders, they must rely upon the discretion

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of the judge: *Jamison v. Reid*, 2 G. Gr., 394.

147. **Signing by by-standers:** The only remedy, when the court refuses to sign a bill of exceptions or signs an incorrect one, is by the signature by by-standers to a correct bill as authorized by Code, § 2835. A bill cannot be impugned by affidavits: *Woodworth v. Byerly*, 43-106.

148. Where a bill of exceptions is signed by by-standers, it should be drawn up and signed at the time of the trial: *Clark v. Parvin*, Mor., 371.

149. Where time beyond the term has been given for filing the bill, that method does not obtain: *St. John v. Wallace*, 25-21.

150. The attorneys of a party are not proper persons, as by-standers, to sign a bill of exceptions of such party: *Ibid.*; *Simon v. Weigel*, 19-505.

151. It is not necessary that the judge certify to his refusal to sign the bill of exceptions. That fact may be proved by the evidence of the by-standers, as here provided: *Craig v. Andrews*, 7-17.

152. A bill of exceptions signed by by-standers is not sufficient if it merely states what they understand the action of the court to be: *Clark v. Parvin*, Mor., 371.

153. To authorize a bill of exceptions signed by by-standers, it must appear that the judge refused to sign it: *Edgar v. Caldwell*, Mor., 434.

154. Where a judge refuses to sign a correct bill of exceptions, the only remedy is by obtaining the signatures of by-standers. Whether this method can be pursued where the time to file a bill of exceptions is extended beyond the term, *quære*. But if the party accepts the incorrect bill and prosecutes his appeal therefrom, and judgment is rendered against him, he cannot upon such facts obtain relief from such judgment in an action in equity: *Bellows v. Tod*, 52-359.

EXECUTIONS.

I. ISSUANCE, STAY, ETC.

II. LEVY AND RETURN; INDEMNIFYING BOND; EXEMPTIONS.

- a. *What property subject to levy.*
- b. *The levy.*
- c. *The return.*
- d. *Exemptions.*

III. SALE.

IV. RIGHTS OF PURCHASER; ASSIGNMENT OF CERTIFICATE; DEED.

V. REDEMPTION.

As to an injunction to restrain the enforcement of an execution, see INJUNCTIONS, §§ 54-78.

I. ISSUANCE, STAY, ETC.

1. No notice of the issuance of execution need be given the defendant therein: *Ayres v. Campbell*, 9-213.

2. **Within what time may issue:** At common law, if execution was not sued out within a year and a day after judgment, it was presumed that the judgment was satisfied or execution released, and a proceeding by *scire facias* was necessary before execution could afterwards issue: *Von Puhl v. Rucker*, 6-187.

3. Under the statute, execution on a judgment of a court of record may issue at any time within twenty years, but as the lien of such judgment upon real property terminates at the end of ten years, an execution on the judgment after that time only operates as a lien upon real property from the time of levy: *Stahl v. Roost*, 34-475.

4. Execution on a judgment of a justice of the peace cannot issue after the expiration of ten years unless a transcript thereof has been filed in the office of the clerk of the circuit court: *Givens v. Campbell*, 20-79.

5. Where the time within which an execution might be issued upon a judgment was extended by statute, *held*, that such statute was applicable to judgments already in existence and extended the time within which execution might be issued thereon: *Gray v. Iliff*, 30-195.

6. **Judgment essential to validity:** If there is no valid existing judgment when the execution is issued, it is void: *Balm v. Nunn*, 63-641.

7. **But one execution:** The statutory provision that but one execution can be in existence at the same time is mandatory and not merely directory. Nevertheless it may be waived by the party for whose benefit it is enacted: *Merritt v. Grover*, 61-99.

8. The mere issuance of a second writ before the return of the prior execution under

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which the levy has been made is not of itself sufficient to establish the abandonment of such levy: *West v. St. John*, 63-287.

9. A second execution should not be issued until a levy under a prior execution has been disposed of: *McWilliams v. Myers*, 10-325.

10. Issuance to another county: The statutory provision that when execution issues to a county other than that in which the judgment is rendered, a transcript of the judgment must be filed in the office of the clerk of the district court of such county, is directory only, and a sale of lands in one county may be made on an execution issued from another county without the filing of the transcript provided for. The effect of failure to file the transcript will be that the levy and sale under the execution will not impart constructive notice to a subsequent purchaser of the property before the recording of the sheriff's deed. But actual notice of the proceedings will supply the want of such record notice: *Hubbard v. Barnes*, 29-289; *McGinnis v. Edgell*, 39-419.

11. When the sheriff's deed is recorded in pursuance of such a sale, it will operate as constructive notice of the title of the purchaser, although a transcript of the judgment was not filed: *Foreman v. Higham*, 35-382.

12. Execution cannot be issued on the transcript. It must issue from the court originally rendering the judgment: *Seaton v. Hamilton*, 10-394; *Furman v. Dewell*, 35-170.

13. Form: While an execution must pursue and be warranted by the judgment, yet a mere irregularity as to date will not render a sale thereunder void. If it so describes and identifies the judgment as to render certain the authority on which it is issued, it is sufficient to vest the sheriff with power to sell: *Sprott v. Reid*, 3 G. Gr., 489.

14. An execution which did not state the amount to be made out of the property, but which contained a statement of the sum due under the decree, *held* sufficient: *Cooley v. Brayton*, 16-10.

15. A simple variance between the execution and judgment *held* not sufficient to affect the validity of the sale: *Cunningham v. Felker*, 26-117.

16. An execution showing that the judg-

ment under which it was issued was recovered before a person described by name, but not stated to be a justice of the peace, *held* not sufficient to render the writ void, where the writ was so described and identified as to render certain the authority on which it was issued: *Dean v. Goddard*, 13-292.

17. An execution from a justice of the peace specifying who recovered the judgment, and against whom it was recovered, but not the names of the parties, *held* sufficient: *Williams v. Brown*, 28-247.

18. In a particular case, *held*, that the execution sufficiently referred to the judgment and stated the matters necessary to be stated as required by statute: *Burdick v. Shigley*, 30-63.

19. In whose name to issue: Execution can only issue in the name of the judgment creditor except in case of his death, bankruptcy, or the like. It cannot issue in the name of the assignee of the judgment: *Corriell v. Doolittle*, 2 G. Gr., 385.

20. The assignment of the judgment carries with it as a necessary incident the right to use the name of the party in whose favor the judgment was rendered, for the purpose of issuing execution: *McWilliams v. Myers*, 10-325.

21. In case of plaintiff's death: An execution issued in the name of a deceased plaintiff without the indorsement provided for by statute in such case (Code, § 3130) may be enjoined: *Meek v. Bunker*, 33-169.

22. Where action is brought, by mistake, in the name of a deceased person, and judgment is rendered and sale had thereunder, the proceedings are invalid: *White v. Secor*, 58-533.

23. Death of defendant: At common law an execution cannot be issued on a judgment after the death of defendant therein, and sales made in pursuance of such execution are void, and this rule is recognized by statute (Code, § 3133). The fact that the property levied on under the execution is already held by the sheriff by writ of attachment levied before the death of the judgment debtor will not affect the rule: *Welch v. Battern*, 47-147.

24. The death of defendant after levy, but before sale, cannot be shown for the purpose of defeating the sale. So *held* where the

Issuance, stay, etc.

judgment was in partition for costs and was made a special lien upon the shares of the property of vendee: *Sprott v. Reid*, 3 G. Gr., 489.

25. A judgment against a person afterwards deceased should be filed with claims against the estate and approved as a claim of the fourth class, within the time specified in Code, § 2420, in order to secure payment out of the personal estate. If not thus filed, the action authorized by statute (Code, § 3092) to subject real property of decedent to execution thereon cannot be maintained: *Bayless v. Powers*, 62-601.

26. Alteration: Where it appeared that the name of the execution debtor had been changed in the execution, and it was sought to defeat the sale on the ground of such alteration, *held*, that it would not be presumed that the alteration was fraudulently made by one not authorized to make it, and after the sale, but that the sale would be upheld: *Preston v. Wright*, 60-351.

27. Recall by court: Where a general execution was improperly issued on a judgment, *held*, that on motion of defendant an order should have been granted in the court in which the judgment was rendered, recalling the execution and releasing the levy made thereunder: *Mayfield v. Bennett*, 48-194.

28. General: Under a statutory provision (Revision, § 3864, now repealed), authorizing the judgment in an action at law upon a note secured by mortgage to be declared a lien from the date of the recording of the mortgage, *held*, a general and not a special execution on such judgment was contemplated: *Mayer v. Farmers' Bank*, 44-212.

29. Special: A special execution may be issued in case of property held under attachment to await the rendition of judgment, although the judgment be general and no particular allowance of a special execution be made therein: *Corriell v. Doolittle*, 2 G. Gr., 885.

30. A special execution under decree of foreclosure of a mortgage on a town lot, commanding the sheriff to sell the lot in conformity with the statute, *held* not to be illegal as requiring the whole lot to be sold: *Southard v. Perry*, 21-488.

31. Where a special execution was improperly issued and a sale was had there-

under, but the same sale under a general execution would have been equally effective, *held*, that the error as to the form of execution was purely technical and the sale could not be set aside: *O'Connell v. Cotter*, 44-48.

32. Where attached property is sold it will be presumed that it was sold under special execution as provided by statute: *Peterson v. Foli*, 67-402.

Further as to special execution against attached property, see ATTACHMENT, §§ 234, 235.

33. Proceedings for contempt: The proper method of enforcing obedience to a continuing order in the nature of a mandatory injunction is by attachment for contempt: *State v. Baldwin*, 57-266.

34. Failure to pay money awarded as temporary alimony in a divorce suit, and for which judgment has been entered, cannot be treated as a contempt: *Baily v. Baily*, 69-77.

35. A certified copy of an order appointing a receiver and directing him to take possession of property serves the same purpose as the writ itself, and a resistance to the receiver acting thereunder will constitute a resistance to the execution of an order of court: *State v. Rivers*, 66-653.

36. Auxiliary proceedings: The provisions of Rev., §§ 3375-3390, for compelling the judgment debtor to appear and answer as to his property, and to deliver in satisfaction of the execution any property thus discovered, on penalty of contempt, were held unconstitutional, not because providing for imprisonment for debt, but as authorizing the determination in a summary proceeding, without a jury, and in a court of inferior jurisdiction (the county court), of questions as to liability of property, etc., not adjudicated in the original judgment, and the enforcement by imprisonment of an order made in such proceedings: *Ex parte Grace*, 12-208.

37. But the present provisions (Code, §§ 8135-8149), by which a party found, upon such examination, to have property not exempt from execution which he refuses, upon order of the court, to apply to the satisfaction of the judgment, can be imprisoned for contempt in the violation of such order, are constitutional, the proceedings provided for being required to be before a court of general jurisdiction or a judge thereof: *Eikenberry v. Edwards*, 67-619.

38. By Code, §§ 3150-3153, equitable proceedings may be brought to subject equitable interests of defendant in real property to the satisfaction of the judgment, and under such proceeding a lien upon such an interest may be acquired which shall be superior to the lien of a prior judgment against defendant: *Bridgman v. McKissick*, 15-280.

39. Stay of execution: The privilege of staying the judgment is extended to any one who, being a party to the proceeding, has such an interest as that, in equity, as between him and the judgment debtor, he may be compelled to pay the debt. Therefore, *held*, that a subsequent purchaser of mortgaged premises, who had assumed the payment of the incumbrance, might stay a judgment against the original mortgagor under a foreclosure proceeding to which both were parties: *Moses v. Clerk of Court*, 12-139.

40. While the legislature may abridge or take away the right to a stay of execution existing when the contract was made or the judgment rendered, the intention to do so should be clearly expressed, and where the time during which stay might be applied for was abridged, *held*, that in the absence of any expression of an intention to the contrary, the new statute was not applicable to the time within which stay might be taken as to judgments existing at the time of the change: *Du Boise v. Bloom*, 38-512.

41. Under a prior statute which did not forbid stays of judgment on appeal, *held*, that the provisions as to stay applied also to judgments in the supreme court: *Peoria F. & M. Ins. Co. v. Dickerson*, 29-98.

42. Approval of stay bond: The question as to whether a bond is good is not judicial, and the clerk is liable for failure to use reasonable care in ascertaining the sufficiency of the security before accepting a bond. The fact that the surety makes affidavit, etc., does not release the officer from such liability, and he may refuse the bond, although the affidavit is made: *Hubbard v. Switzer*, 47-681.

43. A right of action against the clerk for damages arising from his fault in approving a stay bond does not accrue until the expiration of the stay; and so the right of action by the clerk against his deputy for fault of the latter in making such approval arises at

the same time. In the latter action it is no defense for the deputy that his principal had previously approved bonds signed by the same surety: *Moore v. McKinley*, 60-387.

44. Failure of the clerk to require the sureties to justify will not defeat the stay: *Du Boise v. Bloom*, 38-512.

45. Appeal waived: The right of appeal is waived by taking a stay: *Seacrest v. Newman*, 19-823.

46. Even though stay of execution is not taken in the form prescribed by statute, yet if, by consent of the parties, judgment is entered, so that there is a stay under a substantial waiver of further proceedings, an appeal should not be allowed: *Warford v. Eads*, 10-592.

47. Liability of sureties: The statutory provision (Code, § 8064), that the stay bond shall have the effect of a judgment confessed from the date thereof against the property of the sureties, is not obnoxious to the objection that it deprives the parties on the bond of the right to trial. Such right of trial is waived by the execution of the bond: *Cavender v. Smith's Heirs*, 5-157, 186.

48. Under previous statutory provisions somewhat different from the present, *held*, that a stay bond, although filed, would not become a lien on the property of a surety as against persons not having actual notice, unless entered of record as provided by statute: *Waldron v. Dickerson*, 52-171.

49. The determination of the clerk, as to whether the bond is filed within the time required by statute, or whether the filing within the time specified is essential to its validity, in a case where such question arises, is a judicial act, and an error in his decision on that question will render a judgment against the sureties voidable only and not void: *Maynes v. Brockway*, 55-457.

50. Where an instrument intended as a bond for stay of execution is accepted and approved, and recorded as such by the clerk, it has the force and effect of a judgment against the property of the sureties, and cannot be questioned in a collateral proceeding by proof that it was not given until long after the expiration of the period for taking such stay, or that the cause was one in which a stay was not allowable: *Wishard v. Biddle*, 64-526.

Levy and return.—What property subject to levy.

51. Where a stay bond was accepted by the clerk but not recorded, *held*, that although as between the parties it became a lien upon the property of the sureties, subsequent mortgagees and purchasers without notice were not affected thereby: *Waldron v. Dickerson*, 52-171.

52. Execution after stay: Delay in issuing execution after expiration of stay does not discharge the lien of the judgment: *Parish v. Elwell*, 46-162.

53. Consent of sureties to stay: Unless the surety in the original judgment objects to the granting of a stay thereof (as he is authorized to do by Code, § 3068), he will be presumed to have consented to the stay, and thereby to have waived the right to redeem his property if sold under execution, no right to redemption being allowed from a sale under a judgment which has been stayed (Code, § 3102): *Chase v. Welty*, 57-290.

54. Agreement to stay: Whether a judgment absolute on its face can be affected by an antecedent or contemporaneous independent collateral agreement to stay execution, *quære*: *Tousey v. Bishop*, 22-178.

II. LEVY AND RETURN; INDEMNIFYING BOND; EXEMPTIONS.

a. What property subject to levy.

55. Property which may be seized: The general rule is that the right to seize and sell is co-extensive only with the power to take and deliver possession: *Campbell v. Leonard*, 11-489.

56. Mortgagor's interest: Therefore, the interest of a mortgagor in personal property in possession of the mortgagee is not such that it can be levied on under execution: *Ibid.*; *Gordon v. Hardin*, 33-550; *Vanslyck v. Mills*, 34-875.

57. Where the mortgagor of chattels is in possession for a definite time, his interest prior to the expiration of such period is subject to levy under execution: *Rindskoff v. Lyman*, 16-260.

58. But it is otherwise where the mortgagee may take possession at his pleasure, or when the right of the mortgagor to possession is for no definite period: *Ibid.*; *Wells v. Sabelowitz*, 68-288. (But now see 21 G. A., ch. 117.)

Further as to levying upon the mortgagor's interest in chattels, see CHATTEL MORTGAGES, §§ 111-116, 132, 133.

59. Interest of pledgor: The pledgee under a valid pledge has a right to the property prior to that acquired thereon by levy of execution against the pledgor with knowledge of the pledgee's rights: *Reeves v. Sebern*, 16-234.

60. Leasehold interest: A leasehold interest is subject to sale under execution: *Sweezy v. Jones*, 65-272.

61. But the rights of a tenant in possession, with option of purchasing, are not greater than a leasehold interest, and cannot be sold distinct therefrom: *Ibid.*

62. An equitable interest in real property, which is a matter of record, may be sold under execution without an equitable action being brought to subject it to the judgment: *Lippencott v. Wilson*, 40-425.

63. A building erected by one person upon land of another under a parol license, being chattel property, may be sold by a constable under execution from a justice of the peace: *Walton v. Wray*, 54-531.

64. Real property of a person deceased cannot be seized under a judgment recovered in an action against the administrator. Such sale would not be binding against the heirs: *Lepage v. McNamara*, 5-124.

65. The right of redemption and possession during the redemption period which a debtor has in property which has been sold at judicial sale is subject to levy and sale, at least in a case where the debtor would not be entitled to redeem from a second sale, and a surety may require that such property be subjected to the payment of the debt before his property is levied on: *Barnes v. Cavanagh*, 53-27.

And see *infra*, §§ 421-426.

66. Property intended for special use is subject to a levy although it cannot thereafter be applied to such use and does not realize on sale the amount of money it would have brought for use for the purpose intended. In such case the officer will not be liable for the damage resulting, if the levy is rightful: *Coffey v. Wilson*, 65-270.

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Issuance, stay, etc.

88. By Code, §§ 8150-8153, equitable proceedings may be brought to subject equitable interests of defendant in real property to the satisfaction of the judgment, and under such proceeding a lien upon such an interest may be acquired which shall be superior to the lien of a prior judgment against defendant: *Bridgman v. McKissick*, 15-260.

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67. Property in the hands of a receiver appointed by a court is not liable to seizure

What property subject to levy.—The levy.

by an officer under execution: *Martin v. Davis*, 21-535.

68. Judgments cannot, except by special statutory provision (Code, § 3046), be levied on and sold as property, but garnishment of the judgment debtor would be the proper remedy: *Osborn v. Cloud*, 28-104.

69. Although by express statutory provisions a judgment may now be levied on and sold under execution, it is nevertheless a debt and not to be reached under attachment by a levy, but only by garnishment: *Ochiltree v. Missouri, I. & N. R. Co.*, 49-150.

70. Where an agent recovers a judgment in his own name, but for the benefit of the principal, and to which the principal is entitled, such agent has no interest therein which can be subjected to his debts: *Beaver Valley Bank v. Cousins*, 67-810.

71. Negotiable notes may, by the above statutory provision, be taken and sold by indorsement, and such transfer will vest the transferee with a title discharged of infirmities: *Earhart v. Gant*, 82-481.

72. Bonds of a railroad company which had been negotiated and afterwards bought back by the company but not delivered to it, held subject to be levied on by execution against the company: *Hetherington v. Hayden*, 11-335.

73. Garnishment under execution: There is no provision requiring notice of the garnishment proceeding to be served on the judgment debtor, and the court may proceed in such cases against the garnishee without having jurisdiction of such debtor: *Smith v. Dickson*, 58-444.

74. If the judgment on which the execution was issued, although voidable for error on appeal, is not void, it is sufficient to protect the garnishee, and he cannot object thereto: *Houston v. Walcott*, 1-86.

75. The proceeding by garnishment does not obtain where the creditor seeks to subject the real estate of his debtor in the hands of third persons to the payment of his debts. The provisions for garnishment under execution relate to personal property, and not to proceedings where the equitable interest of the debtor in real property is sought to be reached: *Seymour v. Kramer*, 5-285.

Further as to GARNISHMENT, see that title.

b. The levy.

As to levy under writ of ATTACHMENT, see that title, V.

76. No notice of a levy need be given to the execution defendant: *Ayres v. Campbell*, 9-213.

77. What acts necessary: In order to make a legal and valid levy upon personal property, the officer must take possession and control, by doing such acts as that, but for the protection of the writ, he would be liable in trespass therefor. Levy upon property which remained locked in an outbuilding, the key of which was in possession of the debtor, held not sufficient: *Rix v. Silkmitter*, 57-262.

78. Merely noting the fact of levy upon personal property without taking and keeping possession of it, held not sufficient to create a lien: *Techmeyer v. Waltz*, 49-645.

79. Description: A levy in the following words, "levied upon a lot of lumber, consisting of fencing, flooring, sheeting, etc., etc., as the property of," etc., held not sufficiently definite as to the description of the property to be valid. The levy should describe the property with such certainty as to enable either the successor of the officer or the purchaser at the sale to find and identify it: *Payne v. Billingham*, 10-360.

80. Leaving property with defendant, who remains in possession without giving a delivery bond, will prevent the levy being valid as against a subsequent levy under execution, under which possession is taken: *Border v. Bengel*, 12-330.

81. Growing crops: A levy of execution upon an unripe and growing crop is not valid as against subsequently acquired liens, if made so long before the officer can properly proceed to advertise or sell as to evince an intention on the part of the judgment creditor to hold the levy for a time merely as security, and especially if it is reasonably certain at the time of the issuance of the writ that it cannot be fully executed by the sale of the crop during the life of the writ, but that the judgment debtor must be put to the expense of another writ: *Burleigh v. Piper*, 51-649.

82. Where the sheriff levied upon corn in the field ungathered, and notified parties claiming the property of his intention to levy, going into the field for the purpose of mak-

The levy.

ing a levy, *held*, that, having done all that could be done in order to take possession and give notice to persons interested, the sheriff was not required, in order to maintain his levy, to do more than owners of property usually do under such circumstances to retain possession: *Barr v. Cannon*, 69-20.

83. Where crops were levied upon as property of a tenant and left in his hands as agent, *held*, that this was a sufficient levy to constitute a conversion as to the landlord who had a chattel mortgage on the crops, and that the conversion dated from such levy and not merely from the time of sale: *Stuart v. Phelps*, 39-14.

84. In case of principal and surety: Although the statute (Code, § 3039) provides that, when the judgment is against principal and surety, the officer having the collection thereof shall first exhaust the property of the principal, one of two joint judgment debtors cannot compel the creditor to resort to the other one first, unless so directed in the judgment, although as between the two the latter is primarily liable: *Palmer v. Stacy*, 44-340.

85. Such statutory provision only applies when judgment has been obtained against both principal and surety, and not then, unless the order of liability is stated in the judgment: *State v. McGlothlin*, 61-312.

86. The object of this statutory provision is to enable one who is a surety to have it so declared of record, to the end that the property of the principal may be exhausted; but such a finding by the court will not be an adjudication as to the facts, at least unless the principal debtor was a party to the proceeding: *Walters v. Wood*, 61-290.

87. Partnership interest: A partner's interest in partnership property is liable to execution which may be levied thereon and will remain a lien until satisfied by sale or otherwise. The equitable proceedings contemplated by statute in such cases (Code, § 3054) simply pertain to the method of enforcing the liability of the property to the writ: *Lambert v. Powers*, 36-18.

88. In determining the interest of the debtor in the partnership, partners and creditors may be made parties to the equitable proceeding, and where the case demands, the partnership may in such proceeding be

fully settled a *Haines*, 30-574.

89. Where a party under an one partner an bringing the eq statute, just ref of the firm obta partners indivi levy upon such equitable action jected first to th it appearing th property: *Aultm*

90. Where an nership was retu partnership and partner, except as ing in his wife's proceeding by s statutory provision iff could maintai subject the propo the execution, and cause in the sam property should n firm debts: *Ticoni*

91. Estoppel: T disclaiming owner levy thereon cann ping him from se quently acquired, ti not having been de by any precedent a party thus claiming acquired claim: *Da*

92. Excessive lev ting aside a sale, e property sold has b in the same action:

93. A second levy the first is disposed *shaw*, 49-296.

94. The assignee disregard a levy alr second execution a made thereunder un first execution has b way known to the *Myers*, 10-325.

95. Where real est such levy must be d abandonment, or set a

The levy.

a second execution can issue, except as authorized in a particular case by statute (Code, § 8086): *Downard v. Crenshaw*, 49-296.

That a second execution cannot issue while a previous one is outstanding, see *supra*, §§ 7-9.

96. Lien on personal property: A writ of execution does not become a lien upon personal property until actual levy is made: *Reeves v. Sebern*, 16-284.

97. Levy constitutes satisfaction: After levy of execution on goods and chattels sufficient to satisfy the judgment, and defendant in the execution is divested of his right to the property, and the officer making the levy becomes liable to the plaintiff for the debt in case of failure to perform his duty with reference to the property, such levy becomes *prima facie* satisfaction of the judgment: *Lucas v. Cassaday*, 2 G. Gr., 208.

98. And a subsequent release of such a levy without the knowledge of a surety will operate as a release of the surety: *Sherraden v. Parker*, 24-28.

99. While proceedings for the satisfaction of a judgment are going on, and property sufficient to satisfy it is held under execution, the judgment cannot be sued on: *Peck v. Parchen*, 52-46.

100. Levy on sufficient personal property to satisfy the judgment is only considered a satisfaction in certain cases, as where the rights of a junior execution creditor intervene, or where the delay in the sale is occasioned by the plaintiff himself without the agency or consent of defendant, but as between the parties, levy is not satisfaction; and where property which at the time of levy was sufficient to satisfy a claim afterwards depreciated in value, owing to the postponement of the sale at the request of defendant, *held*, that the levy did not constitute a satisfaction: *Williams v. Gartrell*, 4 G. Gr., 287.

101. The rule that a levy upon personal property is a satisfaction of the judgment under which the levy is made does not apply in case of levy upon real property. Therefore, where a levy was made upon real property supposed to belong to defendant, and the same was bid in by plaintiff, but it afterwards appeared that defendant had no title, *held*, that plaintiff might recover from de-

fendant the amount of the bid: *Reed v. Crosthwait*, 6-219.

102. Duty to levy; indemnifying bond; notice of ownership: An officer is bound to levy on any personal property in the possession of, or that he has reason to believe belongs to, defendant, or any on which the plaintiff directs him to levy (Code, § 8055), and is not liable in any way by reason of such levy until he receives the notice provided for in that section. He cannot demand an indemnifying bond as there authorized until such notice is served. His remedy by interpleader is merely cumulative: *Kaster v. Pease*, 42-488.

103. A simple disclaimer at the time of the levy, by the execution debtor, of any interest in the property, will not be sufficient in itself to put the officer on inquiry as to the ownership of the property, or justify him in postponing the levy and incurring the risk of having the execution debtor dispose of the property or otherwise place it beyond his reach: *West v. St. John*, 63-287.

104. Where the execution plaintiff has given an indemnifying bond, the officer must hold the property at all events and apply it to the execution unless it is taken from him by legal process, and cannot escape liability for not so doing by showing that it was not the property of the judgment defendant: *Evans v. Thurston*, 53-122.

105. But the officer is not liable in damages for failure to levy upon property in defendant's possession, if it is shown that such defendant had no interest therein subject to levy: *Crosby v. Hungerford*, 59-712.

106. Where the officer has been indemnified, it is his duty to use the proper means to make the levy effective on the property: *Cox v. Currier*, 62-551.

107. Remedy against officer: In the absence of the notice of ownership of, or claim to, the property required by statute in order to authorize the officer to demand an indemnifying bond, replevin will not lie against the officer to recover the property levied on: *Finch v. Hollinger*, 43-598; *Peterson v. Espeset*, 48-262.

108. And in an action to recover the property from the officer holding it under a levy, it is necessary to allege the giving of such notice: *Allen v. Wheeler*, 54-628.

The levy.

109. Although the officer is to be protected from all liability by reason of the levy until notice is received, he cannot maintain an action for expenses and attorneys' fees in defending a replevin suit for the property levied on, in which he is successful: *Rickabaugh v. Bada*, 50-56.

110. Where plaintiff gives an indemnifying bond upon notice being served upon the officer by a third person, that he has a lien upon the property as mortgagee, and the property is then seized and sold, recovery on the bond cannot be defeated on the ground that the mortgagee still has a lien upon the property, and may take it under the mortgage: *Rand v. Barrett*, 66-731.

111. The statutory provision (Code, § 3058) that the claimant of the property, for the seizure or sale of which an indemnifying bond has been taken, shall be barred of any action against the officer levying on the property, if the surety on the bond was good when it was taken, and limiting the claimant of the property to his remedy on the bond, is unconstitutional so far as it denies to a claimant of property levied on the right to maintain an action for its recovery against an officer levying on such property under execution against another person, in that it deprives the owner of his property without due process of law, by substituting the liability of the party to the bond for that of the officer for his trespass: *Foule v. Mann*, 53-42; *Craig v. Fowler*, 59-200. And see *Sunberg v. Babcock*, 61-601.

112. The statutory provision requiring a similar notice in order to render the officer liable for a wrongful levy under attachment (20 G. A., ch. 45), held not unconstitutional. While it requires notice as a preliminary step before action can be brought against the officer, it does not limit the owner of property wrongfully seized to an action on the bond: *Cheadle v. Guittar*, 68-680.

113. The statutory provision above referred to, requiring notice to the officer of ownership of the property before bringing action against him for wrongful levy thereon, does not apply to a case where the execution defendant claims that the property is exempt from execution: *McCoy v. Cornell*, 40-457; *Parsons v. Thomas*, 62-319.

114. These provisions as to the indemnify-

ing bond, as they apply to levies *worth v. Walli*, 58-585. (But the in such cases by

115. Where the indemnity bond as to which a proper notice of maintain against for the property, tion was brought possession of the 62-65.

116. The trial upon, provided for purpose of deter such property, he replevin by a claim termine his right 3 G. Gr., 104.

117. Joint indemnification by an officer has several different judgments, and is served on the property by a levying bond may be execution plaintiffs, against them join *Baxter v. Ray*, 62-

118. The notice order to authorize indemnifying bond. It is not sufficient *Gray v. Parker*, 49-

119. The object of purpose of proving property, but to enable action against the officer and be upheld, that a bill defendant to the claim levied on, was not the statute: *Gray v.*

120. Service of the deputy sheriff who sufficient: *Burrows v.*

121. But an acceptance notice by the sheriff's *Chapin v. Pinkerton*,

122. If the levy is service of notice of the erty by a third person

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is sufficient: *Headington v. Langland*, 65-276.

123. Notice served upon an officer by a mortgagee of property under chattel mortgage, that such party is the owner of the property by virtue of a certain chattel mortgage, and demanding the immediate return of the goods to the place from which they were taken, is sufficient notice to constitute a taking possession of the property under the terms of a chattel mortgage authorizing the mortgagee to do so whenever he chooses, and such notice evinces the intention of the party to claim his right of possession and foreclosure as provided in the mortgage: *Wells v. Chapman*, 59-658.

124. The fact that upon a claim by a third party to the property the levy has been released, upon failure of the execution plaintiff to give an indemnity bond, will not render the seizure of such property under a second execution invalid as against the owner of the property or a fraudulent grantee thereof: *Clark v. Reiniger*, 66-507.

125. Liability of party: A judgment plaintiff who procures an order to be entered, directing the sale of attached property and the issuance of an execution for its sale, is responsible for such sale, and thereby ratifies the act of the officer in levying the attachment upon it, and, if such sale is wrongful, becomes liable in damages: *Peterson v. Folt*, 67-402.

126. Duty of officer: Where the property levied upon by an officer was taken from him in a proceeding in replevin, and that fact was stated in his return, and afterwards the replevin suit was determined against the plaintiff therein, *held*, that the officer should have proceeded to resell the property under the levy, and that for failure to enforce the levy he was liable in damages: *Cox v. Currier*, 62-551.

127. A sheriff is not liable in damages for failure to levy upon property in the execution defendant's possession if it is shown that such defendant had no interest therein subject to levy: *Crosby v. Hungerford*, 59-712.

128. The sheriff or constable is only held to the exercise of ordinary care in the preservation of the property in his hands: *Cresswell v. Burt*, 61-590.

129. In case a constable is unable by reason

of sickness to take care of property in his hands under execution, he may turn it over to another constable in his township and thus relieve himself from further responsibility. The officer to whom the property is thus turned over may require indemnity under the same circumstances as the first officer might, and if properly indemnified it would seem that he could not refuse to receive the property and execute the writ: *Evans v. Thurston*, 53-122.

130. After the officer has levied upon personal property it is, in legal contemplation, in his possession, custody, or control; and if left with a third person as bailee for safe keeping, such custody is deemed the custody or possession of the officer and for his benefit. Although the bailee may be liable in replevin, it by no means follows that the officer is not also liable: *Ralston v. Black*, 15-47.

131. Delivery bond: The fact that property was not subject to seizure under execution will be a good defense in an action on a delivery bond given to secure the release of the property. Such a bond cannot be considered as voluntarily given in such sense as to estop the party giving it from setting up such defense: *Humphreys v. Humphreys*, 1 G. Gr., 477.

As to setting off mutual judgments, see JUDGMENTS, IV.

c. The return.

As to return of writ of ATTACHMENT, see that title, V.

132. Failure to return: An execution must be regarded as existing until it is returned, although the return day has passed; and a sale under a second execution, issued before the first is returned, should, as to the judgment creditor purchasing thereat, be set aside: *Merritt v. Grover*, 57-498.

133. The failure of the sheriff to make return of a sale within the year following, during which redemption is allowed, will not render the sale void: *Cooper v. French*, 52-531.

134. Failure to return execution within the time required by statute (Code, § 8037) does not render the officer liable to an action for damages, unless special injury is alleged and proved: *Musser v. Maynard*, 55-197.

135. Sale after expiration of execution: If a levy be made while the execution is

The return.—Exemptions.

alive, a sale thereunder will be valid, although made after the execution itself has expired: *Stein v. Chambliss*, 18-474; *Moomey v. Maas*, 22-380; *Childs v. McChesney*, 20-431; *Butterfield v. Walsh*, 21-97; *Thorington v. Allen*, 21-291; *Wright v. Howell*, 35-288.

136. The rule that a sale made after the expiration of the execution is valid applies to executions issued by justices of the peace: *Walton v. Wray*, 54-531.

137. Where the right of the sheriff to subject the property levied on to the satisfaction of the execution is contested by an action of replevin, he should not make any return until after the disposition of the replevin suit. Having made a levy it is competent for him to exhaust the property on that execution, no matter what time expires between the levy and sale of the property: *Cox v. Currier*, 62-551.

138. How made; evidence: The officer's return indorsed on the writ is the evidence as to what property is covered by the levy, and it is not proper for the officer as a witness to testify as to whether other property was levied upon: *Flannigan v. Althouse*, 56-513.

139. If the execution and return be shown to be lost, parol evidence may be introduced to show the contents of such return, but for no other purpose: *Le Barron v. Taylor*, 58-687.

140. An officer is required to make his return in writing indorsed on the execution. If the execution is lost or destroyed, it may be that it would be competent to make the return on a copy, but unless the fact of such loss or destruction is shown by the return, a return made upon a copy cannot be introduced in evidence; nor can the return be explained by parol, unless it is shown that it has been made and lost or cannot be produced: *West v. St. John*, 68-287.

141. Where the sale is treated as a nullity by the parties, parol evidence that it was never completed may be received: *Winnebago County v. Brones*, 68-682.

142. A return upon an execution should be a statement of what is done by the officer in obedience to the writ; and a statement therein purporting to show the acts of a person other than the officer is without authority of law, and surplusage; therefore, held,

that a statement in the return that the execution was satisfied by defendant giving security, which was taken by order of plaintiff, and an entry by the clerk upon the judgment record of the same facts, did not show a satisfaction upon which a subsequent incumbrancer could rely: *Aultman v. McGrady*, 58-118.

143. The return of the officer "no property found" is sufficient evidence to show that property of defendant, on which to make a levy, has not been found within the state: *Cameron v. Boyle*, 2 G. Gr., 154.

144. Statements made by the officer in his return as to acts which are no part of his official duty are not evidence of such acts: *Wickersham v. Reeves*, 1-413.

145. Effect of irregularities: The validity of the sale does not depend upon the regularity of the sheriff's return, and a purchaser at such sale who pays his money and receives his deed cannot be prejudiced by want of or irregularity in the sheriff's return of the sale: *Hopping v. Brunam*, 2 G. Gr., 39; *Corriell v. Doolittle*, 2 G. Gr., 385.

146. Failure to state in the return that notice was given to the execution defendant will not invalidate the deed in a collateral attack: *Humphry v. Beeson*, 1 G. Gr., 199.

d. Exemptions.

147. Liberal construction: Exemption laws will be liberally construed so as to carry out their object: *Davis v. Humphrey*, 22-137.

148. They are to be liberally construed in favor of those claiming their benefits: *Kaiser v. Seaton*, 62-463; *Bevan v. Hayden*, 13-122.

149. Pertain to remedy: Exemptions relate to the remedy and are to be governed by the law of the forum and not by the place of the contract: *Newell v. Hayden*, 8-140.

150. Public property: Under statutory provision (Code, § 3048), public buildings of a municipal corporation are exempt from execution. Therefore, a judgment against the corporation owning them is not a lien thereon: *Davenport v. Peoria M. & F. Ins. Co.*, 17-276.

151. As such buildings cannot be seized and sold under execution, a mechanic's lien

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cannot be enforced against them: *Lewis v. Chickasaw County*, 50-234; *Loring v. Small*, 50-271; *Charnock v. District T'p*, 51-70; *Whiting v. Story County*, 54-81.

152. An averment that property levied on is that of a municipal corporation, and necessary and proper for its use in carrying out its purposes, is a sufficient allegation as to its public character: *Fort Dodge v. Moore*, 37-388.

153. Exemptions to head of a family: The term "head of a family," used in the statute (Code, § 3072) in providing for exemption of personal property from execution, is used in reference to the relation existing between the members of the family as recognized by law and the usages of society, and where a woman, who, as a widow and the mother of children, held the team belonging to her former husband exempt from execution, subsequently remarried, *held*, that she thereby ceased to be the head of the family, and the team became subject to execution on a judgment against her: *Van Doran v. Marden*, 48-186.

154. The question as to who is head of the family is one of law and not of fact, and when the husband is subject to no disability, he, and not the wife, is the head of the family, without regard to which one is the owner of the property: *Ibid*.

155. Where a widower kept house, employing a domestic, and having living with him his son and son's wife, who paid no compensation, *held*, that he was the head of a family: *Tyson v. Reynolds*, 52-431.

156. An unmarried man with whom his brother and brother's wife lived and for whom they kept house, he furnishing the necessities, *held* not to be the head of a family: *Whalen v. Cadman*, 11-226.

157. Where husband and wife lived separate for seven years prior to his death, he neither contributing to nor being asked to contribute to her support, and it not appearing that the separation was intended to be temporary, *held*, that he was not the head of a family, and, therefore, his widow was not, after his death, entitled to have set off to her personal property which would have been in his hands as head of a family exempt from execution: *Linton v. Crosby*, 56-386.

158. Team and vehicle with which debtor earns his living: Under the statutory pro-

vision exempting to a physician, farmer, or other laborer the horse or team and wagon or other vehicle with which he earns his living, *held*, that the two horses with which a physician habitually earns his living will be exempt although he does not use them as a team, but singly, but he must show that they are so used, before he can have the benefit of the exemption: *Corp v. Griswold*, 27-379.

159. Evidence *held* sufficient in a particular case to show that the horses of a farmer were exempt as habitually used to earn his living: *Bevan v. Hayden*, 13-122.

160. One who abandons one employment, and procures a team or part of a team, intending to complete the same, for the purpose of using it in good faith to earn his livelihood, may have the same exempt, without regard to the amount of use he has made thereof: *Ibid*.

161. Where plaintiff, whose stock of goods as a retail grocer had been taken on execution, continued to use a spring wagon for the purpose of delivering goods for the person buying the stock, whether with or without compensation it did not appear, and had no other occupation or method of earning a living, *held*, that he was entitled to the wagon as exempt, although he had been using it in that manner but for a day or two: *Baker v. Hayzlett*, 53-18.

162. One who is engaged in the livery business is or may be a laborer, and if he in such business uses a team of horses, or wagon, or other vehicle, and thereby earns his living, the same is exempt: *Root v. Gay*, 64-399.

163. Where, at the time of seizure of a buggy by the officer, it was the vehicle by the use of which the plaintiff, as a physician, habitually earned his living, *held*, that it was exempt from seizure irrespective of the time when or the motive with which it had been procured: *Farner v. Turner*, 1-53.

164. Where it appears that the debtor has the right to select one of several vehicles as exempt, and such selection is made before levy, it should be respected by the officer: *Parker v. Haley*, 60-325.

165. Two cows and a calf: A yearling heifer is not exempt under the provision with reference to two cows and a calf: *Mitchell v. Joyce*, 69-121.

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166. **Tools:** A party claiming tools as exempt under the statute must show that he is a mechanic, and that they are the tools of his trade, but he need not show that by the use of them he habitually earns his living: *Perkins v. Wisner*, 9-320.

167. The tools contemplated by the statute are those used or handled by the mechanic, and do not include the building or place where the trade is pursued. Therefore, *held*, that the building used by a photographer in carrying on his business, although shown to be personal property, was not exempt in the absence of any showing that a building constructed in a particular manner is required in that business: *Holden v. Stranahan*, 48-70.

168. A threshing-machine owned and used for the purpose of gain, by threshing for others, is not a part of the proper tools of a farmer so as to be exempt: *Meyer v. Meyer*, 23-359, 875.

169. **Provisions for the family**, as exempted by the statute, do not include provisions for strangers or boarders lodging with the family. Therefore, *held*, that provisions prepared for boarders by the keeper of a restaurant were not exempt from execution: *Coffey v. Wilson*, 65-270.

170. **Earnings:** The exemption of earnings extends to professional men as well as to laborers: *McCoy v. Cornell*, 40-457.

171. If the employer of the debtor is garnished, he is not liable unless more than ninety days' earnings are in his hands. The earnings for that length of time, whether accruing before or after the garnishment, are exempt: *Davis v. Humphrey*, 22-187.

172. The object of the statutory exemption of earnings is to protect the earnings for personal service, as contradistinguished from the income arising from a business involving other elements of gain than the mere personal service of those conducting it; therefore, *held*, that the business of keeping a boarding house involves many elements of profit aside from the mere personal earnings of the proprietor and his family, and that money due to him in that business is not exempt from execution as personal earnings: *Shelly v. Smith*, 59-453.

173. The earnings of a debtor as subcontractor for personal services are exempt. Whether a contractor who furnishes materi-

als on his own account, as well as labor, may divide his claim and hold exempt the proceeds of his labor, *quære*: *Banks v. Rodenbach*, 54-695.

174. Wages for personal services earned in the use of exempt property are exempt, and it is not fraudulent for the husband to contract to render such services to another: *Patterson v. Johnson*, 59-397.

175. The person entitled to hold earnings exempt from execution may use such earnings in payment of property purchased by his wife, and such property will be held by the wife free from his debts: *Robb v. Brewer*, 60-539.

176. **Earnings of non-resident:** To entitle a debtor to this exemption, it must be shown that he is a resident of the state: *Smith v. Chicago & N. W. R. Co.*, 60-812.

177. If defendant is a non-resident he cannot claim exemption of earnings, even if they are rendered in the state of his residence, and are exempt by the laws of that state: *Mooney v. Union Pacific R. Co.*, 60-346.

178. **Foreign exemptions:** The exemption laws of another state or territory cannot be relied on and pleaded as a defense, either by a garnishee or judgment debtor: *Broadstreet v. Clark*, 65-670.

179. A creditor cannot, by instituting a proceeding by garnishment in another state, seize a debt due to a debtor in this state, and which would be here exempt from execution: *Teager v. Landsley*, 69-725; *Hager v. Adams*, 70—.

Further as to garnishment of exempt earnings, see GARNISHMENT, §§ 72-77.

180. **Persons leaving the state:** A person who had avowed his purpose to remove from the state, had placed his wagon in position for loading, had boxed some of his goods, and removed them from the house, *held* to have "started to leave the state" within the meaning of Code, § 3076, limiting the amount of exemption allowed to the head of a family in such cases: *Graw v. Manning*, 54-719.

181. The mere expression of intention on the part of a debtor to leave the state will not be sufficient to justify the levy upon his goods, which would otherwise be exempt from execution, and if, by reason of a subse-

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quent change of intention, the debtor is not about to leave the state, the levy will be wrongful: *Tubbs v. Garrison*, 68-44.

182. The fact that the officer making the levy is informed that the debtor is about to leave the state is not admissible as a defense for the wrongful levy: *Ibid.*

183. Facts indicating an intention to remove from the town, without more, are not admissible as evidence of an intention to leave the state: *Ibid.*

184. While the word "start," in connection with leaving the state, in this statutory provision, is not limited to the actual setting out upon a journey, yet, where the intention with which a removal was effected was to change the residence from one part of the state to another, *held*, that there could not be any starting to leave the state within the definition of the statute: *Ibid.*

185. Absconding debtor: To constitute an absconding such as to entitle the wife to hold the property as exempt after the departure of her husband, as provided by statute, the departure need not be without the knowledge and consent of the wife: *Malvin v. Christoph*, 54-562.

186. The wife of an absconding husband may sell property which he held exempt, and which by statutory provision remains exempt in her hands, and hold the proceeds free from his debts: *Waugh v. Bridgeford*, 69-334.

Homestead: As to the homestead exemption, see **HOMESTEAD**.

187. Pension money: The exemption of pension money under the provisions of the Revised Statutes of the United States applies only to money due the pensioner while in course of transmission to him, and not after the money comes into his possession and is deposited in a bank or invested in property: *Webb v. Holt*, 57-712; *Triplett v. Graham*, 58-135.

188. But where a pensioner transferred his pension check to his wife, who purchased real property therewith in her own name, *held*, that such property was exempt from the husband's debts and the transfer could not be deemed fraudulent: *Farmer v. Turner*, 64-690.

189. By statute (20 G. A., ch. 23) pension money, whether in the pensioner's possession

or deposited, loaned or invested, remains exempt. But this act is not applicable to such money coming into the pensioner's possession before it took effect: *Baugh v. Barrett*, 69-495.

190. From the time of the taking effect of this act exempting pension money, any pensioner had power to make a gift of his pension money, or the donee to receive the same, or the property purchased therewith, free from the claim of donor's creditors; but where an action to subject such pension money to the payment of the pensioner's debts was brought before the taking effect of the statute exempting such money, *held*, that such statute could not be given effect: *Goble v. Stephenson*, 68-270.

191. When exemption must be claimed: The owner of personal property exempt from execution may claim such exemption from levy at any time during the progress of the sale thereof, until the sale becomes effectual in law: *Bevan v. Hayden*, 18-122.

192. Selection: Where the debtor is to select the animal to be held exempt, such selection may be made by serving written notice on the sheriff claiming the animal levied on: *Malvin v. Christoph*, 54-562.

193. Waiver of exemption: A simple waiver of the benefit of exemption laws made contemporaneously with the contract or debt will not entitle the creditor, in case of a failure to pay, to levy an execution under a judgment thereon upon exempt property, against defendant's objection: *Curtis v. O'Brien*, 20-376.

194. But a voluntary surrender of property to the sheriff having the execution precludes the debtor from afterwards setting up that it is exempt: *Richards v. Haines*, 30-574.

195. An exemption is a personal right which the debtor may waive or claim at his election. He cannot stand by without objection, seeing and knowing that a levy is about to be made, and afterwards claim the exemption. He must at the time, in some manner, indicate to the officer his purpose to claim the property as exempt: *Angell v. Johnson*, 51-625; *Moffitt v. Adams*, 60-44.

196. But in a particular case, *held*, that the facts did not show a failure on the part of the debtor to object to the levy sufficient to

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constitute a waiver of exemption: *Green v. Blunt*, 59-79.

197. Under a statutory provision, later than the foregoing decisions (19 G. A., ch. 49), that the officer must require defendant to make a selection of the property which he claims as exempt, *held*, that mere silence of defendant, when informed of the levy, and failure to object thereto for two weeks, would not estop him from claiming his exemption, it not appearing what, if any, expense had been incurred by the officer in consequence of the levy: *Ellsworth v. Savre*, 67-449.

198. An interest in the property itself would not be waived by a failure to assert it at the time of the seizure, unless the party making the seizure was thereby misled or induced to change his relations with reference to the property: *Gunsel v. McDonnell*, 67-521.

199. Waiver by contract: The benefit of the exemption laws cannot be waived by stipulation in a note creating an indebtedness, so as to deprive the debtor of his exemptions under execution on a judgment recovered on such note: *Curtis v. O'Brien*, 20-376.

200. A stipulation in a lease by which the landlord is given a lien for his rent upon crops, stock, etc., of the tenant upon the premises, whether exempt or not, is in the nature of a mortgage and is valid: *Fejavary v. Broesch*, 52-88.

201. Partnership property: A partner cannot hold partnership property exempt from execution for the debts of the firm, and this is so without regard to the rights and liabilities existing between the partners: *Van Staden v. Kline*, 64-180.

Life insurance is exempt from the debts of the assured: See INSURANCE, §§ 269-277.

202. Exchange of exempt property: Where exempt property is exchanged for property not by law exempt from execution, such newly-acquired property becomes liable for the owner's debts: *Friedlander v. Mahoney*, 31-311.

203. Sale: When property is exempt from execution, the owner may transfer it free from any claim of his creditors without regard to the uses to which he diverts the proceeds, there being no provision in the statute

to the contrary: *Waugh v. Bridgeford*, 69-834.

204. Therefore where the wife of an absconding husband becomes entitled to property which was exempt in his hands, she may sell the same, and the property sold and the proceeds thereof will remain exempt: *Ibid*.

205. The mortgagee of chattel property taking possession thereof and selling the same for the benefit of the mortgagor is not liable as garnishee so far as such property is exempt from execution, whether the mortgage is in itself fraudulent or not: *Brainard v. Simmons*, 67-646.

206. Proceeds of a voluntary sale of exempt property are not exempt from execution, and a judgment against the purchaser of such property for the purchase money may be levied on by garnishment: *Harrier v. Fassett*, 56-264.

207. Where exempt property is invaded and converted in whole or in part into a money claim, against the will of the owner, the money collected thereon is exempt, at least for a reasonable time: *Kaiser v. Seaton*, 62-463; *Mudge v. Lanning*, 68-641.

208. Liens on exempt property: The statutory provisions as to exemptions were not designed to prevent the accruing of liens otherwise recognized, such, for instance, as an innkeeper's lien, and such lien can be enforced against property to which it attaches without regard to the exemption: *Swan v. Bourne*, 47-501.

209. A lien, such as that of an innkeeper or agister, may arise upon exempt property under the same circumstances as upon property not exempt: *Munson v. Porter*, 63-453.

210. Wrongful levy upon: A mortgagor of exempt property may maintain an action for the wrongful levy upon such property under execution as to which the property is exempt: *Evans v. St. Paul Harvester Works*, 63-204.

211. In an action by replevin to recover exempt property wrongfully levied upon under execution, the residence of plaintiff need not be alleged. It is for defendant to allege and prove non-residence as a defense: *Newell v. Hayden*, 8-140.

As to the remedy against the officer for wrongful levy upon exempt property, see *supra*, § 113.

Sale.

III. SALE.

212. Notice of sale; penalty: If it appears that the officer sold the property without notice, for a sum equal to its value, and applied the proceeds upon the execution and costs, so that the property owner sustained no actual damage for want of notice, the latter cannot recover the penalty of \$100 authorized by statute to be recovered "in addition to the actual damages sustained" (Code, § 3081): *Coffey v. Wilson*, 65-270.

213. So where plaintiff in such case on the trial withdrew his claim for actual damages, *held*, that the penalty could not be recovered: *Enfield v. Byler*, 67-295.

214. Notice of actual occupant: Under a statute (Code, § 3087) requiring that, before sale of real property under execution, written notice of the sale shall be served upon defendant, if in actual occupation and possession of the land, *held*, that notice is not required where defendant is not personally in possession or actual occupation of the property: *Babcock v. Gurney*, 42-154; *Bennett v. Burton*, 44-550.

215. The owner is not, within the meaning of this section, "in the actual occupation" of land leased to, and occupied by, a tenant; but where the owner is in the actual use and enjoyment of the property, although not residing thereon, he is in such actual occupation and possession as is here required. So *held*, where the owner, by means of employees residing on the land, was operating a saw-mill thereon: *Fleming v. Maddox*, 30-239.

216. The provision that in the cases here referred to the sale may be set aside does not invest the court below with such discretion that its action cannot be reviewed on appeal. Though mandatory rather than permissive, it seems there might be cases within the letter of the statute where it would not be enforced: *Jensen v. Woodbury*, 16-515.

217. This section applies to sales under special as well as under general execution: *Ibid.*; *Fleming v. Maddox*, 30-239.

218. It is not essential that the return of the execution show notice to the party in possession of the premises. It would be presumed that such notice was given according to the requirements of the statute: *Corriell v. Doolittle*, 2 G. Gr., 885.

219. Appraisement: Where one of the appraisers selected by an execution creditor lived thirty-five miles from the property, *held*, that the sale should be set aside as against such creditor, who was a purchaser thereat, it appearing that the appraisement was at less than one-half the value of the land, the selection of the appraiser being in violation of the statutory requirement that he should be a householder of the neighborhood: *Woods v. Cochrane*, 38-484.

220. The fact that one of the appraisers is selected by the deputy sheriff does not vitiate the sale. It is a mere irregularity, not affecting the power of the officer to sell nor the validity of the title acquired by the purchaser: *Davis v. Spaulding*, 36-610.

221. The fact that where it appears that the sheriff appointed one appraiser, his return does not show that the party for whom he acted in making such appointment was absent or refused to appoint, will not render the sale void: *Preston v. Wright*, 60-351.

222. Whether the appraisers in fixing the value of the property should find the amount of prior liens and incumbrances and fix the value with reference thereto, or should fix the whole value without reference to prior liens and leave the matter of ascertaining such liens to the sheriff, *quære*. But *held*, that a judicial sale could not be set aside as having been made for an amount less than the two-thirds value, except it should be made to appear that it was for less than two-thirds of the value after deducting incumbrances: *Brown v. Butters*, 40-544.

223. Where a party sought relief on the ground that the sale was for less than two-thirds of the appraised value, *held*, that he had the burden of showing such fact, and unless it was established affirmatively, the sale could not be set aside: *Barber v. Tryon*, 41-349.

224. Further *held*, that the purchaser at such a sale is not bound to look beyond the records for the purpose of determining whether apparent liens or incumbrances have not been discharged. Where the records show an incumbrance which, added to the amount paid, makes two-thirds of the appraised value, the sale should not be set aside, although evidence is introduced to show that the incumbrance has been in

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fact satisfied: *Ibid.*; *McDonald v. Johnson*, 48-72.

225. The property appraised must be sold for a sum which, when added to the prior incumbrance, shall realize to the debtor two-thirds of the fair value of the property as the same has been ascertained by the appraisal: *Sargent v. Pittman*, 16-469; *McDonald v. Johnson*, 48-72.

226. A sale for a less proportion than that authorized will be invalid, at least as between the parties, and the fact that the debtor's title is doubtful, or other circumstances affecting the value of the property, will be immaterial. Such fact should be taken into account by the appraisers, and the value fixed by them should be that of defendant's interest in the property: *Maple v. Nelson*, 31-822.

227. Rent accruing after the execution of the sheriff's deed is not directly the subject of sale, but passes merely as an incident. It is not necessary, therefore, that it be appraised separately from the land. It would be presumed that that right was considered in determining the appraised value of the property: *Townsend v. Isenberger*, 45-670.

228. An appraisalment is not proper evidence of the value of the property in an action by a third person claiming to be the owner thereof and seeking to recover for its conversion: *Flannigan v. Althouse*, 56-513.

229. Failure to have the appraisalment made, *held* not to affect the validity of the sale as to the purchaser: *Shaffer v. Bolander*, 4 G. Gr., 201.

230. The purchaser at the sale is not required to take notice of the regularity of the appraisalment: *Johnson v. Carson*, 3 G. Gr., 499.

231. But, *per contra*, *held* that the provisions as to appraisalment were not merely directory but affected the question of power to sell, on which the validity of the sale depended: *Sprott v. Reid*, 3 G. Gr., 489.

232. Any change in the appraisalment laws calculated to impair rights under existing contracts cannot be made applicable to an execution sale in an action brought under such contract: *Burton v. Emerson*, 4 G. Gr., 393.

233. Where, at the time of the making of a contract, the law does not provide for ap-

praisement, and, at the time of judgment thereunder, appraisalment is provided for, the sale should be made under the law in force at the time of the contract, and appraisalment should not be allowed: *Olmstead v. Kellogg*, 47-460.

234. While legislation depriving the judgment debtor of the benefit of appraisalment or redemption laws is not inhibited by any constitutional provision, still under the statutory provision that the repeal of a prior statute shall not affect any act done or right accruing, and which has been established, etc., *held*, that a judicial sale upon a judgment rendered before the taking effect of the Code should be made under the law as to appraisalment and redemption existing when the judgment was rendered, and not in accordance with the law in existence at the time of the sale, under which the right to appraisalment was taken away: *Holland v. Dickerson*, 41-367.

235. But where the judgment was rendered after the taking effect of the Code upon a contract made before that time, *held*, that the sale should be according to the Code provisions which took away the right of appraisalment, and not in accordance with the law as it existed at the time of the making of the contract: *Babcock v. Gurney*, 42-154; *Fonda v. Clark*, 43-300.

236. Appraisalment pertains to the remedy and is to be governed by the law of the forum and not that of the *lex loci contractus*: *Shaffer v. Bolander*, 4 G. Gr., 201.

237. Adjournment: The discretion of the sheriff, as to adjournment, should be exercised with a fair and impartial attention to the interests of all parties concerned. Where his power in that respect is not judiciously exercised, it may be a ground for setting the sale aside: *Swortzell v. Martin*, 16-519.

238. The fact that there was one more adjournment than is authorized by statute, and that the time was extended beyond the period allowed, *held*, a mere irregularity, to be taken advantage of only on a showing of prejudice: *Reese v. Dobbins*, 51-232.

239. The adjournment of a sale by plaintiff's attorney is a gross irregularity, and a sale at a time to which it is so adjourned will be void: *Wolf v. Van Metre*, 27-348.

240. A postponement of the sale by public

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proclamation and agreement of the parties in interest will not render a subsequent sale invalid: *Coriell v. Ham*, 4 G. Gr., 455.

241. Postponement of the sale at the instance and for the benefit of defendant in execution will not render it invalid between the parties: *Payne v. Billingham*, 10-360.

242. After expiration of execution: Sale of property under execution which has expired, and without renewal, in pursuance of a levy made before the expiration of the execution, is valid: *Stein v. Chambless*, 18-474; *Childs v. McChesney*, 20-431; *Butterfield v. Walsh*, 21-97; *Thorington v. Allen*, 21-291; *Moomey v. Maas*, 22-380.

243. This rule applies also to sales on execution from justices of the peace: *Walton v. Wray*, 54-531.

244. Failure to make return of sale before the expiration of a year from the date thereof will not render the sale void: *Cooper v. French*, 52-531.

245. Injunction against sale: A sale of property on which the judgment is not a lien will be enjoined: *Key City Gas Light Co. v. Munsell*, 19-305.

246. But the sale will not be enjoined if the judgment is a lien on the property, although it is inferior to other liens: *Wiedner v. Thompson*, 66-283.

247. Failure to pay bid: Under the statute (Code, § 3089) providing that, when the purchaser fails to pay the money bid, plaintiff may proceed against him for the amount, or the sheriff shall treat the sale as a nullity and may sell the property again, *held*, that where the execution debtor bid off the property and afterwards failed to pay the money, the officer could not, on the next day, accept the next highest bid and strike off the property to such bidder: *Swortzell v. Martin*, 16-519.

248. While the sheriff must sell for cash, yet if the person entitled to the proceeds is the purchaser, he can properly treat the satisfaction of the judgment as a cash payment: *Beal v. Blair*, 33-318.

249. Where the execution creditor bids in the property, although he cannot be required to pay to the sheriff that part of the purchase money which is to be credited on his judgment, he is to pay the costs, and if he does not do so, the sheriff is to treat the sale as a nullity: *Reese v. Dobbins*, 51-282.

250. Where a purchaser at the sale bids with the understanding and upon the condition that the amount bid is first to be used to satisfy existing liens on the premises, his bid cannot be enforced unless the proceeds are thus applied: *Vanslyck v. Mills*, 34-375.

251. Where the property sold was defendant's undivided interest in a crop and the bid was by the acre, *held*, that under the circumstances of the case the bid should be considered as so much per acre for the acres which defendant's portion of the crop would amount to, and not as that amount for defendant's undivided interest in each acre of the crop: *Denny v. Cochran*, 51-652.

252. Where the property has been sold to the plaintiff in execution, he has not a right thereafter to withdraw his bid and prevent the satisfaction of the judgment, at least without the assent of the sheriff and probably also that of the execution debtor: *Dowdard v. Crenshaw*, 49-296.

253. Where an agent, acting for the execution creditor, by mistake bid more for land offered at the sale than he was authorized, but immediately withdrew his bid and paid costs of sale, *held*, that as the execution debtor had not changed his position on account of the sale, the withdrawal was authorized and the property might be again offered for sale: *Fuson v. Connecticut General L. Ins. Co.*, 53-609.

254. Who may be purchaser: One of several execution defendants has the right at the sale to purchase the property of another defendant: *Windle v. Brandt*, 55-221.

255. Where, at a foreclosure sale, a corporation not party to the foreclosure became the successful bidder, and by consent of the court the bid was transferred to the plaintiff in the foreclosure to whom the deed was issued, *held*, that the latter was the purchaser and not the former: *Gilman v. Des Moines Valley R. Co.*, 42-495.

256. Overplus: Aside from the statutory provision (Code, § 3084) in relation to the disposal of overplus, the sheriff would not be authorized to apply such overplus to another execution in his hands. The money being deemed in the custody of the law would not be subject to levy, but must first be paid to the party whose property is sold: *Payne v. Billingham*, 10-360.

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257. A sale *en masse* of tracts which could advantageously be sold separately will be set aside, either on motion or in an independent proceeding in equity for that purpose: *White v. Watts*, 18-74; *Boyd v. Ellis*, 11-97; *Bradford v. Limpus*, 18-424.

258. So held in case of a sale in gross of distinct parcels under judgment of foreclosure on a mortgage covering all of them: *Lay v. Gibbons*, 14-877.

259. But such a sale, after an offering in parcels without a bid, will not be irregular: *Hill v. Baker*, 32-302.

260. So where a sale was made of a quarter section, one forty of which was the homestead, after an offer in forties, held, that this was a sufficient compliance with the statutory provision as to the sale of homesteads, requiring that the portion of the property not included in the homestead should be first exhausted: *Burmeister v. Dewey*, 27-468.

And see further, HOMESTEADS, III.

261. Distinct or separate parcels or tracts which can have no increased value by reason of being sold together cannot be sold *en masse* even if no bid is made for them when offered separately. And this is the common law rule: *Williams v. Allison*, 33-278.

262. It may be questioned whether sale of two lots together, instead of separately, is such an irregularity as can, after the execution of the deed, be made available to defeat the title in a third party, though it is available to set aside a sale to the execution plaintiff: *Love v. Cherry*, 24-204.

263. Held, that a sale *en masse*, not shown to have been to the injury of the debtor and not attacked for six years, would not be set aside: *Cunningham v. Felker*, 28-117.

264. A sale of a large tract within the corporate limits of a city, held not invalid as a sale *en masse*, it not being shown that it had been divided into lots: *Wallace v. Berger*, 25-456.

265. Whether or not a sale of two parcels for a gross sum will avail in a direct proceeding to set aside the deed, it is clear that such deed cannot be regarded as void in a collateral attack: *Foley v. Kane*, 53-64.

266. Where it does not appear how a sale is conducted, it will be presumed that the officer did his duty and offered separate lots or tracts separately, and if one of the tracts

was a homestead, that the other tract or tracts were first offered: *Eggers v. Redwood*, 50-289.

267. The provisions as to platting and selling only so much as may be necessary are applicable to sales of real estate under special as well as under general execution: *Taylor v. Truloch*, 59-558.

268. If in case of a levy upon a congressional subdivision of land there should be an excess over all execution claims of the least legal subdivision thereof, it should not be sold: *Humphry v. Beeson*, 1 G. Gr., 199.

269. Fraud of officer or purchaser: An averment that there was a fraudulent agreement between the purchaser and the officer, by which the former was to pay nothing on the property and that the return should not be made during the year for redemption, etc., etc., held not sufficient to affect the validity of the sale: *Cooper v. French*, 52-531.

270. In a particular case, held, that the facts were not sufficient to show fraud: *Wallace v. Berger*, 25-456.

271. The rights of a purchaser at an execution sale will not be affected by the improper conduct of the sheriff in the absence of a fraudulent combination between them: *Swortzell v. Martin*, 16-519.

272. Where it appeared that the purchaser at a sale under partition proceedings had for a consideration persuaded others intending to bid from doing so, held, that the sale and approval thereof by the court should be set aside for fraud: *Fleming's Heirs v. Hutchinson*, 36-519.

273. Illegality: Where a second execution was issued at the instance of the judgment creditor before the return of the first, held, that the sale under the second should be set aside, at least in a case where the creditor was himself the purchaser at such sale: *Merritt v. Grover*, 57-493.

274. Further held, that in such case an execution could properly issue for the sale of the property levied on, and remaining undisposed of by reason of the setting aside of the sale: *Ibid*.

275. Inadequacy of price: Gross inadequacy of price is not of itself sufficient to require the setting aside of a sale, but may become an element quite controlling in con-

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nection with other circumstances: *Cavender v. Smith's Heirs*, 1-306, 355; *Boyd v. Ellis*, 11-97; *Williams v. Allison*, 33-278.

276. So held where there was a sale en masse of separate parcels at an inadequate price: *Boyd v. Ellis*, 11-97; *King v. Tharp*, 26-283.

277. It seems that when inadequacy of price is great and the bidders were few, and the power to adjourn was not judiciously exercised, the sale should be set aside upon application seasonably made: *Swortzell v. Martin*, 16-519.

278. A sale was set aside in favor of beneficiaries under an unrecorded mortgage when some of them were minors, the price was inadequate, there was a prior levy undisposed of, the legal title was in another than the judgment defendant, and application was made before the rights of third parties had attached and was accompanied with a tender of the amount of the judgment: *Miller v. Colville*, 21-135.

279. That the interest in real estate sold en masse under execution was not only merely equitable, but also contingent, and that there were other claims against the property prior to that of the judgment creditor, may be considered by the court in determining the adequacy of the amount paid at the sale: *Twogood v. Stephens*, 19-405.

280. Where there was an incumbrance on record against the property amounting to more than the value thereof, held, that the sale on execution of such property would not be set aside on account of inadequacy of price although subsequently the incumbrance was held fraudulent and void: *McDonald v. Johnson*, 48-72.

281. In a particular case, held, that the sum realized at the execution sale was so inadequate as to constitute ground for setting the sale aside: *Wood v. Young*, 38-102.

282. In a particular case, held, that the inadequacy in price was not sufficient to invalidate the sale: *Wallace v. Berger*, 25-456.

283. Gross inadequacy of price is not available to impeach the sale as to the original purchaser who was a stranger to the transaction, the premises having in good faith been sold to a third person: *Hill v. Baker*, 32-302. And see *Shine v. Hill*, 23-264.

284. Mistake as to title: Where the defendant in execution did not have any interest at the time of the sale in the property sold, or where all the interest he did have has been taken away from the purchaser by virtue of a prior claim, the sale may be set aside. The doctrine of *caveat emptor* does not apply to such cases: *Ritter v. Henshaw*, 7-97.

285. An action in equity may be maintained to set aside an execution sale where the officer mistakenly understood that the property was covered by incumbrances to a greater amount than it was in fact: *Whitney v. Armstrong*, 32-9.

286. And especially where the circumstances show bad faith on the part of the purchaser: *Ibid.*

287. Where property was bid in at execution under mistake as to the quantity sold, held, that the sale should be set aside: *Kellogg v. Decatur County*, 38-524.

288. Where the property was sold and bid in under a mistaken description, held, that the sale should be set aside, and that, under the circumstances, there was no such negligence on the part of the attorney of purchaser as to deprive him of the right to such remedy. *Laffner v. Jones*, 55-503.

289. Where, in recording a decree rendered in a foreclosure proceeding, the clerk omitted to include a portion of the property therein described, and this omission was perpetuated in the execution and at the sale at which plaintiff's attorney bid off the property for the amount of the debt, supposing that he was purchasing all that was embraced in the mortgage, held, that the sale should be set aside: *Snyder v. Ives*, 42-157.

290. Equity will refuse to correct a mistake of this kind on the ground of negligence only where the party seeking relief is bound to make inquiry which would have enabled him to correct the mistake or obviate its consequences and he negligently fails to make it. In such a case, the law requires only reasonable diligence to the end that culpable negligence may not be encouraged: *Ibid.*

291. Mere uncertainty of description of the property will not be a ground for setting aside the sale in equity where the land sold is actually the same as that levied on: *Hackworth v. Zollars*, 30-433.

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292. The statutory provision (Code, § 3090) authorizing the setting aside of the sale where property is sold, on which the judgment is not a lien, that fact being unknown to the purchaser, *held* not applicable to a case where defendant in execution had title to the property sold, and the judgment was not a lien thereon because it was rendered in another county and no transcript had been filed in the county where the land was situated: *Chambers v. Cochran*, 18-159.

293. Setting aside sale does not release surety: If the judgment is against principal and surety, and the sale is set aside as authorized in the statutory provision just referred to, the surety will not be held discharged, unless he has by reason of the sale changed his condition or been prejudiced: *Ibid*.

294. Caveat emptor; defective title: The doctrine of *caveat emptor* applies to the purchaser at the sale under execution, and such sale will not ordinarily be set aside to relieve one who has acquired a defective title. If the execution defendant has some interest in or title to the property, the sale will be upheld, although such interest be of no value: *Hamsmith v. Espy*, 19-444; *Holtzinger v. Edwards*, 51-383.

295. Thus where the legal title was in defendant, but by reason of a sale under a prior execution and other prior liens the interest acquired by plaintiff was valueless, *held*, that there was no ground for setting aside the sale or the satisfaction of judgment affected thereby: *Holtzinger v. Edwards*, 51-383.

296. A purchaser at execution sale cannot avoid his bid or excuse himself from paying the amount by showing a defective title in the judgment debtor: *Dean v. Morris*, 4 G. Gr., 312; *Cameron v. Logan*, 8-434.

297. The fact that property sold at judicial sale is covered by liens to nearly its entire value will not entitle the purchaser to rescind the sale: *Downard v. Crenshaw*, 49-296.

298. Other grounds for setting aside: Where the levy is excessive, the sale will be set aside, even though the whole property sold had been previously attached in the same action: *Cook v. Jenkins*, 30-452.

299. Where the rights of a lienholder are such that they will not be affected by judicial sale under another lien, he cannot

maintain an action in equity to restrain such sale: *Ruthven v. Mast*, 55-715.

300. If the sale of the property of a debtor is made to satisfy a joint indebtedness, the fact that the joint debtor is prejudiced by such sale will not be a ground on which the judgment creditor can have the sale set aside: *Miller v. Felkner*, 42-458.

301. The indorser of a note secured by a mortgage under foreclosure of which the sale is made, and who is collaterally liable on the indebtedness, has such interest as to be entitled to maintain an action for setting aside the sale: *Whitney v. Armstrong*, 32-9.

302. Where land was sold by a sheriff under the representation that the excess bid over the amount of the execution would be applied to satisfy a mortgage existing thereon, and the purchaser bid the whole amount of the judgment and mortgage, under the belief and representation that the excess would be so applied, *held*, that the mistake under which the parties acted was a mixed mistake of law and fact, and that the sale should be set aside upon application of the purchaser: *Bay v. Harnett*, 58-344.

303. Notice of motion to set aside: An order setting aside a sale on motion, without notice to the other party or a voluntary appearance by him, is not binding upon him: *Wright v. Leclair*, 3-221; *Lyster v. Brewer*, 18-461.

304. The sale will not be set aside on motion when the purchaser is not a party to the execution, at least without notice to him: *Osborn v. Cloud*, 21-238.

305. Canceling satisfaction of judgment: Where a sale has been judicially set aside, the satisfaction of the judgment which followed the sale and was entered of record by reason thereof should be also set aside: *Farmer v. Sasseen*, 63-110.

306. Where a special execution contained a description of a larger tract than the judgment was against, and plaintiff bid it in for the judgment, *held* competent for plaintiff by motion to have the satisfaction entered upon the execution canceled to the extent of the excess at which the extra quantity of land was bid off, leaving his judgment unsatisfied to that amount: *Parks v. Davis*, 16-20.

307. Where land was sold under execution

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to which defendant had no title, but there was no evidence as to the price for which the land was sold, or whether it was sold in separate tracts, or the relative value of the tracts at the date of sale, *held*, that the credit on the judgment entered in pursuance of such sale could not be set aside: *State Bank v. Harrow*, 26-426.

308. Diligence: Application to vacate a sale should be reasonably made. Acquiescence may be inferred from delay, and long delay with knowledge of the facts may justify a refusal of relief, especially if intervening rights have attached or the circumstances have essentially changed: *Chambers v. Cochran*, 18-159.

309. A motion to set aside a sale filed fifteen months after the sale was made, *held* too late: *Stewart v. Marshall*, 4 G. Gr., 75.

310. Jurisdiction to set aside: Where a case was taken from one court to another on change of venue, and the decree rendered was ordered to be recorded in the court from which the change was taken, *held* that such court had not jurisdiction to set aside a sale on execution under such judgment: *White v. Hampton*, 14-66.

311. Failure to object; estoppel: Where the debtor consents to the proceedings at the sale and they are made under an agreement to which he is a party, he is estopped from setting up illegality or fraud for the purpose of defeating such sale as against the purchaser: *Crawford v. Ginn*, 35-543.

312. Where the debtor has knowledge of a contemplated private sale and does not object thereto, he will be estopped from complaining: *Maquoketa v. Willey*, 35-323.

313. Objection to a sale on the ground that it was made *en masse*, not raised until eleven years afterwards, it not appearing that the execution defendant was in any manner injured thereby, *held* not sufficient to warrant setting it aside: *Wood v. Young*, 38-102.

314. Where irregularities in a sale were not taken advantage of for eight years, *held*, that by such lapse of time they were cured: *Coriell v. Ham*, 4 G. Gr., 455.

315. The execution defendant, having knowledge of irregularities in the manner of sale before the making thereof, and not objecting thereto, cannot defeat the title under

the deed, at least without offering to refund the purchase money. The irregularities should be taken advantage of by motion in the court to which the execution is returnable: *Cooley v. Wilson*, 42-425.

316. Where a surety, against whom judgment on a debt was recovered jointly with the principal, directed execution to be levied upon property of the principal which was sold thereunder, *held*, that such surety could not afterwards, as against the purchaser at the sale, insist upon and foreclose a mortgage given him on the same property by the principal, to secure him for any liability which he might incur as such surety: *Exline v. Lowery*, 46-556.

317. Where it appeared that the party against whom execution was issued knew that another execution was in existence under the same judgment, and not only stood by and made no objection to the sale under the second, but at the expiration of the time for redemption surrendered the possession of the property, *held*, that he could not thereafter, in the absence of a showing that the land was sold for less than its value and an offer to pay the judgment, take advantage of the error: *Merritt v. Grover*, 61-99.

318. Where the execution purchaser has conveyed portions of the property to other purchasers in good faith, even though there is such irregularity in the sale that it might have been held void as to such purchasers, if promptly asserted, yet great delay in taking it may be ground for upholding the sale as to them: *Williams v. Allison*, 33-278.

319. Return of purchase money: A party seeking to have an execution sale to him set aside must return or offer to return the property, or, if he has sold it in good faith before knowledge of defect in the sale, must tender the proceeds: *First Nat. Bank v. Conger*, 37-474.

320. Where, on account of irregularities, a sale was set aside so far as the property remained in the hands of the purchaser, but there was no proof of fraud, *held*, that as to the portions of the property conveyed by him, he would be charged with its proportion of the amount bid and not with the amount for which it had been sold by him, the owner having lost his right to proceed against the persons deriving title from the

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purchaser by reason of laches: *Williams v. Allison*, 33-278.

321. A judgment plaintiff who has received the proceeds of a sale under his judgment, which is of doubtful validity, and afterwards accepts money deposited as a tender, will be held to have taken such tender in full satisfaction of his judgment, and will be required to account for the full proceeds of the sale: *Cotter v. O'Connel*, 48-552.

322. No tender of the amount bid need be made to the purchaser where it is sought to set aside a sale which is void: *Osborn v. Cloud*, 23-104.

323. Where the purchaser at an execution sale pays his money without any knowledge of irregularities therein, he is entitled, upon the sale being set aside, to have refunded to him the money paid, and for that purpose may be subrogated to the rights of the execution plaintiff, although such plaintiff may have afterwards received full satisfaction of his judgment: *Fleming v. Maddox*, 32-493.

324. **Liability for rent or waste:** The purchaser of premises under a foreclosure sale afterwards set aside is not liable for rent or waste accruing between such sale and annulment, if possession was taken by another without his knowledge and he was not in any manner connected with the acts of the tenant: *Vulgamore v. Stoddard*, 21-115.

325. **Evidence of sale:** To establish title under a sale on execution, the purchaser may give in evidence the judgment and execution under which the property was sold and prove the sale, which may be done by the sheriff's deed or the return on the execution: *Lepage v. McNamara*, 5-124.

326. **Validity; presumptions:** A purchaser at execution sale is only required to look at the judgment, execution, levy and sale under appraisal. If these are in conformity with the law, *prima facie* he is justified in paying the price required by law for the property, and he is only required to ascertain the amount as returned and need not go into an examination of the action of the appraisers: *Johnson v. Carson*, 3 G. Gr., 499.

327. When such a sale appears to have been regularly conducted by virtue of a judgment rendered, final and conclusive, the

rights of a purchaser cannot be affected by any error or irregularity in the judgment: *Ibid.*

328. The purchaser depends upon the judgment, levy and deed. All other questions are between the parties to the judgment and the officer. Therefore, a failure to make an appraisal as required by law would not render the sale void as to the purchaser: *Shaffer v. Bolander*, 4 G. Gr., 201.

329. The purchaser has a right to rely upon the judgment, levy and deed. These being valid he cannot be affected by other irregularities of which he has no notice: *Cooley v. Wilson*, 42-425.

330. Where the officer making the sale has power to make it, and there is merely a failure on his part to comply with some statutory provision, directory in its character, the title of the purchaser will be protected in the absence of fraud: *Cavender v. Smith's Heirs*, 1-306.

331. Therefore, *held*, that a former statute requiring personal property to be exhausted before real property was levied upon, and that real property not occupied by defendant should be exhausted before that occupied by him, was directory, and the failure of the officer to comply with these as well as with other such provisions as to notice, return, etc., would, in the absence of fraud, not vitiate the sale: *Ibid.*

332. A sale should not be held void and liable to collateral attack for mere irregularities, for instance in the selection of appraisers: *Hill v. Baker*, 32-302; *Davis v. Spaulding*, 36-610.

333. A *bona fide* purchaser, even if he be the execution plaintiff, is not affected by any irregularity of the sheriff in giving notice and conducting the sale: *Coriell v. Ham*, 4 G. Gr., 455.

334. Irregularities such as a sale *en masse* or before the hour fixed in the notice will not affect the title in such purchaser: *Olmstead v. Kellogg*, 47-460.

335. It will be presumed that the officer did his duty and made the sale within the hours directed by law, although the notice fixed the time for the sale during hours some of which are not thus authorized by law: *Cole v. Porter*, 4 G. Gr., 510.

Further as to the presumption of regu-

Rights of purchaser.

larity arising from the execution of the deed, see *infra*, §§ 386-388.

386. Liability of officer: A purchaser of property on which execution has been levied under a void judgment may maintain action against the officer for unlawfully selling the property. It is not necessary to entitle him to recover that he should have owned the property prior to levy: *Gates v. Neimeyer*, 54-110.

387. The policy of the law is to uphold judicial sales, and they will not be held invalid for irregularities in the acts of the officer. If the one making the sale holds himself out to be a public officer, or acts as an officer *de facto*, he cannot be heard to object that he is not an officer *de jure*. By acting as an officer, he estops himself from denying his right to do so, even when indicted for malfeasance: *State v. Stone*, 40-547.

In general, see OFFICERS, V.

IV. RIGHTS OF PURCHASER; ASSIGNMENT OF CERTIFICATE; DEED.

388. Rights of purchaser: The rights acquired by a purchaser of personal property at execution sale are only the rights of a judgment defendant at the time of levy. They are subject to the rights of a prior purchaser: *Rakestraw v. Hamilton*, 14-147.

389. Where, without fraud, the execution defendant has sold his interest in the property before seizure under the process, although notice of such sale is not brought home to the execution plaintiff or the officer until after such seizure, the rights acquired under such previous sale are paramount to those acquired under the process: *Thomas v. Hillhouse*, 17-67.

340. A purchaser at sale under execution acquires no title where it is apparent of record that the judgment debtor has no interest in or title to the property sold: *Stuart v. Hines*, 33-60.

341. The purchaser at execution sale without actual notice of a mortgage executed after the lien of the judgment has attached and not recorded until after the sale is not affected thereby: *Wood v. Young*, 38-102.

342. Where the purchaser at execution sale had notice of a prior conveyance of the property, but such conveyance appeared

by the record to have been made at such time that it was subject to the lien under which the judicial sale was had, *held*, that in order to affect the purchaser at the execution sale with notice that such conveyance was superior to his rights, it must appear that there was something to indicate that the conveyance was made in fact before the time indicated by the record of the deed: *Brown v. Wade*, 42-647.

343. A purchaser at an execution sale does not acquire priority over the purchaser at a previous foreclosure sale under a mortgage executed and of record before the sale under execution was had: *Bell v. Hall*, 4 G. Gr., 68.

344. Facts of a particular case *held* not to impute to the purchaser at judicial sale notice of an equitable interest in the property held by a third party: *Bonnell v. Allerton*, 51-166.

345. A sheriff's deed under a sale on execution not only operates to transfer the premises sold, but relates back to the day when the judgment became a lien on the premises, and as against the purchaser avoids all immediate liens and alienations: *Kane v. Mink*, 64-84.

346. The attorney of the execution plaintiff, purchasing at a sale under execution of property levied on by attachment, is not to be deemed an innocent purchaser. He and his heirs holding under him are chargeable with equities or any illegalities in the proceedings: *Cook v. Jenkins*, 30-452.

347. An execution plaintiff who purchases at the sale in good faith, and before notice of appeal, will be protected to the same extent as a stranger: *Frazier v. Craft*, 40-110.

348. A judgment creditor purchasing under execution an equitable interest in real estate takes subject to prior equities of third persons of which he has no notice: *Wallace v. Bartle*, 21-346.

349. The plaintiff in execution who purchases at the sale is protected against outstanding equities of which he has no notice, actual or constructive, before the sale. He stands upon the same ground as any other purchaser: *Butterfield v. Walsh*, 36-534, and cases cited. And see *Bear v. Burlington, C. R. & M. R. Co.*, 48-619.

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And see further on this point, RECORDING ACTS, III, a.

The purchaser at execution sale of personal property has priority over a chattel mortgage of which he had no actual or constructive notice before levy: See RECORDING ACTS, III, d.

350. Assignment of certificate of purchase: The assignment to a junior lienholder of the certificate of purchase "and the lands therein described," held to transfer to the assignee not only the title under the certificate, but also the purchaser's right under a tax-title which was matured in his hands at the time of the assignment: *Scribner v. Vandercook*, 54-580.

351. The assignee in good faith of the certificate of purchase from a purchaser at the sale cannot be held responsible for the application of the purchase money by the sheriff: *Gray v. Dye*, 39-360.

352. Where a creditor pays money to the purchaser, claiming it to be by way of redemption, and takes an assignment of the certificate, he acquires by such assignment the rights of the purchaser, even though his redemption is not effectual: *Wilson v. Conklin*, 22-452.

353. A junior lienholder may become the purchaser at a sale under a prior lien, or may take an assignment of a certificate of purchase under such sale; and where the acts of such junior lienholder were not such as required by statute in case of redemption, held, that they would be considered as a purchase rather than an attempt to redeem: *Streeter v. First Nat. Bank*, 53-177.

354. Where the holder of a portion of the notes secured by mortgage foreclosed the mortgage and bid off a portion of the land, and also procured the assignment to him of the certificate of purchase of the same premises at a sale of the balance of the land for the remaining note secured by the mortgage, and also purchased at judicial sale the equity of redemption of a grantee of the land who had taken it agreeing to pay the mortgage, held, that the assignment of the certificate was in the nature of a redemption: *Brooks v. Keister*, 45-303.

355. The assignee of a certificate of purchase takes it subject to any equities existing against the assignor: *Van Gorder v. Lundy*, 60-448.

356. A purchaser of an equity of redemption has no rights other than those of the execution debtor, and cannot, on making redemption from the holder of the certificate of purchase, insist upon the assignment of such certificate: *Hurn v. Hill*, 70—.

357. The legal title of the owner of the property is not divested and transferred to the purchaser until the expiration of the period of redemption. During the period of redemption, the purchaser has an equitable title only, which may or may not ripen into a legal title: *Shimer v. Hammond*, 51-401.

358. The purchaser acquires only a lien for the amount of his purchase money and interest, which may ripen into a perfect title at the expiration of the time allowed for redemption: *Curtis v. Millard*, 14-128.

359. Right to crops, rent, etc.: The estate of the debtor is not divested until execution of the deed, and any crops upon the premises already matured do not pass thereby, although they were not matured when the purchaser became entitled to his deed: *Everingham v. Braden*, 58-183.

360. A purchaser under an execution sale is entitled to the rent accruing or falling due after the execution of the sheriff's deed, and the fact that the sale is in an action by attachment upon notice by publication does not prevent the application of the rule: *Turnsund v. Isenberger*, 45-670.

361. Where a party, by holding over after the execution of a sheriff's deed to the premises, becomes a tenant at will, he becomes so as to the land in its condition at that time and liable to action for the rental value of the premises with unmatured crops growing thereon: *Martin v. Knapp*, 57-336.

362. After the execution of the sheriff's deed the tenant of the former owner ceases to have any right to the possession, and if he takes crops therefrom, he must account to the execution purchaser and not to the former owner: *Ibid.*

363. A tenant of the execution defendant, sowing or planting crops after the sale, with knowledge that they cannot be harvested before the expiration of the period of redemption, is not entitled to possession for the purpose of harvesting such crops, after the right of the purchaser to possession under

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his deed has become complete: *Wheeler v. Kirkendall*, 67-612.

364. Sheriff's deed: The recital of the execution in a sheriff's deed is not essential to its validity, and any variance or mistake in such recital will not impair the deed: *Humphry v. Beeson*, 1 G. Gr., 199.

365. Sufficiency of description in the deed may cure any uncertainty of description in the levy and return: *Hopping v. Burnam*, 2 G. Gr., 39.

366. The sheriff in office at the time the deed is executed is the proper person to make a deed, and not a person who was sheriff at the time of the sale but whose term of office has expired: *Conger v. Converse*, 9-554.

367. The fact that the deed is executed by a deputy is no cause for setting it aside at the instance of the defendant in execution: *Chase v. Parker*, 14-207.

368. A deed issued prior to the expiration of the period of redemption is not necessarily void. It may be equivalent to a certificate of purchase, and admissible in evidence for the purpose of showing the sale: *Warfield v. Woodward*, 4 G. Gr., 386.

369. The fact that the sheriff gives a deed absolute in form instead of issuing a certificate of purchase will not defeat the right of redemption and cannot be considered prejudicial to a party entitled to redeem: *Olmstead v. Kellogg*, 47-460.

370. The fact that the deed is improperly executed before the expiration of the period of redemption will not render it invalid, if redemption is not made: *Conner v. Long*, 63-295.

371. If the deed is issued to one who is not a purchaser, the presumption is that the sheriff had evidence of the fact that the purchaser's rights had been transferred to the person to whom the deed was issued: *Ibid.*

372. To whom deed made: The judgment debtor and the purchaser are ordinarily the only parties who can object that the right of redemption has not been properly exercised, and where money had been paid for the purpose of making the redemption, by a party claiming the right to redeem, and had been accepted by the purchaser and the certificate assigned, *held*, that the sheriff could not refuse to make a deed to the assignee of the certificate on any real or supposed right in

the execution plaintiff to resist such redemption: *Kilbride v. Munn*, 55-445.

373. The sheriff may make his deed to a different person from the purchaser, with such purchaser's consent: *Ehleringer v. Moriarty*, 10-78.

374. Where the person making redemption is the owner, or redeems as owner and not as creditor, he is not entitled to a sheriff's deed: *Dickerman v. Lust*, 66-444.

375. Recording; notice: One who, in good faith, purchases the property after the expiration of twenty days beyond the period of redemption (as provided by Code, § 3125), and before the recording of the sheriff's deed, is not affected with constructive notice of the proceedings: *Harrison v. Kramer*, 3-543; *Churchill v. Morse*, 23-229.

376. But a failure to record the deed is not material as against one who is not a purchaser in good faith, or who purchases with actual notice of the sale: *Harrison v. Kramer*, 3-543; *Walker v. Schreiber*, 47-529, 533.

377. A party cannot complain of delay in taking and recording the sheriff's deed, unless he acquires his interest after twenty days from the expiration of the period of redemption: *Wood v. Young*, 38-102.

378. The constructive notice of the sheriff's sale, imparted by the publicity of the proceedings themselves and the recording of the sheriff's deed, affect only those persons claiming under the title divested by the sale and not those claiming under an independent or hostile title: *Hultz v. Zollars*, 39-589; *Gardner v. Jaques*, 42-577.

379. Where the certificate is assigned by the purchaser to a third person, failure by the assignee to put his deed on record will not defeat his claims as against a subsequent purchaser from the assignors. The requirement of notice applies only as against purchasers from the judgment defendant: *Lindley v. Mays*, 66-265.

380. A levy upon and sale of land in another county than that in which the judgment is rendered, without the filing of a transcript of the judgment, are not proceedings of which a subsequent purchaser of the property is bound to take notice until the deed is actually recorded: *McGinnis v. Edgell*, 39-419.

381. The deed, when duly executed and

recorded, is notice of the prior proceedings, and it is immaterial whether the judgment under which the execution issued was properly indexed or not: *Cushing v. Edwards*, 68-145.

382. Taking deed for benefit of another:

A contract whereby a third person was to purchase certificates of sale of real property sold under execution, and upon securing a deed to the property convey a portion or all of it to the other party to the contract, who had lost his right of redemption, *held* not to constitute a mortgage, or to entitle the latter to any right of redemption except in accordance with the express terms of the contract: *Hensley v. Whiffin*, 58-426.

383. Where a purchaser under execution agrees to convey to the debtor the property purchased upon being paid a certain amount within a certain time, the debtor cannot, after failure to pay the amount within the time agreed, maintain an equitable action to redeem: *Tarkington v. Corley*, 59-28.

384. In a particular case, *held*, that even though a purchase at execution sale was made for the benefit of another with the right to him to avail himself thereof upon payment of certain specified amounts, yet the party seeking to avail himself of the purchase did not show such payments as to entitle him to the benefits of the agreement: *Jack v. Brown*, 60-271.

385. Under particular facts, *held*, that the purchase at execution sale was in trust, and that sufficient steps for redemption having been taken, the execution of the sheriff's deed should have been ordered to be made to the person who, by agreement between the parties, had effected the redemption: *Kennedy v. Stranahan*, 39-205.

386. Presumptions in favor of deed: Where a sheriff's deed is silent as to the nature of the writ under which the sale is made, and no other evidence is offered, the sale is to be presumed regular (Code, § 3126): *Childs v. McChesney*, 20-431.

387. But aside from statutory provisions, it is not evidence of the regularity of prior proceedings, nor even of the existence of the judgment or execution. So *held* in case of a sale under strict foreclosure without proceedings in court, according to the provisions of Code of 1851: *Seevers v. Drennon*, 29-225.

388. Recitals in a sheriff's deed to the effect that at the sale the property conveyed was struck off to the purchaser "together with other real estate . . . for the sum of," etc., *held* not sufficient to show a sale for a gross sum and overcome the presumption that the officer selling did his duty: *Foley v. Kane*, 53-64.

Further as to presumptions in favor of the sale, see *supra*, §§ 326-335.

In general as to presumptions to be entertained to support a judicial sale, as, for instance, in case of a sale under proceedings by guardian, administrator, etc., see GUARDIANSHIP, §§ 55-59: ESTATES OF DECEDENTS, §§ 257-259.

389. Abandonment of sale: Where a sale was made under execution, but no deed delivered in pursuance thereof for four years, and, in the meantime, a second sale of the same property was made to another party, *held*, that the neglect of the purchaser at the first sale to take a deed must be regarded as an abandonment of his rights under the sale, and that a deed subsequently issued to him would not take priority over the intervening sale to a third person: *Walker v. Stannis*, 3 G. Gr., 440.

V. REDEMPTION.

390. Sale without redemption: As there might possibly be circumstances under which a court of equity might order a sale of real property without redemption, a decree ordering a sale without redemption, while it may be erroneous, will not be void for want of jurisdiction: *Traer v. Whitman*, 56-443.

391. So, although it is held in the federal courts that decrees in foreclosure proceedings in such courts in this state where, by state laws, redemption from foreclosure sale is provided for, should not order an absolute sale without redemption, yet such a decree, though erroneous, will not be void and cannot be collaterally attacked: *Moore v. Jeffers*, 53-202.

392. Where land was sold under the appraisalment law of 1860, and notice of election to have the sale made subject to redemption was not filed with the clerk within the time required by that statute, *held*, that defendant was not entitled to have the sale set aside and made subject to redemption: *Gillett v. Edgar*, 22-293.

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393. Redemption in foreclosure proceedings: Where it was provided by statute that foreclosure sales should be subject to redemption as in case of sales under general execution, and afterwards other statutory provisions as to redemption were made, *held*, that such provisions were applicable to sales on foreclosure although such sales were not specifically mentioned: *Davis v. Spaulding*, 36-610.

The provisions as to redemption are now by statute made applicable to sales under foreclosure: See MORTGAGES, VII, b.

394. Period for redemption: Under a statutory provision, not now in force, which authorized action at law on a note secured by mortgage, and provided that the judgment in such case might be declared a lien from the date of the recording of the mortgage, and that the mortgagor or a lienholder might redeem from such sale as from any other sale under execution, *held*, that a lienholder, although not a party to the proceeding, could not redeem except within the time and in the manner thus provided: *Mayer v. Farmers' Bank*, 44-212.

395. Where the execution and return were kept in the office of the attorney for the execution plaintiff, and not filed in the clerk's office, and an inquiry there, and also of the attorney, failed to secure a knowledge of the amount necessary to effect redemption, *held*, that upon a tender being made after the expiration of the time for redemption it should have been allowed: *Hammersham v. Fairall*, 44-462.

396. The fact that property is misdescribed in a mortgage and sale thereunder, and that the description is subsequently corrected during the period of redemption, the party entitled to redeem being a party to the proceeding and asking no relief, will not operate to extend the period for redemption: *McKisick v. Mill Owners' Mut. F. Ins. Co.*, 50-116.

397. The statutory right to redeem within one year cannot be extended by an act of the party claiming the right, such as a suit to redeem or the like, without more: *Hughes v. Feeter*, 23-547.

398. In a particular case, *held*, that an action brought by a purchaser of land at an execution sale against execution defendant during the period for redemption, in which

it was sought to have the title declared to be in the purchaser as against such execution defendant, did not constitute a fraud against the execution defendant, such as to entitle him to make equitable redemption after the statutory period had expired: *Bradford v. Bradford*, 60-201.

399. Where, by reason of a mistake of the clerk in computing the amount required to redeem, the amount paid was not quite sufficient, *held*, that the redemptioner might, after the expiration of the year, have equitable relief against the deed upon paying the deficiency and interest on the whole amount up to the time of completing the redemption: *Wakefield v. Rotherham*, 67-444.

400. In computing the year allowed for redemption, the day of sale is excluded, and redemption may be made any time during the corresponding day of the same month of the next year: *Teucher v. Hiatt*, 28-527.

401. Redemption waived: By statutory provision the taking of an appeal defeats the right of redemption, and it is immaterial whether a *supersedeas* bond is filed on the appeal or not: *Dobbins v. Lusch*, 53-804.

402. The statutory provision that stay of execution waives the right of redemption is applicable to cases where such stay is taken in a justice's court where the judgment is rendered, and afterwards a sale of real property under such judgment is had by filing a transcript thereof in the circuit court: *Brown v. Markley*, 58-689.

403. The restriction upon the right of redemption in case of taking an appeal or stay of execution does not apply to creditors who would otherwise be entitled to redeem, and such creditors have the same right to redeem in case the debtor takes an appeal or a stay as in other cases: *Sieben v. Becker*, 53-24.

404. An appeal or stay of execution by the execution debtor will not defeat the right of redemption by his vendee: *Thayer v. Coldren*, 57-110.

405. Who may redeem: The right of redemption may be in both the judgment debtor and his vendee where the property has been conveyed with covenants of title prior to the execution sale: *Harvey v. Spaulding*, 16-397.

406. The vendee of an execution defendant may redeem. He is to be considered as

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within the meaning of the term "defendant," as used in the statute (Code, § 3102): *Thayer v. Coldren*, 57-110.

407. A judgment creditor who has purchased the property under his execution may redeem from a sale made under a senior judgment lien: *Seever v. Wood*, 12-295.

408. And an attorney who has bought in the property for his client at a sale under execution in favor of such client may exercise such right of redemption which the client would have as against another sale under senior judgment: *Ibid*.

409. A junior lienholder whose debt antedates the homestead may redeem from the sale of the homestead under a senior lien, and, for the purpose of entitling himself to thus redeem, may show by evidence *aliunde*, as against the senior lienholder who has purchased at the execution sale, the fact as to the date of his claim with reference to the commencement of the homestead right: *Phelps v. Finn*, 45-447.

410. A creditor holding a judgment which is a lien upon real property of his debtor may become the purchaser of such real property at a sale under another judgment, and make redemption from such sale in the same manner as if some other person had been the purchaser: *Citizens' Savings Bank v. Percival*, 61-183.

411. An execution creditor who has bid in the property under his own execution does not have a lien upon such property for any unsatisfied balance of his claim by virtue of which he or his assignee can redeem under such sale. (Overruling *Crosby v. Elkader Lodge*, 16-399): *Clayton v. Ellis*, 50-590.

412. Where the execution defendant has no right of redemption, a judgment creditor, who did not become such until after the sale, cannot redeem: *Brown v. Markley*, 58-689.

413. Where the party seeking to redeem was one of several plaintiffs at whose suit the property in question was in equity declared subject to their judgments and sold to satisfy the same, *held*, that redemption could not be made by him: *Hayden v. Smith*, 58-285.

414. A judgment creditor of a grantor, who has made a fraudulent conveyance, has not such a lien upon the property thus conveyed as to entitle him to redeem the same from execution sale, made under a decree

obtained by other judgment creditors subjecting such property to the lien of their judgments: *Howland v. Knox*, 59-46.

415. A holder of a simple judgment lien has not an equitable right to redeem from a senior lienholder, after the execution of the sheriff's deed, made in pursuance of a sale thereunder. So *held* in case of a sale under foreclosure of a mechanic's lien, made under the Revision, which provided that such actions should be at law: *Diddy v. Risser*, 55-699.

As to right of equitable redemption in general, see MORTGAGES, VII, c.

416. A mortgagee may redeem from an execution sale of the property covered by his mortgage, although the liability secured by the mortgage is only a contingent one and may possibly never ripen into a certainty: *Crossen v. White*, 19-109.

417. A mortgagee cannot, after buying in the property at his own foreclosure sale for a portion of his judgment, redeem under such sale by virtue of the judgment held by him, either before or after a redemption is made by the mortgagor. The purchase of the property at the sale exhausts his lien with reference thereto: *Todd v. Davey*, 60-532.

418. Neither can an assignee of a portion of the mortgage debt redeem from a sale on foreclosure of another portion of such debt, whether his assignment was made before or after such foreclosure: *Harms v. Palmer*, 61-483.

That the sale of property covered by a mortgage under foreclosure thereof exhausts the rights of the mortgagee in such property. see MORTGAGES, §§ 417-419.

419. A party who has no interest in the property sold, but is only liable as surety or otherwise for the payment of the indebtedness for which the sale is made, has not a right to redeem: *Brooks v. Keister*, 45-303; *Miller v. Ayres*, 59-424.

420. The holder of a mechanic's lien before judgment thereon not being entitled to redeem (under provisions of Code, § 3108), he does not become entitled to redeem by obtaining a mere money judgment on his claim against a person not the owner of the property upon which the lien is claimed: *Spink v. McCall*, 52-482.

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421. Sale of debtor's redemption right: Defendant's right of possession and redemption during the statutory period may be levied upon and sold under execution: *Barnes v. Cavanagh*, 59-27; *Crosby v. Elkader Lodge*, 16-399.

422. But such redemption right cannot be sold under an execution issued on the balance of the same judgment under which the original sale was made: *Hardin v. White*, 63-683.

423. By the first sale, the creditor exhausts his right as to the property, and it is immaterial that the same indebtedness is embraced in two different decrees, one by foreclosure of a personal property mortgage, and the other upon foreclosure of a mortgage on real property. If real property is sold under special execution issued under a decree on foreclosure of the real property mortgage, the debtor's right of redemption therein cannot be levied on and sold under a general execution issued upon a decree rendered in foreclosure of the personal property mortgage: *Ibid.*

424. A judgment recovered against the debtor during the period allowed him for redemption becomes a lien on his interest in property in which he has the right of redemption, and in case he or his grantee by conveyance made after such judgment redeems from the prior sale, such judgment may be enforced against the property so redeemed, although the holder of the judgment failed to exercise his own statutory right of redemption from the sale: *Curtis v. Millard*, 14-128.

425. After redemption by the debtor or his grantee or assignee of land sold in partial satisfaction of a judgment, it at once becomes liable to pay the unsatisfied balance of such judgment: *Crosby v. Elkader Lodge*, 16-399; *Stein v. Chambliss*, 18-474.

426. Therefore, held, where a debtor conveyed his right of redemption to his wife and furnished her the money to make redemption, with intent to hinder and delay his creditors, the land so redeemed remained subject to the balance of the judgment: *Peckenbaugh v. Cook*, 61-477.

427. Time for redemption by creditor or lienholder: A creditor or lienholder cannot make statutory redemption after the expira-

tion of nine months: *Newell v. Pennick*, 62-128.

428. And this is so, even though the purchaser is also a junior judgment creditor: *George v. Hart*, 56-706.

429. Redemption by creditor within the first six months, during which the debtor's right to redeem is exclusive, will be good as to a subsequent lienholder. It is only the debtor and purchaser who can object to such redemption: *Wilson v. Conklin*, 22-452.

430. The time within which the creditor may redeem cannot be enlarged by the assent of the purchaser: *Hurn v. Hill*, 70 —.

431. Method of making redemption: In redemptions made before the expiration of nine months before the date of sale, the redemption is to be performed by the parties themselves, without the aid of the clerk, and the only evidence of the transaction necessary is the proper transfer of the certificate of sale. The statutory provisions with reference to the action of the clerk are applicable only to redemptions, as provided for, after the expiration of nine months: *Goode v. Cummings*, 35-67.

432. These statutory provisions as to the amount to be paid in order to effect redemption refer to statutory redemption from execution sale, and not to a case where a junior lienholder, not made party to a foreclosure proceeding, seeks to redeem from the sale thereunder by an action in equity: *Jones v. Hartsock*, 42-147.

433. Such junior lienholder seeking to redeem in equity from a prior judgment under which there has been no sale must pay the full amount of such judgment, but in making statutory redemption from a sale under the judgment, he is only required to pay the amount for which the property was bid in at the sale, with interest, costs, etc.: *Hays v. Thode*, 18-51; *Tuttle v. Dewey*, 44-306; *Iowa County v. Beeson*, 55-262.

434. In redeeming from an execution creditor who has bought in the property at the sale, the debtor need only pay the amount bid by such creditor, and is not required to pay, in addition thereto, any portion of the judgment remaining unsatisfied by the sale. Such balance is not a lien upon the property sold. (Overruling *Crosby v. Elkader Lodge*, 16-399): *Clayton v. Ellis*, 50-590.

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435. There is no distinction between the debtor and the creditor as to the matter of making redemption: *Ibid.*

436. Where a junior creditor attempts to redeem from a senior creditor who has taken an assignment of a certificate of purchase, he must pay to such senior creditor the amount of purchase money and also the amount of the senior creditor's lien: *Wilson v. Conklin*, 22-452.

437. Where a mortgage was foreclosed for one instalment of the debt secured thereby, and the decree directed that the entire property covered should be sold and any balance realized in excess of the instalment due should be applied to the payment of instalments not yet due, and the property was bid in by the mortgagee for the entire amount secured by the mortgage, *held*, that the mortgagor could not redeem from such sale upon payment simply of the amount of the instalment already due with interest and costs, but only upon payment of the entire amount for which the property was bid in by the purchaser, although such purchaser had not paid to the clerk any sum except the costs: *Williams v. Dickerson*, 66-105.

438. A judgment creditor whose lien is subsequent to an unrecorded deed cannot defeat the priority of the deed by first redeeming from a prior judgment creditor. The grantee in the deed may redeem from the subsequent judgment creditor in such case by paying the amount due the prior judgment creditor: *Fords v. Vance*, 17-94.

439. Where a party redeems from a sale under a judgment which by mistake is for too small an amount, he is under no obligation to tender more than the amount for which the property was bid in with interest and costs: *Day v. Cole*, 44-452.

440. Where the holder of the first two of three mortgages on the same property foreclosed the first and bid in the property at the sale thereunder, and thereafter the holder of the third foreclosed and bid in the property at his sale and then redeemed from the sale under the first after nine months from the date of such sale, *held*, that such redemption was made under the right of the mortgagor and not as junior creditor, and that the redemptioner did not thereby ac-

quire priority over the second mortgage: *Dickerman v. Lust*, 66-444.

441. A redemption of real property from sale under execution, made within the proper time by a sub-agent under color of authority, whose act was subsequently ratified by the principal, *held* sufficient as against the purchaser under the sale: *Teucher v. Hiatt*, 28-527.

442. For what amount redeeming creditor takes property: Omission by a creditor who has made redemption to make the entry in the sale-book as required by statute (Code, § 8115), in case he is not willing to credit the execution defendant with the full amount of the claim under which such redemption is made, will not prejudice the rights of other creditors to redeem nor defeat the right of the debtor to demand the extinguishment of all the claims of the creditor so failing to make such entry: *Goode v. Cummings*, 35-67.

443. Such provisions apply only to redemptions made after the expiration of nine months from the date of sale. Previous to that time, no entry in the sale-book is required: *Ibid.*

444. Under the Code, the absolute right of redemption on the part of creditors is terminated at the end of nine months from the date of the sale, and it is for the creditor last redeeming within the nine months to determine whether the right of redemption shall be again opened to the other creditors. If he is willing to have his lien and claim wholly extinguished, he is entitled to hold the property at that price, and no further redemption can be made by the creditors. If he is not willing to take the property in full satisfaction, then he must, within ten days, enter on the sale-book the utmost amount he is willing to credit on his claim, and by so doing he confers upon the other creditors the right to redeem under the provisions of Code, § 8116: *Woonsocket Institution v. Goulden*, 28 Fed. Rep., 900.

445. The statute does not prescribe the statement to be entered by a junior creditor redeeming from a judgment sale as to the amount which he is willing to allow on his claim, and if it indicates with sufficient certainty such amount it is sufficient: *Craig v. Alcorn*, 46-580.

446. Failure of the clerk to enter in the

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sale-book the amount which a redeeming creditor is willing to allow on his claim, when a statement thereof is furnished by the creditor in due time, the statement being in fact known to the parties affected thereby within the ten days given by statute for making the entry, will not operate to defeat the effect of such entry, the object of the requirement being to secure to the debtor notice of the intention of the redemptioner; and actual notice will effect that purpose: *Ibid.*

447. **Redemptions by junior and senior lienholders from each other must be made within the year allowed for redemption:** *Phelps v. Finn*, 45-447.

448. **Payment to clerk:** Where the party making redemption pays, and the clerk in good faith receives, a banker's check, or currency which is not legal tender, before the expiration of the time for redemption, the redemption will be complete, although in case of the check the money is not realized thereon by the clerk until after the time for redemption has expired: *Webb v. Watson*, 18-537.

449. **Payment to party:** Whenever a payment to the clerk would be good, a payment or tender to the party entitled to receive the money will be equally valid. The provisions of the Code of '51, allowing money to be paid to the clerk, held to be for the benefit of the holder, and that a payment to the execution plaintiff would be effectual: *Armstrong v. Pierson*, 5-317.

EXECUTORS.

See ESTATES OF DECEDENTS.

EXEMPTIONS.

See EXECUTIONS, II, d.

FALSE IMPRISONMENT.

1. Where one causes the arrest of another without warrant, and without reasonable cause to believe him guilty, the person arrested being innocent, the one who causes the arrest is liable in damages without proof of malice, but malice may be shown to en-

hance the damages: *Allen v. Leonard*, 28-529.

2. If plaintiff was the party against whom the information was filed and for whose arrest a warrant was issued, although there was a mistake in his name, he cannot recover for false imprisonment under the authority of the process, even if innocent. In such case, his remedy must be for malicious prosecution or by other like action: *Ibid.*

3. Where an officer is justified in making an arrest without a warrant, he may detain the person arrested in custody for a reasonable time, and will not be liable in damages for such detention: *Hutchinson v. Sangster*, 4 G. Gr., 840.

4. An order issued to a military officer authorizing an arrest, although it may be so far without authority as to be no justification, may, nevertheless, be proper as evidence to mitigate the damages to be recovered in an action for such arrest: *Carpenter v. Parker*, 23-450.

FEES.

See OFFICERS, VI.

FENCES.

As to when domestic animals may be allowed to run at large, see ANIMALS.

As to obligation of railroads to fence their right of way, see RAILROADS, IV, d.

When deemed part of realty, see FIXTURES, §§ 3-5.

1. **What deemed legal fence:** Under the statutory provision (Code, § 1507), a bluff, a hedge, a trench, a wall, a trestle, or the like, may be held to be in fact a lawful fence: *Hilliard v. Chicago & N. W. R. Co.*, 37-442.

2. Former statute as to height of fence construed: *Phillips v. Oystee*, 32-257.

3. The statutory provision as to hedges (16 G. A., ch. 106) is not so construed as to defeat recovery by a party on the ground that on some point on his line a hedge could not be grown for a short distance: *McKeever v. Jenks*, 59-300.

4. **Obligation to fence:** There is no obligation as to the public resting upon the owners of growing crops to fence them; and in an action by the owner of an ox which had

Obligation to fence.— Partition.

broken through an insufficient fence into a cornfield, and died from the effects of eating the corn, brought against the owner of the field for damages, *held*, that defendant was not liable: *Herold v. Meyers*, 20-378.

5. Where stock is prohibited from running at large, the owner is not to be deemed chargeable with negligence in allowing his animals to run at large upon uninclosed land of another; and the owner of unfenced premises who makes an excavation thereon adjacent to the highway, and in a place which he knows to be frequented by stock running at large, will be liable for injuries occurring to animals from such excavation: *Haughey v. Hart*, 62-96.

6. Where plaintiff, claiming to own certain real estate, sought to recover damages from defendant for maliciously, wrongfully and unlawfully breaking down and destroying the fence and turning his cattle upon such land without plaintiff's consent, *held*, that an instruction, in substance, that, if the land was the property of plaintiff, as to which the jury were directed to inquire, and if they found the land was fenced and the defendant broke down the fence and thereby allowed the cattle to go upon the land, or if the land was fenced and the fence was broken down without defendant's fault, and he drove his cattle upon the land, the plaintiff would be entitled to recover, was not erroneous: *Erbes v. Wehmeyer*, 69-85.

7. Partition fences: By statute (Code, § 1489) the respective owners of lands inclosed with fences are required to keep up and maintain fences between their own and the next adjoining inclosure as long as they improve them in common: *Schnare v. Gehman*, 9-283.

8. If parties use a fence as a partition fence between their farms, it is wholly immaterial whether it is on the exact boundary line, so far as the obligation to maintain the fence or contribute to its construction is concerned: *Card v. Dale*, 67-552.

9. One of the adjacent proprietors cannot evade the law or defeat it by purposely making his fence a few feet from instead of upon the dividing line: *Talbot v. Blacklege*, 22-572.

10. Where defendant in inclosing his premises left a private way entirely on his

own land, next to his neighbor's, *held*, that he could not be required, in addition to fencing such right of way over the remainder of his own land, to construct his share of the partition fence between such right of way and his neighbor's land: *Bland v. Hixenbaugh*, 89-532.

11. A party who fences across a public alley in a village, separating his lot from his neighbor's, so as to make use of his neighbor's fence, does not thereby make such fence a partition fence nor render himself liable to pay for a share thereof: *Anderson v. Cox*, 54-578.

12. The question whether the use of land, or agreement between the parties, was such as to require tight partition fences in a particular case, having been properly submitted to the jury, *held*, that a verdict allowing plaintiff to recover twice the value of such fence which defendant was required to build by the decision of the township trustees as fence viewers, would be sustained: *Huber v. Wilkinson*, 46-458.

13. Premises in common: Adjoining owners cannot be considered as occupying their premises in severalty, within the meaning of the statute, unless there be a partition fence of such character that the proprietor is able to keep his stock upon his own premises. Therefore, *held*, that a hedge which had not attained sufficient perfection to prevent stock from passing through it, did not constitute a partition fence, and the owners were therefore holding in common within the meaning of the statute: *Miner v. Bennett*, 45-635.

14. One who merely incloses his premises adjoining another close and does not own any part of the division fence may at pleasure and without the aid of statute throw his inclosure open to common: *Ibid*.

15. Where one of the owners of adjacent property inclosed in common intentionally puts his animals into the common inclosure, by which the property of the other owner is injured, he is liable therefor, and it is immaterial whether the fence inclosing the common inclosure was a lawful fence or not: *Broadwell v. Wilcox*, 22-568.

16. One who purposely turns his cattle upon his land, from which they go upon the land of another, inclosed in common, and do damage, is liable, though there was no inten-

Where stock restrained.— Fence viewers.

tion that they should go upon his neighbor's land. And where the land trespassed upon is inclosed in common with that of the owner of the cattle, without partition fence, by agreement, the liability is the same as though their lands were separated by a lawful partition fence. The agreement stands as and for the fence: *Winters v. Jacobs*, 29-115.

17. Where stock restrained: The provisions with reference to partition fences are applicable (by statute, Code, § 1508) to counties or townships in which stock is, by legal regulation, restrained from running at large: *Duffees v. Judd*, 48-256.

18. In counties where a herd law is in force, a party desiring to use his ground for purposes not requiring a fence in such county, for instance, for raising crops alone, cannot be compelled to contribute to the erection of a partition fence between his land and that of an owner who desires to use his premises for purposes requiring fencing, as, for instance, for the raising of stock: *Syas v. Peck*, 58-256.

19. Land is to be deemed as not used in common where the use is such that means must be taken to preserve the crops. Where there is no regulation prohibiting stock from running at large, the party desiring to use his land for the raising of crops which must be protected from such stock must contribute to a partition fence. Where it did not appear that stock was not prohibited from running at large, held, that such fact would not be presumed for the purpose of establishing error in the judgment below: *Hewitt v. Jewell*, 59-37.

20. Proceedings of fence viewers: The duty of maintaining partition fences as provided by statute being one created solely by statute, the method prescribed there for enforcing such duty must be followed. A party cannot proceed by action in court instead of by application to the fence viewers: *Lease v. Vance*, 28-509.

21. It is not necessary that the complaint to the fence viewers be in writing and made a matter of record: *Tubbs v. Ogden*, 46-184.

22. The action of the fence viewers is conclusive where they have jurisdiction; but they cannot conclude a party by determining that to be a partition fence which, in fact, is not: *Bills v. Belknap*, 38-225.

23. The adjudication by the trustees as to the sufficiency of the fence should be by them sitting as a board, and as a result of personal inspection, but the inspection need not be made by them in a body. A record of the adjudication should be made by the clerk, but it is not necessary that such adjudication be reduced to writing and certified by them. The certificate of the viewers as to the value of the fence should be filed with the clerk, and will then be sufficient evidence of complainant's rights and notice to the adverse party: *Tubbs v. Ogden*, 46-184.

24. There is no appeal from the action of fence viewers: *McKeever v. Jenks*, 59-350.

25. The decision of fence viewers upon questions within their jurisdiction is conclusive, and the fact that the statute as to these matters denies to the parties a trial in court, either by an appeal or otherwise, does not render it unconstitutional: *Ibid*.

26. Neither the notice, required by statute to be given of the proceedings of the fence viewers, nor the finding, assigning to each his share of the partition fence, need be in writing, though it would be the better practice to put them in that form: *Talbot v. Blackledge*, 22-572; *Gantz v. Clark*, 31-254.

27. The decision of the fence viewers is not conclusive as to the true division line, and in an action by one land-owner against an adjoining owner to recover the proportion of the cost of building a partition fence, in accordance with the direction of the fence viewers, the defendant may show, as a defense, that the fence was not erected upon the true line: *Peschongs v. Mueller*, 50-237.

28. The decision of the fence viewers requiring defendant to build a portion of the fence on such line is not within their jurisdiction, and the defendant may recover for the cutting down of trees and loss of the use of well, etc.: *Ibid*.

29. Fence viewers have jurisdiction only when a controversy arises between the respective owners of land about the partition fences: *Anderson v. Cox*, 54-578.

30. Where the parties have agreed to maintain a certain kind of fence, the trustees may determine whether such agreement has been performed and decide as to time and manner of performance: *Huber v. Wilkinson*, 46-458.

Fence viewers.—Fixtures defined.

81. The evidence of fence viewers is competent in regard to a matter upon which they are authorized to form an opinion: *Phillips v. Oystee*, 82-257.

82. Therefore, *held*, that a party at whose house the viewers met and who was verbally notified by them of making a division, and on being asked whether he had received notice, admitted that he had, could not object to want of a written notice. Also *held*, that where parties were verbally notified and knew of the action and decision of the fence viewers, and such decision was reduced to writing and duly recorded, objection as to want of notice thereof could not be considered: *Talbot v. Blacklege*, 22-572.

83. Under a former statutory provision, *held*, that notice of a meeting of the fence viewers to determine the value of a fence erected in pursuance of their direction, not being expressly required, was not necessary: *Ibid*.

84. An assignment made by the fence viewers as to the amount to be built by each is binding upon the parties without being recorded: *Gantz v. Clark*, 31-254.

85. The question of the sufficiency of a fence, when it arises in an action, is to be determined like any other fact in the case. It is not necessary that the action of viewers thereon be had: *Hilliard v. Chicago & N. W. R. Co.*, 37-442.

86. When exercising power granted to them, the proceedings of fence viewers are to be considered by the court as to all matters of form with at least the same tender and indulgent consideration which is extended to proceedings before a justice of the peace: *Talbot v. Blacklege*, 22-572.

87. Unless due notice is given to the adverse party of the meeting of the fence viewers to examine the fence, the subsequent proceedings cannot constitute the basis of a recovery against him: *Lookhart v. Wessels*, 46-81.

88. As to what is due and sufficient notice, see *Tubbs v. Ogden*, 46-184.

89. Where a party, without availing himself of the provisions of the statute as to fence viewers, gave notice to an adjoining land-owner to build one-half the fence between their lands, and such adjoining owner, in compliance with his demands, built his one-

half the fence and afterwards built the remainder of the fence, which should have been built by the party giving the notice, *held*, that the party thus building the fence might recover, from the party serving the notice, the value of one-half the fence built: *Schnare v. Gehman*, 9-288.

40. The proceedings of the fence viewers do not bar other proceedings which involve division lines: *Peschongs v. Mueller*, 50-237.

41. Agreements between parties (Code, § 1506) as to determining title to lands, etc., need not necessarily be in writing: *Bills v. Belknap*, 38-225.

FERRIES.

See WATERS, III.

FIXTURES.

1. **Defined:** Fixtures are personal chattels annexed to the freehold, and which may be severed and removed against the will of the owner of the freehold by the party who has annexed them: *Pickerell v. Carson*, 8-544.

2. The character of the property, as to whether it is a fixture or not, must very often be determined from a knowledge of the purpose designed in its erection or connection; therefore, *held*, that a bell belonging to a church, which had been reserved upon the sale and removal of the church building and placed in a frame on the church lot and used for its proper purpose, was a portion of the realty and exempt from execution, though the posts of the frame were not let into the ground. Its position and use would unmistakably indicate the intention of the society to affix it to the realty and render it a permanent accession to the land: *Congregational Society v. Fleming*, 11-533.

3. Fences: Rails not laid into a fence, but piled upon the land, are not a part of the realty: *Robertson v. Phillips*, 8 G. Gr., 220.

4. But rails laid in a fence are a part of the freehold and belong to the owner of the soil: *Boon v. Orr*, 4 G. Gr., 304.

5. A fence which forms a close or part of an inclosed place on the premises is to be regarded as a part of the freehold. It makes no difference how the fence is constructed or of what material. If of rails, it may or may

Machinery.—Trade fixtures; removal.—Severance.

not have stakes fastened in the ground: *Smith v. Carroll*, 4 G. Gr., 146.

6. Machinery: Fixtures are a species of property constituting the dividing line between real and personal property. To decide on which side of the line certain property belongs is often a vexatious question. A steam-engine or water-wheel constituting the propelling power of a mill or manufactory is uniformly held to be a fixture and to pass with the realty, and the same may be said of the stones or burs in a grist-mill, cog-wheels, gearing or shafting in a mill, manufactory, etc., they being parts of the motive power; but *held*, that looms, spinning jacks, etc., in a woolen factory, being propelled by the engine which furnished the motive power for such factory, were also parts of the real estate: *Ottumwa Woolen Mill Co. v. Hawley*, 44-57.

7. The controlling consideration in determining whether the machinery in a mill or manufactory is part of the real estate is whether the intention of the party making annexation was to make a permanent accession to the freehold. Physical attachment is a very uncertain and unsatisfactory criterion, the only value to be attached to it being to determine the intention of the owner in making annexation. If it be so fixed that its removal would materially injure the building, this is evidence of the intention to make it a permanent accession: *Ibid*.

8. Where a smutter was hired by its owner to the owner of a flouring-mill and by the latter fixed in place and operated as a part of the machinery of the mill, although it could be removed without material injury to the mill, *held*, that as to the purchaser of the mill at judicial sale, without knowledge of the facts, it passed as a part of the realty, although as between the immediate parties it remained personalty: *Stillman v. Fleniken*, 58-450.

9. A corn elevator built by permission of a railroad company upon its right of way, and operated by a shaft running over a vacant lot and connecting it with a mill owned by the person building the elevator, *held* not to be a fixture appurtenant to the mill: *Walton v. Wray*, 54-531.

10. Trade fixtures; removal: Trade fixtures must be removed by the tenant upon

or prior to the expiration of his term and before he has surrendered possession. He cannot re-enter for the purpose of effecting such removal: *Dostal v. McCaddon*, 85-318.

11. Where the vendee under a sale of premises, made after surrender of the premises by a tenant, had no actual notice of the existence of fixtures annexed by him, *held*, that the vendee was entitled to such fixtures although without his knowledge the person in possession of the property at the time of his purchase was using such fixtures under permission of the former tenant who erected them: *Ibid*.

12. When buildings and other trade fixtures are erected upon real estate, upon the faith of an implied license from the owner, they will not be treated in equity as a part of the realty in the hands of a subsequent purchaser, who acquired his title with full knowledge of such license: *Wilgus v. Gettings*, 21-177.

13. Although it is a general principle of law that a building, permanently annexed to the freehold, becomes a part of it, yet, if it is erected by the builder with his own money for his own exclusive use, as disconnected from the use of the land, and with an agreement to that effect between the owner of the land and the builder, it will, as between the parties, be considered as personal property. Especially is this true when the very contract by which the building was erected contemplates its removal: *District T'p v. Moorehead*, 43-466.

14. Severance by chattel mortgage: Whether fixtures which are a part of the realty as between the vendor and vendee are, in law, severed and made personalty by the execution of a chattel mortgage thereon, *quære*. But the chattel mortgage, when recorded and indexed as such, does not constitute constructive notice to a subsequent purchaser of the realty: *Bringhoff v. Munzenmaier*, 20-513.

15. Where a saw-mill was erected upon leased ground, the boiler being encased in brick and the shed covering the mill resting on blocks, it being possible to remove both shed and mill without injury to the realty; and the mill was then mortgaged as personal property, *held*, that as between the mortgagor and was grantees and the mortgagee

and his assignees, the mill must be regarded as personal property, and that the fact that the owner of the land became owner of the mill after the execution of the mortgage thereon would not merge the ownership of the mill with that of the realty so as to defeat the chattel mortgage: *Denham v. Sankey*, 88-269.

16. Nursery trees planted by the owner of real estate become a part of the realty, and pass as such to the purchaser at the foreclosure of a mortgage executed by the owner, although the trees were planted after the execution of the mortgage: *Price v. Brayton*, 19-309.

17. A mortgagee of real property on which nursery trees are standing, who purchases such property at foreclosure sale, is entitled to the trees as against a chattel mortgage thereon given subsequently to the execution of the real property mortgage but recorded before the foreclosure sale: *Adams v. Beadle*, 47-439.

18. As between heir and executor, the rule of fixtures obtains with the greatest rigor in favor of the inheritance and against the right to consider as a personal chattel anything which has been affixed to the freehold; therefore *held*, in a particular case, that a saw-mill erected by one who at the time claimed to be the owner of the land, and built in a permanent manner, partly in the bed of the river and partly in the bank, was a part of the realty, so that an action for the conversion thereof could not be brought by the administrator: *Kinsell v. Billings*, 35-154.

FORCIBLE ENTRY AND DETAINER.

See JUSTICES OF THE PEACE, VII.

FORMER ADJUDICATION.

See JUDGMENTS, II, d.

FRAUD.

As to FRAUDULENT CONVEYANCES, see that title.

As to fraud in particular cases, see references in INDEX.

1. What constitutes: Fraud includes any act, omission, or concealment, which involves

a breach of legal or equitable duty, trust, or confidence, and is injurious to another, and by which undue or unconscientious advantage is taken of another: *Lumpkin v. Snook*, 63-515.

2. Where there is no concealment or misrepresentation as to any existing fact, but parties contract with full knowledge of every fact pertaining to the subject of the agreement, the contract cannot be considered fraudulent: *Ibid*.

Further as to what is sufficient fraud to entitle a party to relief in equity, see EQUITY, II, b.

As to what is sufficient fraud to warrant rescission of contract, see CONTRACTS, XII, a.

3. Fraudulent representations: Where parties through their agents fraudulently represented that no actions to enforce liens held by them had been commenced, and by means of such representations secured their judgments on such liens without notice to or defense by the purchaser of the property to whom such representations were made, and had executions levied so as to defeat the right of election of such party to have the property sold subject to the right of redemption, *held*, that these facts constituted fraud: *Gregory v. Perkins*, 40-82.

4. Where a surety, before signing a note for money to be advanced, inquired of payee whether the principals were indebted to him at that time, and was told that they were not so indebted, which statement was false, *held*, that such false representation would avoid the note, and also a confession of judgment entered into thereon, before the surety was aware of the fraud: *Melick v. First Nat. Bank*, 52-94.

5. In order to render a person liable in damages for false representations, it must appear that they were contrary to the fact and that the party making them knew them to be contrary to the fact. It is not sufficient to show that they were made without reason to believe them to be true. So *held* with regard to representations as to responsibility of party inquired about: *Avery v. Chapman*, 62-144.

6. False representations as to the solvency or pecuniary condition of another, to be actionable as fraudulent, must at the time have been known to be false by the party

Fraudulent representations.— False promises.

making them, or he must have assumed or intended to convey the impression that he had actual knowledge of their truth when he had not: *McKown v. Furgason*, 47-636.

7. While it is not invariably true that false representations, made as an inducement to a contract, will not constitute fraud if the other party had an opportunity to detect the falsehood, yet, in general, a party cannot make the mere opinion of another a ground of fraud, especially where this opinion relates to the value of an article, or to what will happen in the future, in relation to which each party has equal opportunities of judging for himself: *Bondurant v. Crawford*, 22-40.

8. Fraudulent representations made to a third party with intent that they be communicated to the other party for the purpose of influencing his action, and which are so communicated, may be shown: *Davidson v. Vorse*, 52-384.

9. Before a party can recover for false representations he must show that by such representations he was induced to act to his prejudice: *Gee v. Moss*, 68-318.

10. The question whether in such a case the party acted with reasonable prudence and care in accepting and acting upon the representations is one of fact for the jury. It cannot be said, as a matter of law, that any degree of intimacy existing between the party to whom the representations are made, and the one making them, would or would not justify their acceptance. In a particular case, *held*, that representations by an officer and stockholder of a corporation, with reference to the value of its stock and the condition of its affairs, was false and fraudulent, and rendered the person making such representations liable in damages to a person buying stock upon the strength of his representations: *Ibid*.

11. Certain false representations made as an inducement to the execution of a note, *held* sufficient to avoid the note for fraud: *Averill v. Boyles*, 52-672.

Further as to false representations, see EQUITY, §§ 102-120; VENDORS, II; SALES, III.

12. False promises: A mere failure to perform an agreement never constitutes fraud: *Van Vechten v. Smith*, 59-173.

13. Fraud in general consists of misrep-

resentation of matters of fact, not in a failure to keep a promise to do or to omit to do something. Therefore, *held*, that the allegation that an administrator had falsely pretended that he would submit to the allowance of a claim, and proposed to secure the claimant the conveyance of land belonging to the estate in satisfaction therefor, was not sufficient to show personal liability on his part for fraud in failing to settle his claim: *Hazlett v. Burge*, 22-535.

14. Relation of parties: It cannot be imputed to a child as want of vigilance that he accepts as true, without question or further inquiry, declarations of a parent with whom he has always resided, whom he has been accustomed to obey, and in whose word he has habitually confided: *Rider v. Kelso*, 53-367.

15. A party *in pari delicto* cannot make his illegal act a basis of recovery; but where the stronger mind takes possession of the weaker and by persuasion and influence procures an unlawful act, this rule ceases to be applicable: *Davidson v. Carter*, 55-117.

Further as to confidential relations, see EQUITY, §§ 123-127.

16. Without injury: Where an act, claimed to be fraudulent, had resulted only in procuring the performance by the opposite party of what he would, without such alleged fraud, have been legally bound to do, *held*, that he was not injured thereby, and was not entitled to relief: *Pheteplice v. Eastman*, 28-446.

17. Waiver: The giving of a note for a balance due on a sale will constitute *prima facie* a waiver of fraud in the sale: *Moffitt v. Cressler*, 8-122.

18. Pleadings: Where a party seeking to enforce a vendor's lien testifies that such lien has not been waived, he cannot recover on the ground that a waiver was obtained by false representations: *Gnash v. George*, 58-492.

19. In order to be entitled to rely upon fraud, the party must specially plead it. It cannot be made a ground of defense by instructions without having been pleaded: *Root v. Schaffner*, 39-375.

That fraud must be pleaded, see PLEADINGS, §§ 63-73.

20. Effect: Fraud vitiates all contracts, and may therefore be shown by parol evi-

Evidence.—What conveyances deemed fraudulent.

dence, although its effect will be to vary or contradict a written instrument: *Day v. Lown*, 51-364.

21. Where a certificate of pre-emption is procured from a county by fraud, the county may set up that fact in any proceeding in which the certificate is brought in question: *Bixby v. Adams County*, 49-507.

22. Though an action for damages for fraud in a sale would amount to an affirmation of the sale and could not be maintained against a minor, yet an action to recover the property on the ground that there was no sale by reason of the fraud might be maintained: *Nolan v. Jones*, 53-387.

23. Where the property, which was the subject of a fraudulent sale, could not be reached, *held*, that the proceeds thereof could be applied in the same manner as though the property was available: *Davis v. Gibbon*, 24-257.

24. Evidence: Fraud will never be presumed but must be proved, as any other fact: *Cheuvete v. Mason*, 4 G. Gr., 231; *First Nat. Bank v. Hurford*, 29-579.

25. Fraud will not be presumed when the facts upon which it is sought to predicate it are consistent with honesty and good faith. It must be affirmatively established by satisfactory evidence: *Hamilton v. Bishop*, 22-211; *Schofield v. Blind*, 33-175; *Prichard v. Hopkins*, 52-120.

26. Where fraud is alleged in a motion to set aside a judgment, it must be affirmatively proven, and will not be presumed because a motive is shown for fraud: *Moore v. Parker*, 25-355.

27. To warrant the setting aside of a judgment in a collateral proceeding for fraud, the evidence should clearly establish the fraud: *Hulverson v. Hutchinson*, 39-316.

28. Fraud will not be deemed proven unless the evidence is satisfactory: *McClanahan v. McKinley*, 52-222; *Schofield v. Blind*, 33-175.

29. But it is not error, in instructing the jury, to omit the word "satisfactorily" and merely instruct them that fraud must be proven: *Galpin v. Wilson*, 40-90.

30. A preponderance of evidence is sufficient to establish fraud vitiating a sale. It is error in such a case to instruct the jury that the presumption is that the transaction is honest and fair and the burden of proof is

upon defendant to overcome such presumptions by clear and satisfactory evidence. A fair preponderance of evidence, sufficient to satisfy the minds of the jury, is all that is required: *Bixby v. Carskadon*, 55-533.

31. A party seeking to show fraud must sustain his allegations by a preponderance of the evidence. If the case is left in equipoise, the plaintiff must fail: *Oaks v. Harrison*, 24-179.

32. A court will not be justified in overturning a legal title upon the testimony of a single witness, contradicted by the testimony of another witness, even though the latter be a party to the action: *Epps v. Dickerson*, 35-301.

33. The fact that property is sold on credit, for the purchase of which vendor is still indebted, and the knowledge of vendee of such fact, will not raise a presumption of fraud; but in case of such sale under unusual circumstances, the circumstances may be considered by the jury in determining the question of fraud: *Hughes v. Monty*, 24-499.

34. Certain facts in a particular case, *held*, admissible as tending to show fraud in a sale: *Wadsworth v. Walliker*, 51-605.

35. Evidence in particular cases *held* insufficient to establish fraud: *Baldwin v. Wheeler*, 50-46; *Munson v. Foss*, 55-309; *McCoy v. Quigly*, 55-315.

Further as to evidence of fraud, see FRAUDULENT CONVEYANCES, IV.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES.

- I. WHAT CONVEYANCES DEEMED FRAUDULENT; VOLUNTARY CONVEYANCES.
- II. WHO MAY HAVE RELIEF AGAINST.
- III. MODE OF RELIEF; PARTIES AGAINST WHOM RELIEF MAY BE GRANTED.
- IV. EVIDENCE; BURDEN OF PROOF.

I. WHAT CONVEYANCES DEEMED FRAUDULENT; VOLUNTARY CONVEYANCES.

1. **Intentional fraud; effect:** If property be conveyed with the design on part of the vendor, participated in by the vendee, to

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defraud his creditors, the vendee's title will not be protected, notwithstanding he pays a sufficient consideration: *Chapel v. Clapp*, 29-191; *Williamson v. Wachenheim*, 58-277.

2. The assignee of a contract, who takes the same for the purpose of enabling the assignor to hinder his creditors in reaching the benefits of such contract, can take nothing under it, not even what he has paid for labor and materials expended in its execution: *Chapman v. Ransom*, 44-377.

3. A purchase of property for the purpose of aiding to hinder, delay and defraud creditors is invalid, notwithstanding the fact that sufficient consideration has been paid: *Sweet v. Wright*, 57-510.

4. Where an action is brought against the grantee in a fraudulent conveyance to have it set aside, although he may be a creditor of the grantor, yet his claim not being reduced to judgment, he cannot come in with other *bona fide* creditors for a distributive share out of property conveyed. The conveyance being thus founded in actual and positive fraud, as being made under the influence of corrupt motives, and with the intent to cheat creditors, may be considered void *ab initio*, and the grantee in the deed a *particeps criminis*. As the grantee can claim no right from his fraudulent act, he stands in no better position than any other creditor having a simple debt against the fraudulent grantor, and cannot come in for a ratable proportion of the property: *Wilson v. Horr*, 15-489.

5. If the grantor's intent is in part to avoid fines in a criminal prosecution, and also to avoid the payment of a judgment which may thereafter be obtained in a civil action, the conveyance is wholly fraudulent. It cannot be upheld in part and void in part: *Weir v. Day*, 57-84.

6. A design to delay and hinder creditors, as well as a design to defraud them, will render a sale void if such design is participated in by the other party: *Birby v. Carskaddon*, 55-533.

7. A conveyance the making of which is a criminal act under the statute prohibiting fraudulent conveyances is void: *Davenport v. Cummings*, 15-219.

8. In a particular case, *held*, that a conveyance was merely colorable, made and entered into by the parties for the purpose of prevent-

ing the creditors of the grantor from seizing the property on execution, although at the time of the conveyance suit had not yet been brought: *Corder v. Williams*, 40-582.

9. Facts in particular cases discussed, and *held* to show that the conveyances involved were intended to delay, hinder and defraud creditors and were therefore void: *Glenn v. Glenn*, 17-498; *Brainard v. Van Kuran*, 22-261; *Baldwin v. Tuttle*, 23-66; *Ryan v. Mullinix*, 45-631; *Whitcomb v. Whitcomb*, 52-715; *Searing v. Berry*, 58-20; *Deere v. Needles*, 65-101.

10. Evidence in a particular case *held* not sufficient to show fraudulent intent: *Draper v. Andrews*, 49-637.

11. Secret reservation or trust: A secret reservation between the vendor and vendee of land, by which the vendor is to have the right to use and enjoy such use, the enjoyment constituting a part of the consideration, will render the conveyance fraudulent, irrespective of the intention with which it was executed, and even though the transfer be for a valuable consideration: *Macomber v. Peck*, 39-351; *Dean v. Skinner*, 42-418.

12. Reservation of future support: A conveyance given in whole or in part consideration of future support to be furnished by the grantee is fraudulent as to a creditor: *Graham v. Rooney*, 42-567; *Strong v. Lawrence*, 58-55.

13. Where the grantee, a relative of grantor, paid an adequate consideration, *held*, that the fact that he allowed grantor and his wife to remain on the property and receive a portion of the rents and profits was not sufficient to show fraud, as grantee might make whatever disposition he saw fit of the property: *Rusie v. Jameson*, 62-52.

14. A conveyance in trust for support of grantor's family will be upheld as upon a sufficient consideration: *Riddle v. Cutter*, 49-547.

15. Fraudulent intent of grantee: A fraudulent purpose on the part of the grantor alone is not sufficient to avoid the conveyance; a like intention must be traced to the grantee, and, unless shown, the conveyance will be upheld: *Fifield v. Gaston*, 12-218.

16. Where a conveyance is not voluntary, but is supported by a sufficient consideration, a fraudulent intent on the part of the grantor

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and of the grantee must be shown to avoid it: *Drummond v. Couse*, 89-442.

17. Under facts of a particular case, *held*, that it was sufficiently shown that the conveyance was without consideration and made for the purpose, shared by both parties, of defeating grantor's creditors: *McDonald v. Farrell*, 60-335.

18. Grantee's knowledge of fraudulent intent: To warrant the setting aside of a conveyance for fraud against a creditor, where there is a consideration, the creditor must show not only fraud of the grantor, but also participation therein on the part of the grantee, so far at least as to have knowledge of grantor's fraudulent intent, or of facts and circumstances such as ought to put the grantee upon inquiry: *Steele v. Ward*, 25-635; *Kellogg v. Aherin*, 48-299; *Preston v. Turner*, 36-871.

19. To avoid a sale on the ground that it was fraudulent for the purpose of defeating creditors, it must be shown that there was fraud on part of the grantor, and that the grantee had knowledge of the fraudulent intent, or had notice of such facts as would have put a man of ordinary prudence upon inquiry which would have led to knowledge of the fraudulent purpose; but it is not essential to establish a fraudulent purpose on the part of the grantee: *Jones v. Hetherington*, 45-691; *Williamson v. Wachenheim*, 58-277; *Spaulding v. Adams*, 68-487.

20. Where a purchaser of property is not a creditor, but a mere volunteer, and the seller intends by the sale to hinder, delay and defraud his creditors, it is not necessary that it be shown that the purchaser bought with a fraudulent intent. It is enough if it be shown that he had knowledge of such facts as would charge him with notice of the fraudulent intent of the seller: *Lyons v. Hamilton*, 69-47.

21. Mere knowledge by the vendee of the insolvency of the vendor, without further knowledge that the sale is for the purpose of defrauding creditors, will not make such sale fraudulent, although the object of the vendor was really to defraud creditors: *Hughes v. Monty*, 24-499.

22. The fact that a person loaning money by mortgage had reason to suppose that the borrower was financially embarrassed, and

knew of the pendency of an action against him and an intent to attach his land thereunder, *held* not sufficient to affect the mortgage with notice of fraud: *Collier v. French*, 64-577.

23. Evidence in particular cases *held* sufficient to affect the grantee with knowledge of the fraud of the grantor: *Smith v. Smith*, 22-516; *Milner v. Davis*, 65-265; *Platner v. Platner*, 66-378.

24. Preference of creditors not necessarily fraudulent: A mortgage to a *bona fide* creditor will not be invalid for the single reason that it operates to postpone and delay other creditors: *Adler v. Clafin*, 17-89.

25. One creditor may, lawfully, by the exercise of superior diligence, obtain payment or security from his debtor, and in so doing absorb or take all the debtor has, and it is immaterial that there are other creditors who get nothing. There must be, however, on the creditor's part, no intent to wrong or defraud other creditors, but a *bona fide* intent to protect himself: *Crawford v. Nolan*, 70—.

26. The transfer by an insolvent debtor of all his property in the actual discharge of a pre-existing debt, though the transferee has knowledge of other creditors not paid, will not render the transaction fraudulent *per se*. At common law the debtor may prefer any one of his creditors by payment of his debt, or by conveying to him property in trust for the purpose of its payment: *Johnson v. McGrew*, 11-151.

27. A creditor has the right to secure his debt in good faith, even if he knows that his debtor has other creditors and that the effect will be to prevent other creditors from collecting their claims: *Carson v. Byers*, 67-606.

28. A mortgage executed by a debtor to one or more of his creditors, having the effect to hinder and delay others who are not secured, is not necessarily fraudulent. It will be fraudulent only when executed with a fraudulent intent on the part of the mortgagor, and when such intent is participated in by the mortgagee. The fact that the mortgagee accepts for his own benefit a mortgage which he knows will have the effect of hindering and delaying the collection of the claims of other creditors will not render such mortgage fraudulent, and the intention of

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such mortgagee to assist the mortgagor in hindering and delaying the claims of other creditors cannot be inferred from the mere fact that the mortgage necessarily has such effect: *Kohn v. Clement*, 58-589.

29. Where land was conveyed to a party upon agreement by him to pay certain debts of the grantor, *held*, that the creditor whose debt was to be paid had the right in equity to subject the property to the payment of such indebtedness, and that a subsequent grantee by quitclaim deed took subject to such equity: *Kaiser v. Waggoner*, 59-40.

30. The creditor may accept a conveyance for the purpose of securing the payment of his debt, even though he knows that the debtor is in debt to other creditors and is prompted by fraudulent motives in making the conveyance. The conveyance cannot be set aside upon proof of such knowledge unless the grantee also participated in the fraud: *Chase v. Walters*, 28-460; *Aultman v. Heiney*, 59-654.

31. Conveyances, made to creditors having valid claims against the grantor, in amount fully equal to the value of the property conveyed to them, and taking such conveyances without knowledge of the indebtedness of the grantor or any contemplated fraud by him, *held* not fraudulent: *Citizens' Bank v. Rhutasel*, 68-597.

32. Sale of a stock of goods to one creditor for the purpose of delaying other creditors will not be fraudulent as to the vendee unless such purpose was known to him: *Hutchinson v. Watkins*, 17-475.

33. Where, pending action on a note, and three days prior to a judgment thereon, certain conveyances of property which would be subject to such judgment when rendered were made to third parties to secure claims which they held of the same nature and validity as that upon which suit was brought, and plaintiff after judgment bought in the property for a very small portion of its value and then sought to set aside such conveyances as fraudulent, it appearing that the debtor retained property sufficient in value to satisfy plaintiff's claim, *held*, that such conveyances would not be set aside as fraudulent: *Robinson v. First M. E. Church*, 59-717.

34. Where the grantee does not participate

in the fraudulent intent of grantor, but takes the property conveyed to secure his own *bona fide* claim subject to the payment of certain other indebtedness, and claims to hold for that purpose only, and to be willing to account for the balance for the satisfaction of any *bona fide* creditor, the conveyance is not to be treated as fraudulent: *Gould v. Hurto*, 61-45.

35. A conveyance in extinguishment of pre-existing indebtedness will not be fraudulent even between relatives, although there is evidence that the grantee has knowledge that the grantor has other creditors whom he is intending to defraud by such conveyance: *Adams v. Ryan*, 61-733.

36. The law will protect a creditor who by his diligence has secured his own claim, even though he knew of the failing condition of the debtor when he accepted the security, if his only purpose in accepting it was to protect his own interests: *Poole v. Seney*, 66-502.

37. A promise by the creditor that if the debtor will convey property to him in payment, he will reconvey it to the debtor's wife as a gift, it appearing that the amount of property thus conveyed is not in excess of the real indebtedness to the creditor, will not make the transaction fraudulent: *Smith v. Riggs*, 56-488.

38. The fact that a person is insolvent will not render a sale by him of property for cash and an existing indebtedness against him fraudulent. Nor would the fact that the purchaser held a chattel mortgage on the property purchased and other property, and by such purchase threw the burden of his mortgage upon such other property, which was subject to the claims of other creditors, render the sale void: *Connolly v. Dillrance*, 50-92.

39. A creditor, although having an honest claim, cannot use it for the purpose of hindering and delaying other creditors: *Craig v. Fowler*, 59-200.

40. A creditor must, in taking a mortgage, act for the purpose of securing his claim and in good faith. Such honesty of purpose and good faith would not exist if one of the objects in taking the security were to assist the debtor in placing his property beyond the reach of his other creditors: *Headington v. Langland*, 65-276.

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41. Grantee protected as to advances: Where the grantee in a fraudulent conveyance has paid off a mortgage, or purchased and taken an assignment of other liens upon the land prior to the judgment of the creditor seeking to set the conveyance aside, he should be subrogated to the rights of the original holder, and entitled to a lien on the property for the amount advanced by him: *Garner v. Philips*, 35-597; *Smith v. Grimes*, 43-356.

42. Where a conveyance of property from mother to son was made for one-half its value, the consideration being a sum paid and the assumption of a mortgage existing on the property, and the premises were sufficient in value to repay the consideration and also satisfy the claim which was sought to be enforced against the property, held, that the conveyance would, under the circumstances, be treated as fraudulent to the extent that the value of the property exceeded the consideration paid therefor, and such excess would be applied to the payment of the creditor's claim: *Johnston Harvester Co. v. Cibula*, 62-697.

43. Even where it is not shown that a conveyance is fraudulent, if it can be regarded as given as security for money advanced, it will be so treated, and the grantee will be considered as a mortgagee in possession: *Keeder v. Murphy*, 43-413.

44. Where it was shown that a conveyance was made in good faith to secure grantee for an indebtedness due to him from grantor, held, that such conveyance could not be set aside at the suit of an execution creditor, except upon payment by him of the indebtedness secured: *Moss v. Dearing*, 45-530.

45. Where, in consideration of a conveyance understood by both parties to be fraudulent, vendee paid a debt due from vendor to one of his creditors, held, that as the debtor had the right to make such a preference, the vendee was not liable to account for the portion of the value of the goods thus appropriated: *Starker v. Luse*, 38-595.

46. Fraudulent conveyances as between partners: The purchase by a partner of the interest of his copartner is not necessarily to be deemed to have been made in bad faith as to the creditors of such copartner, even though he is insolvent and the purchaser has

knowledge of such insolvency: *Darland v. Rosencrans*, 56-122.

47. The acceptance by a creditor of a member of a firm, of payment out of the partnership funds, or out of money borrowed by one member of the partnership from another, will not be deemed fraudulent in the absence of knowledge of fraudulent intent or of the inability of the partnership to pay its debts: *George v. Wamsley*, 64-175.

48. Where goods, sold by a firm, are partly paid for by the cancellation of an individual debt of one of the partners, this amounts to a diversion of firm property to the payment of individual indebtedness, and, if the firm is insolvent, constitutes an actual fraud upon its creditors: *Patterson v. Seaton*, 70—.

49. Fraudulent conveyances as between husband and wife: If the husband, after a voluntary conveyance to the wife, holds himself out to the world as the owner of the property, the transaction may be impeached for fraud if it appears that the representations of the husband were relied upon and that the creditor had a right to rely upon them: *Lyman v. Cessford*, 15-229.

50. The act of the wife in withholding from record a voluntary conveyance of the husband until credit had been given to the husband on the faith of the property, would perhaps be deemed a fraud, if wilfully or negligently done; but where the title in question was never in the husband, but the conveyance was procured by him to be made directly to the wife by third parties, and there was a failure by inadvertence to secure the recording of the deed by the wife, held, that a subsequent creditor could not have the deed set aside: *Ibid*.

51. Where a conveyance from the husband to the wife was upon good and sufficient consideration, accompanied with possession exclusive in its character, held, that the mere neglect to file the deed for record could not act as an estoppel of the wife in asserting her title: *Ray v. Teabout*, 65-157.

52. Facts in a particular case held sufficient to show knowledge on the part of the wife of the fraudulent character of a conveyance made to her by her husband: *Zimmerman v. Heinrichs*, 43-260.

53. While ante-nuptial settlements have been upheld against an existing creditor of

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the husband even when it was known to the wife that the husband was indebted, this will not be done when the settlement was grossly out of proportion to the husband's station and circumstances, so that the facts of the case will charge the wife with knowledge of the fraud: *Gordon v. Worthley*, 48-429.

54. Where, by the acts and declarations of a wife, holding out that the husband is worthy of credit by reason of the ownership of lands, a person is induced to give him credit, and render services under contract with him, the wife will be estopped from setting up her title to such lands against such person under a conveyance from the husband, even though it can be shown that she was the equitable owner of the property: *Hendershott v. Henry*, 63-744.

55. Where a deed to property purchased with the wife's money was by mistake made to the husband, without the wife's knowledge, and while the property stood in the husband's name he was accepted as surety on the faith of such property, but before judgment was recovered against him he conveyed the property to his wife, *held*, that such property could not be subjected to the payment of a judgment against the husband as such surety: *Crouse v. Morse*, 49-382.

56. The fact that title to land bought with money of the wife is taken in the name of the husband, and that while thus held by him debts are contracted, will not estop the wife from asserting her equitable title to the land as against such debtor: *Bennet v. Strait*, 63-620.

57. Where the husband, with his own money or the money of others which he holds, enters into business and acquires property in his wife's name, such property cannot be held by the wife free from her husband's debts: *Hamilton v. Lightner*, 53-470; *Ticonic Bank v. Harvey*, 16-141; *Laing v. Cunningham*, 17-510.

58. Where a husband and wife acquire property by their joint industry and management, which is taken in the name of the husband; a conveyance thereof, without consideration, to the wife, to the prejudice of existing creditors of the husband, will be set aside: *Langford v. Thurlby*, 60-105.

59. A vendor's lien cannot be enforced by

the assignee of the vendor as against the wife of the vendee, to whom the property has been conveyed in consideration of an existing indebtedness due her from her husband, and with the knowledge and consent of the holder of the lien: *Shepard v. Pratt*, 32-296.

60. A conveyance of land by the husband to the wife, to secure advances of money made by her to him, is valid: *Doyle v. McGuire*, 38-410.

61. Where a debtor who would have been worth ten thousand dollars if persons owing him had remained solvent and performed their contracts, conveyed three thousand dollars' worth of real property to his wife in payment of money advanced him by her, *held*, that the transaction was not fraudulent: *Jones v. Brandt*, 59-382.

62. Where the wife has advanced money to the husband with the understanding that it shall be repaid to her, the fact that her claim against her husband has become barred by the statute of limitations will not render fraudulent a conveyance by him in satisfaction of such indebtedness. The husband's moral obligation to pay the wife is sufficient to prevent such a transfer being fraudulent: *City Bank v. Wright*, 68-132.

63. The fact that the wife in accepting such conveyance has knowledge of the embarrassed condition of her husband will not render the conveyance fraudulent. She has the same right as other creditors to obtain payment under such circumstances: *Ibid*.

64. Evidence in a particular case *held* sufficient to show that a conveyance from husband to wife was made in payment of a valid debt from the husband to the wife and was therefore not fraudulent: *Farmers' Nat. Bank v. Warner*, 68-147.

65. Cases of conveyance of property from husband to wife, made in consideration of money previously received from the wife by the husband, and claimed by creditors to be fraudulent as to them, involve the good faith of the ownership of the property and the existence of debts as between the husband and wife, and commonly depend for determination upon circumstances from which fraud is inferred. Under such circumstances the supreme court will not on appeal disturb the verdict of a jury on such question unless

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they are sure that, allowing to the verdict the presumption in its favor arising from the opportunity of the jury to judge of the credibility of the witnesses, it is so against the evidence as to raise the presumption of passion or prejudice: *Enneking v. Scholtz*, 69-473.

66. Where, soon after marriage, the wife gave to the husband five or six hundred dollars coming to her by inheritance, which he invested in property in his own name, and forty years afterward the husband conveyed to the wife other property which was a portion of what had been obtained by him through various exchanges from the property originally bought with the wife's money, *held*, that the money of the wife given to her husband could not, without any express agreement for repayment, be considered a consideration for the conveyance by the husband to the wife, and that such conveyance, being procured by the wife from the husband for the purpose of preventing him from squandering his property, was fraudulent as to existing creditors: *Moore v. Orman*, 56-39.

67. Sale by the wife to the husband of personal property, taking back a chattel mortgage thereon for the purchase money, and the assignment of a policy of insurance on such property, *held* not to be a fraudulent transaction under the circumstances: *Vandercook v. Gere*, 69-467.

68. Where conveyances to the wife with intent to defraud creditors are made upon a partial consideration, they should be treated as a security for the amount of the husband's indebtedness to her and sustained to that extent: *Keeder v. Murphy*, 43-413; *Stamy v. Laning*, 58-662.

69. A father having intended to convey a portion of his real estate to his son L., was requested by him to make the conveyance to the wife of said L., which was accordingly done. In an action by the creditors of L., to subject the land to their claims, *held*, that in the absence of a showing of fraud or bad faith on the part of the donor or donee, the property could not be reached, although L. might have had a fraudulent purpose in view in requesting the deed to be made to his wife: *Stow v. Miller*, 16-460.

70. Where one who is insolvent pays a consideration for property which he procures

to be conveyed to his wife, the conveyance is void: *Geur v. Schrei*, 57-666; *Triplett v. Graham*, 58-135.

71. Voluntary conveyances between husband and wife: It is not necessary, in case of a voluntary conveyance from the husband to the wife without consideration, and which is made at a time when the husband is largely indebted and insolvent, to allege fraud. Such a conveyance is presumptively fraudulent: *Triplett v. Graham*, 58-135; *Watson v. Riskamire*, 45-231.

72. A voluntary conveyance by the husband to the wife while his debts were inconsiderable as compared with his property, *held* fraudulent, and set aside upon the application of subsequent creditors, the husband having remained in possession as the apparent owner: *Gardner v. Baker*, 25-343.

73. A voluntary conveyance of land by husband to wife, where it does not appear that the husband was indebted at the time, and where no fraud is shown, is not fraudulent as to subsequent creditors: *Shepard v. Pratt*, 32-296; *State v. Wallace*, 67-77.

74. Such a conveyance cannot be rendered fraudulent by reason of subsequent insolvency: *Phillips v. Potter*, 32-589.

75. A voluntary conveyance from husband to wife, which still leaves the husband solvent and possessed of other property sufficient to satisfy his debts, cannot be set aside as fraudulent: *Cours v. Hanna*, 34-597.

76. A conveyance from husband to wife, which purports to be made for a valuable consideration, is not of itself presumptively a gift, and the burden is upon the party claiming it to be such to show the want of consideration: *Stephenson v. Cook*, 64-265.

77. A gift by a husband to his wife is not of itself improper, and before a creditor of the husband can ask to have it set aside, he must show that the husband has not sufficient property remaining to enable the creditor to collect his claim: *Ibid*.

78. Where it did not appear but that at the time of the voluntary conveyance to the wife, the husband had property sufficient to pay all his debts, *held*, that the conveyance was not fraudulent: *Lloyd v. Bunce*, 41-660.

79. In view of the wide latitude which is allowed in the admission of testimony to show fraud, *held*, in a case where a fraud-

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ulent conveyance of personal property from husband to wife was alleged, evidence that the wife had a large amount of other property in her hands transferred to her by her husband was admissible: *Presnall v. Herbert*, 84-539.

80. Under particular facts, *held*, that a conveyance from husband to wife was without consideration and therefore void as to existing creditors: *Boulton v. Hahn*, 58-518.

81. Where the wife joined the husband in a conveyance of property to a third party with the understanding that such third party should reconvey a portion of such property to her in consideration of her dower interest, which was done, *held*, that the conveyance to the wife was without consideration and voluntary as against creditors, the wife having no such interest in the property during her life as to render such conveyance valid against creditors: *Haynes v. Kline*, 64-308.

82. Under a certain state of facts, a deed from husband to wife *held* fraudulent and void as against existing creditors of the husband: *Brainard v. Van Kuran*, 22-261; *Pratt v. Green*, 25-39.

83. The purchase of an interest by the wife in mines owned by her husband, and the investment of the proceeds of the sale of such interest in other property managed principally by him, *held* not fraudulent in a particular case: *Sears v. Robinson*, 61-745.

84. Under particular facts, *held*, that a conveyance by a husband to the wife was not fraudulent as against creditors: *Addicken v. Humphal*, 56-365.

85. Crops raised on land which is conveyed from husband to wife by an instrument in the form of an absolute deed, but intended as a mortgage, are not necessarily subject to the payment of the husband's debts: *Lanning v. Seaton*, 68-156.

86. Objection to the conveyance of the homestead from husband to wife cannot be made by a creditor after the husband's death, unless it appears that the husband was indebted when such conveyance was made: *Kendall v. Kendall*, 42-464.

87. Conveyances between parents and children: A sale of land by parent to child for a consideration less than that named in the deed, and immediately preceding insolvency, is a circumstance sufficient to raise a

presumption of fraud, but such presumption must be sustained by proof when fraud is denied in the answer: *Culbertson v. Luckey*, 13-12.

88. A conveyance from father to son, for the purpose of defrauding creditors of the father, leaves the land subject to the father's debts as before: *State Bank v. Harrow*, 28-426.

89. Where the owner of property obtained the release of a claim for which it was held by a third person and secured a reconveyance thereof to children without consideration, *held*, that the property was subject to the payment of the debts of such owner, even though the satisfaction of the claim for which it was held before reconveyance was procured by the application thereto of property exempt from execution: *Friedlander v. Mahoney*, 31-311.

90. A conveyance made to a son in part consideration of the assumption by him of the payment of notes made by the grantor to his daughters for services rendered in the family of such grantor, while members of such family, will be deemed fraudulent, even though a part of the consideration of such conveyance may actually have been paid: *Irish v. Bradford*, 64-303.

91. Where husband and wife, while insolvent, conveyed property owned by them, and, after several subsequent conveyances made within a short time, it came into the hands of their son, the last conveyance being made by his procurement and in consideration of the assumption of liens on the property less than its value, *held*, that, so far as the value of the property exceeded the liens assumed, the conveyance was fraudulent: *Lyon v. Haddock*, 59-682.

92. The transfer of property to a son to pay a *bona fide* indebtedness will not be regarded as fraudulent, although it gives him a preference over other creditors: *Sands v. Peirson*, 61-702.

93. Where it appeared that a father sold to a son, just come of age and still living at home, the farm on which they lived, the son agreeing to pay therefor the full value in debts of the father, for a large portion of which the son was already liable as surety, *held*, that the conveyance was not fraudulent, even though it left other debts of the

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father unprovided for: *Fleischer v. Dignon*, 53-288.

94. Where a husband induced his second wife to join in a conveyance of the homestead to his eldest son by his first wife, promising to give her a portion of the proceeds and furnish her further support, but failed to do so, *held*, that there was no fraud warranting the setting aside of the deed as fraudulent in behalf of a party who had recovered judgment against the husband for support subsequently furnished the wife: *Curl v. Donaldson*, 53-291.

95. A reconveyance from son to father in payment of purchase money on a conveyance of the same property from the father to the son will not be considered fraudulent in the absence of proof of actual fraudulent intent, or that the conveyance from father to son was intended as a gift: *First Nat. Bank v. Hostetter*, 61-395.

96. Where the daughter of a debtor occupied land which it was sought to have subjected to the payment of his debts, and subsequently, pending such litigation, bought in the same from a purchaser at a trustee's sale, *held*, that she was not subject to the creditor's claim unless it appeared that she bought in the property with her father's money: *Simple v. McCrary*, 48-37.

97. A conveyance by a father to a daughter for services rendered in his family, *held* not fraudulent: *Collier v. French*, 64-577.

98. Where a father caused a conveyance of property to be made to his son for services performed fifteen years before, and such conveyance was without knowledge of any claim on the part of a creditor who afterwards sought to set it aside, *held*, that there was not sufficient evidence of fraudulent intent to render the conveyance void: *Hunt v. Hoover*, 84-77.

99. In a particular case *held* that a conveyance by a parent to a child who had attained majority, but remained a member of the family, for services rendered, was made in pursuance of the parent's express contract and was therefore valid: *Chadwick v. Devore*, 69-637.

100. Conveyance of property to children by a debtor immediately after a decision adverse to him in the supreme court and pend-

ing a rehearing, *held* fraudulent: *Potter v. Phillips*, 44-353.

101. Under facts in a particular case, *held*, that a conveyance from father to son was made by the father for the purpose of defeating his creditors and that the son had knowledge of such intention: *Dickerman v. Farrell*, 59-759.

102. In particular cases, *held*, that conveyances by parents to children were without consideration and fraudulent: *Hart v. Flinn*, 86-386; *Star Wagon Co. v. Maurer*, 53-741; *Blanchard v. Glasier*, 84-875.

103. Evidence in a particular case *held* not sufficient to render a conveyance from a son to his mother fraudulent: *Caffal v. Hale*, 49-53.

104. Other relationship: Where a conveyance was made by a nephew to an uncle, to whom the former had been in the habit of looking for counsel and advice, upon the suggestion that it was necessary to do so in order to prevent the property being taken by others who would claim it as heirs, *held*, that the relation between the parties was such that equity would grant relief from such conveyance, it appearing that there were actually no creditors who would have been defrauded by the transaction: *Williams v. Collins*, 67-413.

105. Conveyance of homestead: The conveyance of a homestead which is not subject to the claims of creditors cannot be set aside as fraudulent as to such creditors: *Smith v. Grimes*, 48-356; *Kendall v. Kendall*, 42-464.

106. If a party makes a conveyance of property, such as a homestead, which is exempt from the claims of creditors, such conveyance cannot be set aside as fraudulent as to them, even though voluntary and with the intention of preventing their claims from attaching thereto: *Delashmut v. Trau*, 44-613.

107. Whatever may be the intent of the conveyance it cannot be set aside as in fraud of creditors, unless it does in fact hinder or delay them in collecting their claims. Therefore where a conveyance of property including the homestead was made to a creditor, and the amount of his claim exceeded the value of so much of said property as was not exempt as a homestead, *held*, that the conveyance could not be considered fraudulent,

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whatever might have been the debtor's intention: *Aultman v. Heiney*, 59-854.

108. The fact that a debtor, holding a homestead exempt from execution for his debts, exchanges the same for other property which he procures to be conveyed directly to his wife, does not constitute such conveyance to his wife fraudulent: *Jones v. Brandt*, 59-882.

109. Where defendant had sold property of his wife and used the proceeds, agreeing to convey to her property of like value, and afterwards exchanged the homestead, which was in his own name, for property equal in value to the amount he was to repay her, the deed of which property was made to her; and it appeared that the homestead so conveyed was not subject to the claims of creditors, and that the wife only joined in the conveyance of the homestead on condition that the property acquired should be deeded to her, *held*, that the conveyance was not fraudulent as to such creditors: *Officer v. Evans*, 48-557.

110. Where the wife joins in a conveyance of the homestead which is not liable to the claims of creditors, and property exchanged therefor is conveyed to her, the conveyance cannot be set aside as fraudulent as against such creditors: *Gwyer v. Figgins*, 37-517.

111. The conveyance of property for less than its value cannot be set aside as fraudulent at the suit of creditors when it is a homestead and not liable to the claims of such creditors: *Griffin v. Sheley*, 55-513.

112. Exempt property; earnings: Although exempt property is used to satisfy a claim for which other property of the debtor is held by a third person, yet a reconveyance of such property by such third person to children of the owner will be fraudulent, and the property will be subject to debts of the owner: *Friedlander v. Mahoney*, 31-311.

113. The use by the husband of personal earnings in payment of property purchased by his wife amounts to the giving of such property to his wife, and if the earnings are exempt from execution at the time they are so employed, such a purchase does not constitute a fraud upon the husband's creditors: *Robb v. Brewer*, 60-539.

114. It is not fraudulent for a debtor to contract to render personal services with the

aid of implements exempted to him by law in the service of another to raise crops, etc., and such crops do not become liable for his indebtedness, although, if raised by him on his own account by the same services, they would be subject to his debts: *Patterson v. Johnson*, 59-397.

115. Voluntary conveyances: The want of consideration may be a badge of fraud, but it is only presumptive and not conclusive evidence of it, and may be met and rebutted on the other side: *Carson v. Foley*, 1-524.

116. A mere voluntary conveyance is not fraudulent *per se* as to existing creditors: *Gwyer v. Figgins*, 37-517.

117. Whether a voluntary conveyance to a child will be fraudulent as to creditors of the father in the absence of actual intent to defraud will depend upon its reasonableness and the condition of the grantor as to his ability to pay his debts out of other property retained by him: *Stewart v. Rogers*, 25-395.

118. A conveyance cannot be considered fraudulent as to creditors when it is made in the discharge of a moral obligation, although such obligation is one which cannot be enforced at law: *Cottrell v. Smith*, 63-181.

119. Voluntary conveyances, while good between the parties, are void in so far as they have the effect to delay, hinder or defraud creditors. If the person making the conveyance is indebted at the time, the burden of proof is upon him to establish facts which will repel the presumption of a fraudulent intent: *Elwell v. Walker*, 52-256.

120. If at the time of the conveyance the grantee has more than sufficient property to pay his other debts, the conveyance may be valid even though the other property may turn out to be inadequate by reason of some accident which human foresight could not guard against, such as losses by trade or by fire or storm. But the ordinary fluctuation in the value of property occasioned by the condition of mercantile affairs cannot be ranked among such casualties. Where the party making the conveyance was indebted at the time it was made, but claimed that his remaining property was sufficient to pay his debts, *held*, that the fact that the debt was an Iowa debt and the conveyance in question covered all the debtor's Iowa property, and that his remaining property was heavily

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incumbered, and that at the time of the suit his property was exhausted in payment of indebtedness prior to that of plaintiff, without his having suffered any casualties, were sufficient to stamp the conveyance as fraudulent: *Ibid.*

121. A party who sets up a voluntary conveyance in opposition to the claims of pre-existing creditors is required to show that the means of the donor, independently of the property conveyed, were abundantly ample to satisfy all his creditors, and where it is found that the debtor is insolvent at the time judgment is rendered, his insolvency will be considered as extending back beyond the voluntary conveyance of the property made during his indebtedness unless the contrary is shown: *Strong v. Lawrence*, 58-55.

122. Even where a partial consideration is paid, if the difference between the price paid and the actual value of the property is apparent, the conveyance will be regarded as voluntary to the extent of that difference: *Ibid.*; *Lyon v. Haddock*, 59-682.

123. A conveyance which on its face purports to be voluntary as to part of the property is void as to creditors to the extent that it is voluntary, and where a creditor seeks to subject a part of the property to the payment of his debt, the burden of proof is upon defendant to show the deed to have been for a valuable consideration: *Baldwin v. Tuttle*, 23-66.

124. Personal property given by a father to his child, while solvent, which is taken possession of by the child, and thereafter remains under his exclusive control, is not liable to execution on a debt of the father's subsequently contracted, though the property remained in the father's house, and there was no conveyance in writing, nor notice of the child's ownership of record: *Pierson v. Heisey*, 19-114.

125. A voluntary deed, valid and *bona fide* when made, cannot be rendered fraudulent by subsequent embarrassments of the grantor, and in the absence of fraudulent intent will be good against subsequent creditors: *Lyman v. Cessford*, 15-229.

126. A subsequent indebtedness is not sufficient to make a voluntary conveyance fraudulent; to have that effect there must

have been at the time, on the part of the grantor, a fraudulent intent: *Ibid.*

127. A voluntary conveyance, made in good faith, cannot be defeated by a subsequent purchaser or incumbrancer who had notice of it: *Wolf v. Van Metre*, 23-397; *Gardner v. Cole*, 21-205.

128. The payment of individual debts of a partner out of the assets of the firm is not, in law, regarded as voluntary and fraudulent as to the creditors of the partnership, provided there is any actual consideration, such as that the individual partner shall remain in the firm and assist in carrying on the business: *George v. Wamsley*, 64-175.

129. Land held by a voluntary conveyance cannot, after the death of the grantor, be subjected to the payment of the expenses of the administration of his estate: *Willett v. Malli*, 65-675.

130. In a particular case, held that absence of consideration was not affirmatively established, and therefore, no actual fraud being shown, the mortgage would be sustained: *Preusser v. Henshaw*, 49-41.

131. Facts in a particular case held sufficient to show that a conveyance of property by a judgment debtor was not supported by a consideration and was therefore void as to his creditors: *Warder v. Rivers*, 64-412.

132. Where a wife, being surety on her husband's note, from which no liability arose against her, voluntarily conveyed lands owned by her to her children, and afterwards suffered judgment to go against her on the note by default, which was conclusive upon her, it was held that the lands so conveyed by her could not be subjected to the payment of the judgment, one half the court putting it upon the ground that the judgment did not relate back to the date of the note, and the other half on the ground that the judgment creditors had released security for the note after the conveyance in question had been made, and with notice of it: *Wolf v. Van Metre*, 23-397.

133. The rule in this country seems to be, that if the property transferred by the debtor, under voluntary conveyance, be such as could be reached by the creditor, either in a court of law or equity, such conveyance to the prejudice of creditors would be void: *Ibid.*

Who may have relief against.

II. WHO MAY HAVE RELIEF AGAINST.

134. Not one who has legal remedy: A plaintiff who has a complete remedy for the enforcement of his judgment against property of the debtor is not entitled in equity to an action against a fraudulent conveyance of other property: *Ayers v. Rivers*, 64-548.

135. Return of execution; proof of insolvency: A plaintiff seeking in a court of equity to have a conveyance set aside as fraudulent must show, by return of *nulla bona* (no property found) upon the execution, or in some other way, that he has no remedy at law for the enforcement of his claim: *Gurjer v. Figgins*, 87-517.

136. But it is not indispensable that the grantor shall have issued execution and had it returned *nulla bona*, if he charges in his bill and proves on the hearing that the debtor is in fact insolvent, and that an execution, if issued, must necessarily be returned unsatisfied. In such case there is no reason to require the creditor to go through the fruitless form: *Gordon v. Worthley*, 48-429.

137. While the return of *nulla bona* is the most satisfactory method of establishing insolvency, yet that fact may be charged and proved as a fact without such formality having been complied with. But no proof of insolvency is necessary where the action is against the estate of a decedent: *Postlewait v. Howes*, 3-365.

138. In the absence of any evidence of the insolvency of the debtor an action to set aside a conveyance by him cannot be maintained: *Pearson v. Maxfield*, 51-76.

139. In order to support an action to set aside a conveyance as being in fraud of creditors, it is not necessary to show an execution returned *nulla bona*. It is sufficient if plaintiff show his inability to collect the judgment by execution. In such case it will not defeat plaintiff's right to have the conveyance set aside that defendant is the real owner of other property which he has also fraudulently conveyed and to which a clear title upon sale under execution could not, therefore, be made: *Miller v. Dayton*, 47-312.

140. Where an execution has been satisfied in whole or in part by the sale of defendant's interest in property claimed to have been fraudulently conveyed, and the pur-

chaser goes into equity to perfect his title or set aside such fraudulent conveyance, the rule that there must be a return of *nulla bona* does not apply: *Harrison v. Kramer*, 3-543.

141. A bill in equity to remove out of the way of an execution a pretended conveyance which is alleged to be void may be maintained although it does not appear that the party has exhausted his legal remedies in his efforts to obtain satisfaction of his judgment. It is not, therefore, necessary in such case that the execution be returned *nulla bona*: *Loving v. Pairo*, 10-282.

142. A judgment creditor is entitled, after levy under execution and before sale, to bring suit in equity to set aside a conveyance of the real estate levied on as being fraudulent and void, and in such case a return of *nulla bona* is unnecessary: *Brainard v. Van Kuran*, 22-261.

143. Where a judgment is recovered jointly against two parties, one as maker, the other as indorser and guarantor, the judgment creditor may maintain action to set aside a fraudulent conveyance by the former without showing the insolvency of the latter: *Strong v. Lawrence*, 58-55.

144. Party not injuriously affected: Where action was brought to set aside a fraudulent conveyance of a deceased debtor and subject the property to the payment of plaintiff's claim, *held*, that as there were ample assets in the hands of the executor to pay off any claim of plaintiff's which was allowed, and as any claim not allowed was then barred by the statute, the plaintiff had failed to prove any indebtedness against the estate which entitled him to the relief asked: *Jordan v. Stephenson*, 17-514.

145. Existing creditors: It is a prior and not a subsequent creditor that can take advantage of the fraud: *Whitescarver v. Bonney*, 9-480; *Fifield v. Gaston*, 12-218.

146. To enable an attaching creditor to seize and hold property previously conveyed, it is incumbent upon him not only to show that the conveyance was fraudulent, but also to aver and prove that he was a creditor of the vendor at the time of the conveyance: *Day v. Kendall*, 60-414.

147. Subsequent creditors: On the mere ground that the conveyance is voluntary, where the grantor has no fraudulent intent,

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a subsequent creditor cannot impeach it. It seems that, if it was actually fraudulent, the property being held in secret trust for the grantor, who has obtained credit on the faith of his possession and apparent and asserted ownership, a subsequent creditor can have relief against the previous conveyance: *Hook v. Mowre*, 17-195.

148. Where a debtor made a conveyance to his wife, and had existing at the time a debt which was subsequently substituted for one owed by his creditor to a third party, the latter was regarded as an existing rather than a subsequent creditor, and it was held that he might attack the conveyance: *Gardner v. Baker*, 25-848.

149. A voluntary conveyance of all the property of a person who is largely indebted, and who pays such existing debts by the contracting of subsequent debts, may be set aside at the instance of such subsequent creditors: *Barhydt v. Perry*, 57-416.

150. As to whether voluntary and fraudulent conveyances are valid as to subsequent creditors, the decisions in this state are hardly reconcilable. The current of authorities generally is undoubtedly to the effect that a deed intentionally made to defraud existing creditors will be held void as to subsequent creditors. (Per *Beck, J.*, in dissenting opinion, collecting the cases): *Bonnell v. Allerton*, 51-166.

151. Creditor in case of tort: A person having a claim for a tort is a creditor in such sense that a conveyance to defeat any judgment which he may afterwards obtain is a conveyance to defraud creditors: *Weir v. Day*, 57-84.

152. Subsequent judgment: A fraudulent conveyance may be set aside at the suit of the person recovering a judgment in an action for tort, although at the time of the conveyance plaintiff in the action had not yet recovered his judgment: *Miller v. Dayton*, 47-312.

153. A creditor may pursue property of the debtor disposed of in fraud of creditors, although his judgment is not recovered until after such disposition has been made: *Peck-enbaugh v. Cook*, 61-477.

154. A general creditor who has not yet obtained judgment cannot have an injunction to restrain the disposal of prop-

erty by his debtor: *Buchanan v. Marsh*, 17-494.

Further as to who may have an injunction against fraudulent conveyances, see INJUNCTION, §§ 88-95.

155. Fraudulent creditor: A person seeking to defeat the claims of a creditor by setting up a claim against the debtor which is fraudulent or collusive cannot have a fraudulent conveyance made by such debtor set aside: *Jones v. Farris*, 70—.

156. A judgment creditor may proceed in equity to set aside a fraudulent conveyance, although the judgment has become dormant so that it cannot be enforced without being revived: *Postlewait v. Howes*, 3-365.

157. A mortgagee who has not yet recovered judgment may have an injunction to restrain a judicial sale in fraud of his rights: *Brigham v. White*, 44-677.

158. Attachment: The service of garnishment will not entitle a creditor to maintain an action to set aside a fraudulent mortgage. He must have secured a lien by levy under his attachment: *Maish v. Bird*, 4 McCrary, 129.

159. An assignee for the benefit of creditors may maintain an action to set aside a conveyance by his assignor made in fraud of creditors: *Schaller v. Wright*, 70—.

And see further on this point, ASSIGNMENTS, §§ 129-133.

160. The administrator of a decedent's estate may maintain an action grounded upon a fraudulent alienation of property by the decedent, when the estate is insolvent and the property or its value is required for the payment of debts: *Cooley v. Brown*, 30-470; *Doe v. Clark*, 42-123; *Harlin v. Stevenson*, 30-371.

161. Effect as between parties, heirs, privies, etc.: A conveyance made for the purpose of hindering, delaying and defrauding creditors will nevertheless pass the title against all persons except creditors of the grantee and bona fide purchasers from him for a valuable consideration: *Wright v. Howell*, 35-288; *Mellen v. Ames*, 39-283.

162. A conveyance made or procured to be made to defraud creditors will not be set aside at the instance of the parties to it, but equity will leave them to their remedy at

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law, and will not interfere in favor of either: *Holliday v. Holliday*, 10-200.

163. A deed executed to defraud creditors is valid between the parties and their heirs, and equity will not require the grantee or his heirs to reconvey by way of enforcing a trust between the parties: *Stephens v. Harrow's Heirs*, 26-458.

164. The vendor, in a sale made to defraud creditors, cannot set up the fraud against a mortgagee of the vendee: *Osborn v. Ratliff*, 58-748.

165. A party who makes a conveyance with intent to hinder, delay or defraud his creditors cannot recover from his grantee or subsequent grantees, and under such circumstances it is immaterial whether or not such grantee had knowledge of the fraudulent intent of the grantor: *Weir v. Day*, 57-84.

166. The fraudulent grantee can have no relief as against a purchaser in good faith and for a valuable consideration from the fraudulent grantor, even with notice: *Hurley v. Osler*, 44-642.

See, also, *infra*, §§ 188-203.

167. An attorney employed to act for the grantee in a fraudulent conveyance cannot, as against his client, claim that the conveyance is void: *Byington v. Moore*, 62-470.

168. The conveyance of land by a corporation, being authorized by its board of directors, cannot be attacked nor set aside except by some one holding an equitable right superior to that of the grantee: *Miller v. Iowa Land Co.*, 56-374.

169. Where one, who had made a voluntary conveyance to his wife, afterwards procured a judgment against her grantee by collusion and fraud, and set up such judgment in attacking the conveyance from such grantee as being fraudulent as to creditors of the latter, it was held that such judgment was void as to such defendant who held under the voluntary conveyance: *King v. Tharp*, 26-283.

170. While equity will not, as between parties and their heirs, interfere to set aside a conveyance which is without consideration and made with a fraudulent intent on the part of both parties to hinder, delay and defraud creditors of the grantor, neither will it lend its aid to enable parties to consummate their fraudulent design, and an action to cor-

rect such a deed cannot therefore be maintained: *Gebhard v. Sattler*, 40-152.

171. Where a conveyance claimed to be fraudulent is afterwards canceled, leaving the parties in the same position as before it was made, it cannot afterwards be the ground of an action, although it was originally made with intent to defraud: *Davidson v. Dwyer*, 62-332.

172. Where conveyance is not fraudulent: Where plaintiff had made a conveyance of property to a party to protect himself against certain claims that were being prosecuted against him, which claims were, as he insisted, groundless, and were afterwards held to be so, held, that as he was not in fact indebted at the time the conveyance was made, it was not void as made in fraud of creditors and might be shown to have been in trust merely: *Morris v. Landaur*, 48-234.

173. If a party, for the purpose of putting his property beyond the reach of a third person, conveys it to a grantee upon the advice of such grantee, he may have it set aside as for want of consideration if the third person has, in fact, no claim which could be injuriously affected by such conveyance, but the burden of proving that fact is on the grantor seeking relief. But proof of a prior settlement would be *prima facie* sufficient, and would throw upon defendant the burden of impeaching such settlement: *Kervick v. Mitchell*, 68-273.

174. Although the party making a fraudulent conveyance cannot be relieved in equity, yet if there are no creditors, purchasers or other persons, having a claim or right to the property which may be enforced in law or equity, then the claim will not be in fact fraudulent, whatever the intention with which it was made, and if procured by fraud or undue influence, it may be set aside at the suit of the party making it: *Day v. Loun*, 51-364.

III. MODE OF RELIEF; PARTIES AGAINST WHOM RELIEF MAY BE GRANTED.

175. How the creditor may proceed: A creditor may sell under execution the interest of his debtor in the property claimed to be fraudulently conveyed, and having become the purchaser, if there is no redemption, file

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his bill to quiet his title, or the person holding the adverse title may file his bill and enjoin the creditor from interfering with his property until the title thereto is settled: *Harrison v. Kramer*, 3-543.

176. Instead of adopting this course, the creditors may, in the first instance, after the return of an execution unsatisfied, commence their suit in equity to remove the obstruction and subject the property to the satisfaction of their claims: *Bridgman v. McKissick*, 15-260.

177. In such case the creditor who first brings his equitable action acquires a priority over one who has not yet sought relief in equity, but has levied on and sold the property fraudulently conveyed: *Ibid*.

178. A sale on execution without subsequent action to remove the fraudulent conveyance would confer a mere barren right without value, because the legal title of the fraudulent grantee, without an adjudication against him, would be an insuperable barrier to the acquisition of any right, title or possession. Therefore a creditor who obtains his judgment after a fraudulent conveyance has no statutory right to redeem the property from a sale thereof made under special execution at the suit of other creditors, who have had the conveyance set aside in a proceeding in equity, for the reason that such fraudulent conveyance was absolute as to the grantor, and he had no title to which the judgment could attach as a lien: *Howland v. Knox*, 59-46.

179. Where property levied on by an officer is in possession of a third person who claims to be owner thereof under sale from the execution debtor, proof of such possession and sale is sufficient to make out a *prima facie* case in an action by the person in possession to recover the property from the officer. If the officer relies upon the fact that the sale is fraudulent, the burden of proof is upon him to show it. That fact being shown, he may then rely upon the writ, and he will have established his right to hold the property as against the plaintiff: *Parsons v. Hedges*, 15-119.

180. The usual proceeding to subject personal property fraudulently conveyed to the payment of debts is to levy thereon as though no such conveyance had been made, and if the grantee seeks to assert his title by re-

plevin, to test the validity of the conveyance in that action. An equitable action against the grantee in such conveyance to subject the property to the payment of the debt is not usual: *Gould v. Hurto*, 61-45.

181. A judgment creditor, by garnishing the mortgagee, may reach his debtor's property under a fraudulent mortgage, whether it be fraudulent on its face or shown to be so by evidence *aliunde*: *Brainard v. Van Kuran*, 22-261.

182. **Liability of grantee for interest:** Where a conveyance is set aside as fraudulent, it appearing that the grantee has disposed of the property and appropriated it to his own use, he may be treated as having wrongfully received and illegally held it, and interest should be allowed as against him from the time of receiving such proceeds. But if he has acted without fraud or collusion, and has been restrained by the fact that the fund was in the custody of the law from paying it over, he will not be liable for interest: *Wilson v. Horr*, 15-489.

183. In an action to set aside a fraudulent conveyance and subject the property to payment of plaintiff's judgment, the court may not only decree that the property be subject to such judgment, but may order the sale of the property to satisfy it and the issuance of a special execution therefor, and the fact that the defendant is thus compelled to pay interest upon interest on the judgment until satisfied will not render the decree improper: *Searing v. Berry*, 58-20.

184. **Parties:** In an action to set aside a conveyance by a person deceased as having been made in fraud of creditors, his heirs are neither necessary nor proper parties. They are concluded by the conveyance from asserting any interest in the property: *Harlin v. Stevenson*, 30-371.

185. In such an action the grantor is a proper but not a necessary party: *Potter v. Phillips*, 44-353.

186. **Following property into hands of purchaser:** The creditor may pursue property of a fraudulent debtor or the proceeds thereof, wherever it can be found, into the hands of a purchaser with notice, but it is questionable whether in an action at law a judgment creditor can, under his levy, hold property the possession and title of which

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was never in the debtor but has been procured with the proceeds of the property fraudulently conveyed: *Rutledge v. Evans*, 11-287.

187. In such case the title and right of possession of the property fraudulently conveyed being in the grantee, the property obtained in exchange therefor vests in him, and the debtor has no interest in such property which can be levied upon and sold: *Ibid*.

188. Subsequent purchasers: The statute of 27th Elizabeth, designed to protect subsequent good faith purchasers of real property as against fraudulent or collusive transfers, has never been re-enacted in this state, but, as it antedates the settlement of our country, it is a part of our unwritten law: *Gardner v. Cole*, 21-205; *Wright v. Howell*, 35-288.

189. A conveyance originating in a fraudulent purpose and without consideration of value, the grantor remaining in possession and claiming ownership, is void as to a subsequent purchaser from such grantor, who buys without actual notice of the prior deed and pays value: *Gardner v. Cole*, 21-205.

190. The constructive notice arising from the record of a deed which is actually fraudulent, the grantor remaining in possession, claiming and selling the property as his own to a purchaser for value, without actual notice, does not prevent such subsequent purchaser from avoiding the prior deed, which would otherwise work a fraud upon him: *Ibid*.

191. In the construction of the statute of 27th Elizabeth, the American courts have very generally concurred in holding that, not being bound to do so, they would not follow the English rule that a subsequent purchaser with notice may avoid a prior voluntary conveyance made in good faith, as, for example, to a wife or children, and under circumstances repelling the idea of fraud: *Ibid*.

192. A good faith purchaser for value from the grantor, in a fraudulent conveyance, will be protected as against the grantee therein, even though such purchaser had knowledge of such fraudulent conveyance: *Hurley v. Osler*, 44-642.

193. In an equitable action to quiet title to real property, a defendant who claims title through a deed made by the holder of

the legal title for a fraudulent purpose, without consideration, and after notice of the levy of an attachment on the premises by the plaintiff, cannot dispute plaintiff's title: *Greeley v. Sample*, 22-388.

194. A grantee, by trust deed, of a portion of lands fraudulently conveyed to the grantor, is not estopped afterwards from setting up the fraud in the conveyance to his grantor, if there is no showing that he had full knowledge of the fraud at the time he took his conveyance: *Baldwin v. Tuttle*, 23-66.

195. Action to set aside a fraudulent conveyance may be maintained against the purchaser of the property with knowledge of all the facts: *Cooley v. Brown*, 30-470.

196. It is now the settled American doctrine that a *bona fide* purchaser for a valuable consideration is protected under the statutes of the 18th and 27th Elizabeth, as adopted in this country, whether he purchases from a fraudulent grantor or a fraudulent grantee, and that there is no difference in this respect between a deed to defraud subsequent creditors and one to defraud subsequent purchasers: *Wright v. Howell*, 35-288.

197. Therefore, subject to the rights of creditors of the fraudulent grantor, a *bona fide* purchaser from the fraudulent grantee takes subject to the liens and judgments existing against such grantee: *Ibid*.

198. An innocent purchaser from the grantee in a fraudulent conveyance is not affected by a sheriff's sale of the property under a judgment against the grantor: *Gardner v. Jaques*, 42-577.

199. Such a purchaser also takes the property free from the lien of an attachment in a suit against the fraudulent grantor: *Eldred v. Drake*, 43-569.

200. A *bona fide* purchaser for value of lands from the wife holding the legal title, having neither actual nor constructive notice of fraud in the conveyance of the same to her from her husband, or of the levy thereon of an attachment in a suit against the husband alone, will hold the property against creditors of the husband, even though the conveyance to the wife was for a fraudulent purpose: *Bailey v. McGregor*, 46-667.

201. As between the grantee in a fraudulent conveyance and a purchaser from the

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grantor with notice of such fraud, evidence of the fraudulent character of the transaction and of the contract between grantor and such subsequent purchaser is admissible: *Hurley v. Osler*, 44-642.

202. An injunction may be maintained against the grantee in a fraudulent conveyance to prevent alienation of the property to an innocent purchaser until the determination of an attachment suit in which the property is attached as belonging to the grantor: *Joseph v. McGill*, 52-127.

203. One who takes a mortgage to secure an antecedent debt without extension of time or other consideration is not a *bona fide* purchaser: *Flannigan v. Althouse*, 56-513.

IV. EVIDENCE; BURDEN OF PROOF.

204. **Burden of proving fraud:** The burden of proving fraud is upon the party alleging the conveyance to be fraudulent: *Wright v. Wheeler*, 14-8; *Wolf v. Chandler*, 58-569; *Adams v. Ryan*, 61-733; *Drummond v. Couse*, 39-442; *Allen v. Wegstein*, 69-598.

205. The fact that an instrument which is a deed in form is intended as a mortgage does not change the burden of proof as to fraud: *Fifield v. Gaston*, 12-218.

206. If a fraudulent grantee has disposed of part of the property conveyed, and has bought other property which he has mingled with that fraudulently conveyed, the burden of proof is upon him to distinguish between the property so mingled, and to show that property levied upon is not part of that received by him under the fraudulent conveyance: *French v. Reel*, 61-143.

207. **Evidence of fraud:** The burden of proving fraud being upon the plaintiff, he cannot recover in the absence of evidence thereof: *Minneapolis Mill Co. v. Jamison*, 63-506.

208. Fraud never will be imputed when the facts upon which it is predicated are consistent with honesty and purity of intention: *Lyman v. Cessford*, 15-229; *Drummond v. Couse*, 39-442; *Kellogg v. Aherin*, 48-299; *Sunberg v. Babcock*, 66-515.

209. A creditor attacking a deed on the ground of fraud should only be allowed to divest the grantees of the legal title thereby conveyed, upon testimony which is clear,

distinct and satisfactory: *Fifield v. Gaston*, 12-218; *Ray v. Teabout*, 65-157.

210. To establish fraud in a conveyance, it is not necessary that it be proven beyond a reasonable doubt: *Lillie v. McMillan*, 52-463.

Further as to evidence of FRAUD, see that title, §§ 24-35.

211. **Other transactions, admissions, etc.:** Fraud cannot always be shown by direct evidence, but is usually proved by circumstances; and where a fraudulent conveyance with knowledge of the purchaser is sought to be established, the business transactions of the parties and the declarations of vendor and the knowledge of vendee of such practices and purposes may be shown: *Craig v. Fowler*, 59-200.

212. But while knowledge of the fraudulent character of the particular transaction involved will be inferred from circumstances which are sufficient to raise inquiry, that rule cannot be extended so as to impute knowledge on the part of the vendee of fraud in other transactions not directly involved so as to put vendee on inquiry as to the transaction in question: *Ibid.*; *Clark v. Reiniger*, 66-507.

213. A transaction claimed to be fraudulent, taking place prior to that in question, cannot be shown for the purpose of establishing fraud on the part of one not a party thereto: *Hurdy v. Moore*, 62-65.

214. Where two transactions are claimed to be fraudulent, only one of which is being controverted, it must be shown that they are so connected as to evince a common purpose, before the uncontroverted transaction can be admitted in evidence for the purpose of establishing fraud in the other: *Ibid.*

215. Acts of persons other than those engaged in the alleged fraudulent transaction cannot be considered in determining the fraudulent intent: *Bixby v. Carskaddon*, 63-164.

216. Neither should subsequent acts and language of one party to the transaction of which the other party had knowledge be received for the purpose of determining whether the sale was fraudulent or not on the part of the latter: *Ibid.*

217. After the transfer is consummated, the debtor becomes a stranger to the title, and his acts and declarations are not binding upon

Evidence; burden of proof.

the grantee any more than are those of a stranger to the transaction, and declarations and admissions by him are not receivable in an action to set aside the conveyance: *Bixby v. Carskaddon*, 70—.

218. Prior conversations and fraudulent acts of the debtor are not admissible to show the *mala fides* of the transaction claimed to be fraudulent unless there is some connection between the two transactions: *Ibid.*

219. Evidence of declarations of the grantor of an intention to defraud creditors is not admissible: *Benson v. Lundy*, 52-265.

220. Where the same conveyance covers personalty and realty, evidence tending to show that as to the realty the conveyance was not fraudulent is admissible in an action in which its validity as to the personalty is in question: *Wilson v. Hillhouse*, 14-199.

221. The conversations and admissions of the grantor before the execution of the conveyance claimed to be fraudulent, tending to show an indebtedness by him to the grantee, are admissible to prove that the conveyance was not fraudulent: *Moss v. Dearing*, 45-580.

222. A judgment rendered against the fraudulent creditor may be pleaded as conclusive against the grantee, but an allowance of a claim against the estate of the grantor is not competent evidence against the grantee: *Willett v. Malli*, 65-675.

223. Advice of counsel: Where the question in issue is whether the acquisition of personal property is fraudulent or not, the advice of counsel before the contemplated action of the parties is not receivable in evidence: *Hanna v. Hawks*, 81-146.

224. Facts indicating fraud: If goods are sold on long and unusual time, and the notes given therefor are of little or no value, or of less value than they purport to be, these circumstances are to be considered in determining the good faith of the transaction: *Spaulding v. Adams*, 63-437.

225. The intent of the grantor to apply the proceeds of the sale to the payment of his debts is not conclusive that the sale was not made with fraudulent intent: *Ibid.*

226. Possession of realty by the vendor thereof after sale is not, *per se*, either conclusive or presumptive evidence of fraud in such sale, although it may properly be con-

sidered in connection with other circumstances in determining whether there was fraud in fact: *Suiter v. Turner*, 10-517.

227. The fact that the deed is delivered by the grantor to the recorder for record may tend to show fraud in the transaction; but such fact alone does not, as a matter of law, make the deed fraudulent and void, nor will it sustain a verdict of the jury to that effect: *Ward v. Wehman*, 27-279.

228. The fact that all of the property of one charged with a fraudulent sale, which was liable to execution, was conveyed by a mortgage about the time of the sale, and that the mortgage was executed to one whose notes for an amount greater than the consideration therein named had been given, but three or four days before, as a part consideration for the goods which were alleged to have been fraudulently sold, and which were still held by the party to whom the notes were given, may be shown in evidence as bearing upon the intent of the party charged with bad faith: *Price v. Mahoney*, 24-582.

229. Evidence in a particular case, held not to show that the execution of a mortgage by the debtor on his property, and a foreclosure thereof and sale of the property thereunder, was with the purpose of defrauding his creditors: *Johnson v. Pennell*, 67-669.

230. Inadequacy of consideration is material in ascertaining whether there was fraudulent intent: *Hunt v. Hoover*, 34-77.

231. If the price paid by the purchaser of goods is grossly inadequate, that circumstance should be considered in determining whether the transaction was fraudulent, and its weight as evidence of fraud may be affected by other circumstances of the transaction. But if the purchaser bought the property with an honest purpose and intent, his right of title will not be defeated by the inadequacy of the price paid: *Bickler v. Kendall*, 66-703.

232. Where the purchase of the property was at the rate of twenty-six dollars per acre, and it appeared that it was worth thirty dollars, held, that there was no such inadequacy of price as to indicate fraud: *Rusie v. Jamieson*, 62-52.

233. In a particular case, held, that a sale by the debtor of his stock of goods to a mortgagor was not for so inadequate a considera-

Evidence; burden of proof.—How garnishment effected; notice.

tion as to prove it fraudulent: *Warfield v. Lynd*, 67-722.

234. In a particular case, *held*, that the consideration was not so inadequate as to be a badge of fraud: *Day v. Cole*, 44-452.

235. Where it was claimed that a conveyance was in good faith in payment of a prior indebtedness, and it appeared that the grantor had been allowed to remain in possession of the premises without payment of or agreement to pay rent, and that the price claimed to have been received by him was grossly inadequate, and that the grantee had made no examination of the title, although the grantor was insolvent, and that grantee admitted that the deed to him was not intended to deprive the grantor of all interest in the property, *held*, that the conveyance was fraudulent: *Smith v. Grimes*, 43-356.

236. Mortgage for more than due: The making of a mortgage for a sum larger than the amount owing and purporting to be secured tends, in the absence of proof, to show an unfair or fraudulent purpose, and such circumstance is proper to be considered as one of the badges of fraud: *Davenport v. Cummings*, 15-219.

237. The fact that the amount named in the mortgage is greater than that actually due and that the grantor is at the time insolvent or contemplating insolvency, and that the intention of the parties is that the property shall be held by the mortgagee, not to secure a debt, but to be out of the reach of attachment or execution in favor of other creditors, is sufficient to render the instrument fraudulent: *Wilson v. Horr*, 15-489.

238. The fact that a mortgage is given for a sum larger than the legitimate indebtedness is, in the absence of explanatory evidence, a badge of fraud, and may, in and of itself, be sufficient to show a fraudulent purpose: *Taylor v. Wendling*, 66-562.

239. The burden of proving that a mortgage made in contemplation of insolvency, for an amount in excess of the debt which it purports to be given to secure, was given in good faith for an honest purpose, and of explaining why it was given for an amount in excess of the indebtedness, is upon the mortgagee: *Lombard v. Dows*, 66-243.

240. The fact that a mortgage given by an insolvent to secure an antecedent debt for

more than is due, although the fact of insolvency is known to the mortgagor, while a circumstance strongly indicative of fraud, is not conclusive, and is susceptible of explanation, at least where the fact that the mortgage is for an amount in excess of the indebtedness is not known to the mortgagee: *Wood v. Scott*, 55-114.

241. Although in case of a mortgage for more than is due, given by one who is insolvent, it is incumbent upon the mortgagee to show that it was executed in good faith and for an honest purpose, and satisfactorily explain why the mortgage was taken for an amount greater than due, yet *held*, in a particular case, that such explanation was satisfactorily made: *Carson v. Byers*, 67-806.

GARNISHMENT.

- I. HOW EFFECTED; NOTICE.
- II. WHO SUBJECT TO; WHAT PROPERTY REACHED BY.
- III. ANSWER OF GARNISHEE; SUBSEQUENT PROCEEDINGS; JUDGMENT; APPEAL.

I. HOW EFFECTED; NOTICE.

1. Attachment necessary: Garnishment is simply a mode of attachment: *Woodward v. Adams*, 9-474.

2. It is only where the sheriff has a writ of attachment that he is authorized to garnish: *Vanfossen v. Anderson*, 8-251.

Garnishment is, however, also an incident of execution, and an officer having a writ of execution may issue a notice of garnishment, and the proceedings thereunder will be the same as in case of attachment: Code, §§ 3051, 3052.

3. How shown: The proper evidence of the fact of garnishment is the officer's return on the writ of attachment. Such fact cannot be proved by parol evidence of the officer nor his indorsement of service upon the notice to the garnishee: *Rock v. Singmaster*, 62-511.

4. When the fact of garnishment is put in issue, the proper evidence of it is the same as the evidence of any levy, to wit, the return thereof. The fact that the garnishee appears and answers the interrogatories does not preclude him from afterwards putting in issue

How effected; notice.— Who subject to.

the fact of garnishment: *McDonald v. Moore*, 65-171.

5. **Jurisdiction:** Garnishment being in the nature of a proceeding *in rem*, the thing against which the proceeding is directed must be brought within the jurisdiction of the court by a virtual seizure thereof, and the court does not acquire jurisdiction except by the proper issuance of the writ of attachment and notice of garnishment thereunder: *Ibid*.

6. If the proceeding is by publication and it is sought to effect the attachment by service of notice of garnishment, and no debt is due at the time so as to be actually reached by such garnishment, the court acquires no jurisdiction whatever in the case, and cannot acquire jurisdiction by reason of a debt afterwards arising from the party garnished to the defendant: *Morris v. Union Pacific R. Co.*, 56-135.

7. **Notice:** Though the notice to a garnishee to appear and answer specifies the wrong court, yet, if answers are taken by the sheriff under execution from the proper court and such answers are duly returned, that court acquires jurisdiction to render judgment against the garnishee: *Fanning v. Minnesota R. Co.*, 37-379.

8. A notice to a garnishee requiring him to appear on any other day than the first day of the next term of the court is void, and confers no jurisdiction over such garnishee: *Padden v. Moore*, 58-703.

9. Where a garnishee seeks in equity to have a judgment against him set aside on the ground that the notice was not sufficient to give the court jurisdiction, the burden is not upon him to show that the judgment is also erroneous, but is upon the adverse party who insists that it is just. The garnishee is not presumed to be indebted: *Ibid*.

10. The garnishment process may be served before service of notice of action by attachment: *Phillips v. Germon*, 43-101.

11. Notice of the garnishment need not be given to the defendant in the principal action: *Ibid*.

12. But, by a subsequent statute, 18 G. A., chapter 58, McClain's Ann. Stat., § 2975, notice to the defendant in the principal action is required before the rendition of judgment against the garnishee, and such notice should

be served ten days before the trial of the issue, and in case there is no issue, ten days before judgment is rendered against the garnishee: *Williams v. Williams*, 61-612.

13. This notice is essential to the jurisdiction of the court over the subject-matter in controversy, and if the garnishee fails to assert his right to be discharged on account of such want of notice, but submits the case without making that question of record, it is proper for the court to set aside the trial and submission as premature and continue the cause for such action as either of the parties may take: *Ibid*.

14. Service of original notice of the action itself does not make this service of notice of the garnishment proceedings unnecessary: *Wise v. Rothschild*, 67-84.

15. Where it is sought to attach the sum due by a railway company to a land-owner for right of way taken by the company, the notice of garnishment should be served on the company and not upon the agent of the company individually, although such agent is authorized to procure the right of way and is doing so at his own risk for a gross sum: *Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co.*, 62-494.

II. WHO SUBJECT TO; WHAT PROPERTY REACHED BY.

16. **Exemption from garnishment:** The exception of municipal corporations from liability to garnishment (see *infra*, §§ 19-22) is the only exemption from such liability: *Caldwell v. Stewart*, 80-879.

17. **Corporations** generally may be garnished. So held of a railroad company: *Taylor v. Burlington & M. R. R. Co.*, 5-114.

18. Under statutory provisions which did not exempt a municipal corporation from garnishment, held, that a corporation, whether public or private, might be garnished, and that if there was any exemption of a municipal corporation, such an exemption was a privilege which it alone could assert, and which could not be interposed by the debtor: *Wales v. Muscatine*, 4-302; *Burton v. District T'p*, 11-166.

19. **Municipal corporations:** The statutory provision (Code, § 2976) that a municipal corporation shall not be subject to gar-

Who subject to; what property reached by.

nishment applies to all cases and without condition, and is not dependent upon whether such exemption is necessary to protect them against embarrassment in the execution of their political, civil or corporate duties: *Jenks v. Osceola T'p*, 45-554.

20. Waiver: The municipal corporation itself may waive the exemption in its favor; and where the objection was not raised until upon a second trial, when the court first instructed in regard thereto, *held*, that the right to the exemption had been waived and could not then be raised: *Clapp v. Walker*, 25-315.

The right to insist upon the exemption in favor of a municipal corporation cannot be exercised by a creditor of the corporation: See *supra*, § 18.

21. Where a municipal corporation at the same term at which its answer in the garnishment proceeding, made before a commissioner, was reported to the court, raised the question of its right to exemption under the law, *held*, that such claim was in time and not waived: *Jenks v. Osceola T'p*, 45-554.

22. The fact that a county brings an action to determine to whom it shall pay a sum of money due by it to a contractor, and makes a creditor who has attempted to garnish the county for its indebtedness to him a party to the action, does not constitute a waiver of exemption from garnishment: *Des Moines County v. Hinkley*, 62-637.

23. Property in the hands of an officer of the court may be attached as provided by statute (Code, § 2977) by leaving with the clerk a copy of the writ with notice specifying the fund: *Patterson v. Pratt*, 19-358.

24. Where money of a debtor was taken under a search warrant sworn out by a third person, and was in the hands of a justice of the peace to whom the search warrant was returned, *held*, that a creditor of the prisoner might in this manner attach such money for his debt: *Ibid*.

25. So an officer who in making an arrest has searched the person of the prisoner and taken therefrom property, such as a watch, money, etc., may be garnished for such property by a creditor of the prisoner, it not appearing that the arrest was collusively made or with any fraudulent purpose: *Reifsnnyder v. Lee*, 44-101.

26. But property taken by an officer from the person of a prisoner which is not connected with the crime is to be deemed in the personal possession of the prisoner and cannot be attached in the officer's hands: *Commercial Exchange Bank v. McLeod*, 65-665.

27. Property in the hands of a receiver is in the custody of the law, and therefore not liable to seizure on execution: *Martin v. Davis*, 21-585.

28. A sheriff may, at the suit of the creditor of the mortgagor, be garnished for any balance of proceeds of the sale of property under a chattel mortgage, put in his hands for collection, remaining after satisfying the mortgage: *Hoffman v. Wetherell*, 42-89.

29. And in such case, *held*, that a garnishment proceeding against the mortgagee of the property would not bind the balance in the hands of the officer: *Ibid*.

30. Property in hands of agent: Where the answer of a garnishee showed that he was auditor and cashier of the corporation defendant in the principal action, and had charge of the accounts, receipted for cash remitted by its agents, made collections and disposed of the cash from time to time as directed by the general manager of the corporation, and that he had, at the time of garnishment, certain money belonging to the corporation kept in the safe provided by it, to which he alone had a key, *held*, that it was his duty as garnishee to retain the money on hand subject to the garnishment, and he could not escape liability on the ground that he did not have independent control of the money but was under obligation to dispose of it as directed by his superiors: *First Nat. Bank v. Davenport & St. P. R. Co.*, 45-120.

31. Though the answer of the garnishee discloses that it was his duty to pay out the money in his possession on the order of another, the process of garnishment imposes upon him a paramount duty to retain it in his possession: *Ibid*.

32. Money held for third person: Where, by agreement between a railway company and a contractor, it was provided that the former might reserve out of money due the latter such amount as might become due by the contractor to laborers, and superintend the payment of the same, *held*, that the money in the hands of the railway company

Who subject to; what property reached by.

thus reserved to be paid over to laborers was not subject to garnishment for the debts of the contractor: *Taylor v. Burlington & M. R. R. Co.*, 5-114.

38. An executor cannot be held liable as garnishee in his individual capacity for an indebtedness due as executor: *Clark v. Shrader*, 41-491.

34. Equitable custodian: A garnishment will be valid as against a fund of which the garnishee is the equitable custodian, although it is not within his possession: *Des Moines County v. Hinkley*, 62-637.

35. What rights, indebtedness, etc., reached by garnishment: The garnishee process only reaches the right which the defendant actually has at the time, in the property thereby sought to be attached: *Thomas v. Hillhouse*, 17-67.

36. The liability of a garnishee is measured by his obligation to the execution defendant at the time of service of garnishment: *Huntington v. Risdon*, 48-517.

37. The garnishee cannot be held for a debt which had no existence at the time of the garnishment but was subsequently contracted: *Thomas v. Gibbons*, 61-50.

38. It must be made to appear that the garnishee was indebted to defendant at the time of service of notice. Where the service of notice and the assignment by the debtor of his claim against the garnishee appeared to be of the same date, *held*, that the garnishee would not be liable without further proof that the service was prior to the assignment: *Weire v. Davenport*, 11-49.

39. Judgment should not be rendered against the garnishee where it appears that his indebtedness to the principal debtor is only conditional and it is not shown that the condition has been fulfilled: *Williams v. Young*, 46-140.

40. Where the claim of a land-owner against a railway company for damages for right of way was pending in the circuit court upon a claim for a greater amount of damages than allowed by the commissioners, *held*, that the garnishment of the railway company would hold any amount afterwards found due or which the company should agree to pay in satisfaction of the claim: *Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co.*, 62-494.

41. Garnishee should not be held liable on a judgment where he has a cause of action which he might bring against the judgment creditor greater in amount than the amount of the judgment, even though such cause of action might have been interposed as a defense in the proceeding in which the judgment was recovered: *Fairfield v. McNany*, 37-75.

42. If a third person is garnished, in an action against one of two persons, for notes in his hands belonging to a partnership, and it appears that the partners are entitled to equal shares therein, and no claim of fraud is set up by partnership creditors, judgment may be rendered against him for the interest of defendant partner remaining in his hands: *Harlan v. Moriarty*, 2 G. Gr., 486; *Robinson v. Moriarty*, 2 G. Gr., 497.

43. Where the purchaser of property was advised, after making the contract of purchase, that the property belonged to another, and gave his note to such other for the balance of the purchase price, and was subsequently garnished as the debtor of the person with whom the contract was made, *held*, that he would not be protected in making payment to the payee of the note, with knowledge that the indebtedness was actually due to the party from whom the purchase was made: *Kesler v. St. John*, 22-565.

44. The fact that an innkeeper has a lien on the baggage of his guest for his charges will not prevent the guest from being garnished as the debtor of the innkeeper. The guest could, by paying over to the sheriff the amount due, release his baggage from the lien: *Caldwell v. Stewart*, 30-379.

45. Where a conveyance of property from grantor to grantee is rescinded by the action of the grantor after a conveyance has been made to a subsequent grantee, the original grantor is not a debtor of his first grantee and subject to garnishment as to the consideration which is to be refunded, but his liability inures to the benefit of the subsequent grantee: *Deere v. Young*, 89-588.

46. Capital stock: At common law, stock in an incorporated company could not be reached under an attachment nor a valid transfer thereof prevented. The attaching creditor must follow the mode pointed out by statute (Code, § 2967), which requires no-

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tice to the president or other officer that the stock has been attached. Garnishment of the secretary as an individual will not accomplish the object, even though he understands that the attachment of the stock is intended: *Moore v. Walker*, 48-164.

47. Interest of mortgagee: The interest of the mortgagee of real property cannot be seized under attachment by levy on the land. The method of procedure is by garnishment: *Courtney v. Carr*, 6-238.

48. A landlord's right to a share of the crops grown on the leased premises can only be reached by garnishment of the tenant: *Howard County v. Kite*, 69-307.

49. Interest of mortgagee of chattels: A mortgagee of personal property not in his possession is not liable on garnishment for such property, or the amount by which the value thereof exceeds his claim: *Curtis v. Raymond*, 29-52; *First Nat. Bank v. Perry*, 29-266.

50. But the mortgagee in possession may be garnished for the surplus remaining in his hands: *Doane v. Garretson*, 24-351.

51. Unconditional judgment cannot be rendered against a chattel mortgagee, as garnishee, for the excess of the value of the mortgaged property over his debt, where he is not in actual possession of the property by virtue of his mortgage: *Fountain v. Smith*, 70—.

52. The equity of redemption of the mortgagor of personal property after condition broken is subject to sale or transfer as other property and passes under a general assignment. After such general assignment the mortgagee is not subject to garnishment in a suit against the mortgagor: *Gimble v. Ferguson*, 58-414.

53. Where it was agreed by and between the mortgagor and attaching creditors and the mortgagee, that the property should be sold in bulk and the proceeds applied upon the attachment, *held*, that the proceeding operated as a transfer of the equity of redemption of the mortgagor, and took priority over a subsequent garnishment by a second attaching creditor of the surplus in the sheriff's hands after the satisfaction of the first mortgage: *Phelps v. Winters*, 59-561.

54. The mortgagee of a stock of merchandise, when garnished while in possession, may

discharge the landlord's lien for accrued rent out of surplus left after satisfying his mortgage, without being liable under garnishment for the amount thus applied: *Doane v. Garretson*, 24-351.

55. Fraudulent mortgagees, who are garnished by the mortgagor's creditors, must retain the property or its proceeds, and if they part with the same in payment of the mortgagor's debts, they act at their peril: *Brainard v. Van Kuran*, 22-261.

56. A person holding property under a bill of sale to secure him for any liability as surety may be garnished for the proceeds of such property remaining after satisfying his claim: *Davis v. Wilson*, 52-187.

57. Assignment: Where the creditor of the garnishee has, by assignment, in any form appropriated the property or indebtedness, and the assignment has been accepted by the assignee, the garnishee cannot be held liable: *Smith v. Clarke*, 9-241.

58. An equitable assignment will secure the property against garnishment for a debt of the assignor, though no notice be given to the party holding the property prior to the attachment, if such notice is given in time to enable the garnishee to bring it before the court in time for judgment: *Ibid.*

59. The assignee of a non-negotiable debt should give notice of the assignment to the garnishee in time to enable him to show such assignment in his answer, or at least before judgment against him: *Walters v. Washington Ins. Co.*, 1-404.

60. A garnishee who has notice of the assignment before answering and fails to set up that fact by way of defense, and allows judgment to go against him, cannot plead such judgment against the assignee: *Ibid.*; *Dalhoff v. Coffman*, 87-283.

61. The assignment of a debt will be good as against a garnishment of the debtor in a proceeding against the original assignor, though the claim is not taken by the assignee as payment but only as collateral security: *Moore v. Lowrey*, 25-336.

62. The assignor of a judgment taking it subject to garnishment of the judgment debtor acquires no right as against the plaintiff in the garnishment: *Phillips v. Geron*, 48-101.

63. A debtor having notice of the assign-

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ment of the debt before garnishment cannot be held liable in an action against the assignor, even though, by peculiar statutory provision (Code, § 2087, as it stood before amendment), he might have been exonerated by payment of the debt to the assignor, even with notice of the assignment: *Bailey v. Union Pacific R. Co.*, 62-354.

64. Assignment of negotiable or assignable paper: Under a statute (Rev., § 3211) providing that the garnishee should not be held liable on a debt due by negotiable or assignable¹ paper, unless such paper was delivered or the garnishee completely exonerated or indemnified for all liability thereon after satisfaction of the judgment, *held*, that a judgment on a mortgage lien could not be rendered unless the mortgage was delivered or the mortgagee exonerated: *Timmons v. Johnson*, 15-23.

65. Held, also, that this statutory provision was applicable to the case of negotiable paper after maturity, and that the maker thereof could not be held liable as garnishee without exoneration or indemnity: *Hughes v. Monty*, 24-499.

66. But without reference to such statutory provision, *held*, that the maker of a note who was garnished after maturity thereof, without notice or knowledge of any assignment, might be held liable as a debtor of the payee of the note: *McCoid v. Beatty*, 12-299.

67. Held, also, that this rule was applicable where the assignment of the note past due was made after service of the notice of garnishee, but before the answer of the garnishee, if the garnishee at the time of answering had notice of such assignment, the rights of the assignee being subordinate to the garnishment: *Stevens v. Pugh*, 12-430.

68. These provisions as to indemnity in case of negotiable paper may be taken advantage of by the garnishee, but if waived by him the failure to comply with them does not affect the power of the court to render judgment: *McPhail v. Hyatt*, 29-137.

69. But though the garnishee fails to demand indemnity and allows judgment to go against him, such judgment will be no defense against a holder of the paper who

acquired it before the garnishment: *Yocum v. White*, 36-288.

70. In the case of negotiable paper, the court may order that plaintiff have judgment when the provisions as to indemnity are complied with. But such order will not be a final judgment upon which execution may issue: *Seals v. Wright*, 37-171.

71. Where the garnishee, after notice of garnishment, paid a note, made to the defendant or bearer, to the indorsee of such note, *held*, that under the evidence as to ownership introduced in the case, a judgment in favor of garnishee was not so wholly unsupported as that it should be reversed: *Kauffman v. Jacobs*, 49-432.

72. Exempt earnings: While a garnishment of an employer for wages of his employee will hold not only wages due but such as afterwards become due, yet, as the employee, if a married man, is entitled to have ninety days' wages exempt (Code, § 3072), the employer is not to be held liable to judgment in such case, unless it appears that at the time of garnishment, or some time subsequent thereto, he had more than ninety days' wages in his hands: *Davis v. Humphrey*, 22-137.

73. The burden rests upon defendant or garnishee to show that an amount due to the defendant in the principal action is exempt as earnings, and unless that fact clearly appears, the debt will be held subject to garnishment: *Oakes v. Marquardt*, 49-643.

74. The debtor cannot, in a garnishment proceeding, appear and plead an exemption under the laws of another state: *Leiber v. Union Pacific R. Co.*, 49-688.

75. A debt due to a non-resident for services performed in another state may be attached in an action in this state by publication against such non-resident, by garnishment of the debtor in this state, notwithstanding any custom of the garnishee to pay for such services in the state where they are rendered: *Mooney v. Union Pacific R. Co.*, 60-346.

76. Exemption laws of another state are not to be relied upon as a defense, either by the garnishee or by the judgment debtor: *Broadstreet v. Clark*, 65-670.

¹ The present statutory provision (Code, § 2990) refers only to negotiable, not to assignable, paper.

Answer of garnishee; subsequent proceedings; judgment; appeal.

77. A creditor cannot, by instituting a garnishment proceeding in another state, seize a debt due the debtor in this state, and which would be here exempt from execution: *Tenger v. Landsley*, 69-725; *Hager v. Adams*, 70—

III. ANSWER OF GARNISHEE; SUBSEQUENT PROCEEDINGS; JUDGMENT; APPEAL.

78. Duty to appear; witness fees: If his fees are not tendered, the garnishee may refuse to attend, but will not be released from his obligation to retain any property belonging to, or money due defendant, and his attendance may be secured at a subsequent term by proper summons and tender of fees: *Westphal v. Clark*, 42-371.

79. The power to compel the attendance of a garnishee is not limited to seventy miles, as is provided in case of witnesses: *Ibid.*

80. The non-payment of the fees of a garnishee, if lawfully demanded, will excuse his failure to testify, but if he appears without prepayment of fees, he cannot then demand mileage before testifying, and judgment may be rendered against him for failure or refusal to testify on account of such non-payment: *Stockberger v. Lindsey*, 65-471.

81. Appearance before commissioner: Where a court appoints a commissioner to take the answer of a garnishee, without fixing a time or place for such answer, the garnishee should not be adjudged in default for failure to appear and answer unless notified by the commissioner of the time and place fixed for taking his answer: *Thomas v. Hoffman*, 62-125.

82. Answers taken by officer: It is only when the sheriff has a writ of attachment that he is authorized to take answers as provided by statute: *Vanfossen v. Anderson*, 8-251.

83. A deputy sheriff may administer the oath to the garnishee: *Conable v. Hylton*, 10-598.

84. Further answer: Where the garnishee is notified to appear and answer at a term of court, the questions which are to be answered by the garnishee need not be propounded or filed until he has appeared to answer: *Parmenter v. Childs*, 12-22.

85. The plaintiff is not precluded, by the fact that the garnishee makes answer to the sheriff, from prosecuting the examination further if he sees fit: *Thompson v. Silvers*, 59-670.

86. Refusal of garnishee to answer: Where a garnishee refused to answer questions propounded before a referee appointed to take such answers, and plaintiff, upon the facts being reported by the referee, moved for an order requiring her to answer at a particular time, at which time she refused to answer, and her refusal was sustained by the court, *held*, upon appeal, that although the plaintiff might have been entitled to judgment by default against the garnishee for refusal to answer questions propounded by the referee, yet having obtained an order for further examination he could not have judgment against the garnishee for refusal to answer, when the court sustained her objections, although in so doing the court erred: *Ibid.*

87. Written interrogatories: It is within the discretion of the court to require that questions to be propounded to the garnishee shall be reduced to writing and submitted to the court before answer: *Elwood v. Crowley*, 64-68.

88. Answers of wife: A wife who is garnished as the debtor of her husband is not exempt from answering on the ground that her answers would be testimony against her husband. It is not to be regarded as against her husband's interest that his property in her hands is subjected to payment of his debts: *Thompson v. Silvers*, 59-670.

89. Answers in person: The creditor has the right to examine the garnishee personally, and where the garnishee did not appear, but filed a sworn answer, *held*, that such answer was properly stricken from the files and judgment rendered against him on default: *Penn v. Pelan*, 52-535.

90. Answer of corporation: Where a corporation aggregate is garnished it may answer in writing through some officer or agent duly authorized: *Bailey v. Union Pacific R. Co.*, 62-354.

91. Objections to questions: Where the garnishee objects to the competency of a question asked him, he should, after the court has determined that the question is a

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proper one, have an opportunity to respond before being charged absolutely: *Sawyer v. Webb*, 5-315.

92. Answer as evidence: The answer of garnishee is competent evidence on the trial of the issue as to his liability: *Fairfield v. McNany*, 37-75.

93. The credit and weight to which the answer of the garnishee is entitled should be left to the jury: *Drake v. Buck*, 35-472.

94. The garnishee's answer is not a pleading in the case, but is in the nature of evidence, and, therefore, is not a part of the record unless made so by a bill of exceptions: *Brainard v. Simmons*, 58-464.

95. While the garnishee may be required not only to answer with reference to his liability, but to disclose what he knows with reference to other persons who may have property or credits of the debtor under their control, such answer does not bind any one but the one making it. Therefore, the answer of a member of the firm, garnished individually, will not be binding upon the firm: *Bean v. Barney*, 10-498.

96. The garnishee's answer is not competent evidence on an issue raised by an intervenor claiming the debt sought to be reached by the garnishment: *Easley v. Gibbs*, 29-129.

97. Setting up defendant's exemptions: A debtor who procures himself to be garnished without the knowledge of his creditor, for a debt the proceeds of which are exempt, and does not set up such exemption, or notify his creditor so that the latter may do so, is guilty of fraud, and will not be released from liability by a judgment against him: *Smith v. Dickson*, 58-444.

98. Whether a garnishee is required to set up any defense that the debtor may have, as that the property or debt is exempt, or should notify the debtor of the fact of garnishment, in order that the latter may set up such defense, *quære*: *Moore v. Chicago, R. I. & P. R. Co.*, 43-385; *Leiber v. Union Pacific R. Co.*, 49-688.

99. An answer of the garnishee that he was informed and believed that the defendant was a married man living with his family, *held* not sufficient to show the right of exemption, for the reason that it did not allege such to be the fact, nor allege that he

was a resident of the state: *Smith v. Chicago & N. W. R. Co.*, 60-312.

100. Where the garnishee interposes an objection that the indebtedness is exempt and defendant has notice of the proceeding, and judgment is nevertheless rendered against garnishee, such judgment is conclusive against defendant in any subsequent action to recover the indebtedness. It is his duty to set up the exemption and to appeal from the judgment rendered, if erroneous: *Wignall v. Union Coal, etc., Co.*, 37-129.

101. Defendant may set up exemptions: The defendant in the principal action may set up, by way of objection to a judgment against the garnishee, that the indebtedness is exempt from execution, or that the judgment is satisfied, etc. But he cannot interpose an objection which is personal to the garnishee: *Wales v. Muscatine*, 4-302.

102. Setting up claims of assignee: An assignee of non-negotiable paper must give the maker notice of the assignment, before such maker is required to answer as garnishee in a suit against the assignor, or at least before judgment is rendered against such garnishee, or he will be barred by such judgment: *Walters v. Washington Ins. Co.*, 1-404; *McCoid v. Beatty*, 12-299.

103. If the paper is assigned after the garnishment of the maker, he may be held liable, notwithstanding he knew of the assignment before answering: *Stevens v. Pugh*, 12-430.

104. Up to final judgment against him the garnishee may protect himself from liability by showing the assignment of the debt to a third person, and judgment in garnishment will not bar an action against the garnishee by such assignee if the garnishee had notice of the assignment before final judgment: *McPhail v. Hyatt*, 29-137.

105. Where an attorney was garnished for money collected by him on a note, and had knowledge of facts which, if made known, would have protected the rights of an assignee of such note, *held*, that he should have set up such facts in his answer: *Large v. Moore*, 17-258.

106. Where a debtor is garnished in a suit against a creditor, but no judgment has been rendered in the proceeding, he may, in defense to an action by an assignee of his cred-

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itor's claim, to whom such claim has been assigned after the garnishment, plead the pendency of such proceeding as matter in abatement, but not in bar of the action: *Clise v. Freeborne*, 27-280.

107. Turning over property: The garnishee cannot be held liable for not turning over property to the sheriff as authorized by statute after answer (Code, § 2988), where he holds such property under a lien which has not been satisfied: *Smith v. Clarke*, 9-241.

108. A failure to tender or bring into court money or property in his hands liable to garnishment does not subject the garnishee to costs: *Randolph v. Heaslip*, 11-37.

109. Where property is turned over by the garnishee to an officer upon certain conditions, such conditions should be recognized when shown to the court, and carried out: *Buckham v. Wolf*, 58-601.

110. The statutory provision with reference to turning over property does not authorize the discharge of a judgment against a garnishee upon the payment of a sum less than the amount of such judgment, even though the judgment rendered is for an amount greater than the amount actually due: *Burlington & M. R. R. Co. v. Hall*, 87-620.

111. Liability for interest: A garnishee is not liable for interest unless it be shown that he used the money for which he is liable, instead of setting it apart as a separate fund; and this rule is not changed by the fact that he might, under the provisions of statute, pay over the money to the sheriff: *Moore v. Lowery*, 25-336.

112. Notice of subsequent proceedings: The garnishee is bound to take notice of proceedings subsequent to his answer until he is discharged. He may move for a discharge upon filing his answer: *Chase v. Foster*, 9-429.

113. If issue is not taken upon the answer of the garnishee at the term it is filed, the garnishee is entitled to notice: *Kienne v. Anderson*, 13-565.

114. Issue upon garnishee's answer: The plaintiff may take issue upon the general answer of the garnishee denying indebtedness: *Bebb v. Preston*, 8-325.

115. While it may be that formal pleadings are not necessary in reply to the answer

of a garnishee in order to enable the defendant to dispute its truthfulness by evidence, yet, when the plaintiff files an answer setting up the facts upon which he bases the denial of the garnishee's answer, thus presenting an issue of fact, he cannot depart therefrom and ask recovery upon grounds not pleaded: *Freese v. Co-operative Coal Co.*, 67-42.

116. Where plaintiff, seeking to take issue on the garnishee's answer, filed a pleading controverting and denying the same and alleging that the garnishee was indebted to plaintiff in a certain sum, and asking judgment therefor without stating the facts constituting the indebtedness, held, that such pleading not having been assailed by motion or demurrer, the garnishee could not object to the introduction of evidence thereunder on the ground that it did not raise any issue: *Ruby v. Schee*, 51-422.

117. Whether the facts disclosed in the answer of the garnishee show an indebtedness to the principal debtor is a question of law which may be reviewed upon an appeal to the supreme court, but when the garnishee's answer is denied and evidence is introduced on both sides upon the issue thus made, which issue is tried and decided, the supreme court cannot pass upon the correctness of the decision without having the entire evidence before it: *Sheppard v. Downing*, 14-597.

118. Where plaintiff sought to take issue upon the answers of two garnishees by one pleading, and one of them was on motion discharged from the issue raised thereby, held, that it was error to strike from the files a subsequent pleading by the plaintiff controverting the answer of such other garnishee: *Coffman v. Ford*, 56-185.

119. When an intervenor in the garnishment proceeding who claims an assignment of the debt to him prior to the service of garnishment process has introduced evidence tending to establish such claim, he is entitled to judgment unless other facts are properly shown which defeat his claim, and the garnishee's answer is not competent evidence on such issue: *Easley v. Gibbs*, 29-129.

120. Venue: Garnishment proceedings upon an execution cannot be brought in any other court than that in which the judgment to be satisfied is entered. No other court

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would have jurisdiction and the garnishee must take notice of that fact: *McGuire v. Pitts' Sons*, 42-585.

121. The issue raised on the answer of garnishee must be tried in the court wherein the principal action is pending, and the venue cannot be changed to the county of the garnishee's residence: *Miller v. Mason*, 51-289; *Smith v. Dickson*, 58-444.

122. Where a change of venue is taken by defendant in the principal case, such change does not apply to the garnishee unless he joins in the application therefor, and the case should be tried as to him in the court where the proceeding is commenced: *Westphal v. Clark*, 42-871.

123. Trial: When a trial is required to determine the rights of all the parties, the question as to whether the garnishee is indebted to the defendant is not to be presented separate from that as to whether the debt in the hands of the garnishee is to be condemned for the payment of such indebtedness: *Williams v. Williams*, 61-612.

124. Default: Where the garnishee was notified to appear and answer at the March term, but no appearance being made by him then, or at any time, default was taken at the October term of the next year, *held*, that such default was properly rendered, and it was immaterial whether a continuance from term to term was entered or not: *Langford v. Ottumwa Water Power Co.*, 53-415.

125. A slighter showing of diligence or excuse will be sufficient to warrant setting aside default against a garnishee than in case of default against a defendant: *Evans v. Mohn*, 55-302.

126. Notice to show cause: Although the statute provides (Code, § 2985) that garnishee is not to be held liable to pay the amount of plaintiff's judgment on account of a mere failure to appear, until he has had an opportunity to show cause against the issuing of an execution, yet it is not provided what notice to show cause shall be given the garnishee in default before final judgment can be rendered against him. It is not essential that such notice be served ten days before the term at which judgment is sought. Where it was served during the term, but more than ten days before the time at which the garnishee was required to show cause,

held, that it was sufficient. Also, *held*, that it was not error, in the absence of any appearance by the garnishee in response to such notice, to render final judgment against him at a later day in the term than that fixed in the notice: *Langford v. Ottumwa Water Power Co.*, 53-415.

127. Where the court has not acquired jurisdiction of the garnishee by proper notice, the fact that the garnishee, when served with notice to show cause why execution should not issue against him, appears and protests that the court has acquired no jurisdiction, will not render judgment by it valid: *Padden v. Moore*, 58-708.

128. The garnishee may, when called upon to show cause why judgment should not be rendered against him, answer to the original notice of garnishment, although he is in default by failing to appear as required in such notice. His answer to the merits should be presented with his excuse for default, but it is not to be considered until his excuse is held sufficient and his default set aside: *Fifield v. Wood*, 9-249.

129. Garnishee should not only rebut the presumption of indebtedness but show sufficient excuse for his default: *Parmenter v. Childs*, 12-22.

130. Where default has been rendered against a garnishee who has appeared but has failed to answer in accordance with an order of the court, judgment by default may be rendered against him as for failure to plead, and such a default can only be set aside under the provisions relative to setting aside judgments by default in general: *Scamahorn v. Scott*, 42-529.

131. As long as the judgment against the garnishee stands as only for failure to appear, and until he is called on to show cause, he may protect himself from liability by showing an assignment of the debt from the judgment debtor to another, and the judgment in garnishment will not bar an action against the garnishee by the assignee of the claim: *McPhail v. Hyatt*, 29-137.

132. The notice required to be given, defendant of an opportunity to show cause is not a *scire facias*: *Duncan v. Sangamo F. Ins. Co.*, 35-20.

133. Where judgment has been rendered against garnishee for failure to appear when

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he has not been served with notice to appear, he may at a subsequent term have the judgment against him vacated upon motion: *Thomas v. Hoffman*, 62-125.

134. The showing in a particular case held sufficient to sustain the setting aside of default against the garnishee for failure to appear: *Westphal v. Clark*, 46-262.

135. The judgment which can be rendered against garnishee after he has been given an opportunity to show cause, in default of appearance, should not be greater than that for want of appearance. It is not proper to add interest or costs: *Langford v. Ottumwa Water Power Co.*, 53-415.

136. Discharge of garnishee: A garnishee is not relieved from the garnishment liability by a failure to have the garnishment proceedings continued from one term to another by order of the court. If he pays the debt before an order of discharge, it is at his peril: *Hughes v. Monty*, 24-499.

137. The fact that one or more terms intervene between the garnishment process and the judgment against the garnishee does not show an abatement of the proceeding: *Phillips v. Gernon*, 43-101.

138. Garnishee's liability: Primarily the garnishee is taken to be an innocent person, and to stand indifferent between the parties, and if no issue is raised on his answer, it is the sole test of his indebtedness. His rights are to be carefully protected, and he is not to be placed in a situation where he will be compelled to pay the debt twice: *Walters v. Washington Ins. Co.*, 1-404.

139. He is in no case to be placed in a worse condition than he would be if the defendant himself was enforcing his claim: *Williams v. Housel*, 2-154; *Smith v. Clarke*, 9-241; *Burton v. District T'p*, 11-166.

140. The indebtedness of the garnishee or his possession of property must be affirmatively shown in order to render him liable: *Morse v. Marshall*, 22-290.

141. While the garnishee is to be looked upon as an indifferent person, as between the plaintiff and defendant, and is not to be required to pay his debt but once, yet he will not be protected against the consequences of his own carelessness and negligence, especially where such negligence may result to

the injury of bona fide creditors: *Houston v. Wolcott*, 7-178.

142. While the garnishment stops the payment of any debt due from garnishee to defendant, it does not prevent any transaction not growing out of the relation of debtor and creditor, nor prevent the payment by the garnishee to defendant of money which such garnishee is under no legal obligation to pay: *Victor v. Hartford F. Ins. Co.*, 38-210.

143. Where a person, being insolvent, by an attorney in fact sold his entire stock of goods to a creditor to secure the payment of a debt, and after such creditor had taken possession he was garnished under an attachment issued in favor of another creditor, held, that the garnishee was not to be presumed liable and the burden was upon plaintiff to show such liability, either from the garnishee's answer or by taking issue thereon, and showing it by evidence on such issue, and that upon failure to show that the garnishee did not hold the goods under a valid sale or pledge he was not to be held liable: *Farwell v. Howard*, 26-381.

144. Where the garnishee answered that the note in his hands sought to be reached by the garnishment proceeding was received by him from the defendant for the specific purpose of paying a judgment on which the garnishee was liable as surety, held, that the action as to garnishee was properly dismissed: *Dryden v. Adams*, 29-195.

145. Garnishee's liability is to be measured by his responsibility and relation to the defendant. Therefore, held, that where garnishee was surety for defendant and authorized to pay the secured debt out of property held by garnishee belonging to defendant, he should not be liable for so much of the proceeds of such property as was necessary to satisfy the secured debt: *Cox v. Russell*, 44-556.

146. Where the creditor requires payment or pledge to secure payment in advance of the contracting of indebtedness, no indebtedness is created that can be the subject of garnishment: *Caldwell v. Stewart*, 30-379.

147. The garnishee is not to be held liable for proceeds of exempt property of the debtor, held by him at the time of garnishment under mortgage which he has sold or allowed

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to be sold for the debtor's benefit: *Brainard v. Simmons*, 67-646.

148. When answer shows liability: To charge a garnishee on his answer alone, there must be in it a clear admission of a debt due to, or the possession of attachable property of, the defendant. If there is a reasonable doubt whether he is chargeable, he is entitled to judgment in his favor: *Morse v. Marshall*, 22-290; *Church v. Simpson*, 25-408; *Hibbard v. Everett*, 65-372.

149. But, although the garnishee deny generally having property of, or being indebted to, the defendant, if it appear from the other statements of his answer that he is so indebted, judgment should be rendered against him: *Bebb v. Preston*, 1-460.

150. Although the admissions of the answer are not explicit, yet if from the entire answer it clearly appears that the garnishee is liable, judgment should go against him: *Smith v. Clarke*, 9-241.

151. Where the answer of the garnishee stated that he was indebted to the judgment debtor at a certain date, "about the time of the service of garnishment, in the sum of," etc., held, that the answer was sufficient to justify the conclusion that he was indebted at the time of service of notice which was on the next day after the day mentioned in his answer: *Hoops v. Culbertson*, 17-305.

152. The statement of a person that he is indebted to defendant, and a promise on his part to retain the amount of such indebtedness in his possession until a garnishment proceeding can be instituted against him, will not estop him from stating, when summoned as garnishee, that he is not indebted to the defendant in such proceeding: *Starry v. Korab*, 65-267.

153. Judgment: The judgment rendered against the garnishee should not exceed the amount of the judgment against the original debtor and the costs of the proceeding in which such judgment was obtained: *Timmons v. Johnson*, 15-23.

154. Without a recovery against the debtor there can be no judgment against the garnishee: *Barton v. Smith*, 7-85.

155. And a judgment against a garnishee will be reversed on appeal where it does not appear from the record that judgment was rendered against the defendant in the

main action: *Bean v. Barney*, 10-498; *Toll v. Knight*, 15-370.

156. Judgment against garnishee cannot legally be rendered on a liability not yet due: *Wilson v. Albright*, 2 G. Gr., 125.

157. Conditional judgment: Where the garnishee is found indebted to defendant on a contract payable in property other than money, the judgment should be conditioned that it may be discharged in property, or, on failure thereof, become absolute, and a general execution issue: *Stadler v. Parmlee*, 14-175; *Ransom v. Stanberry*, 22-834.

158. Where it appears that the garnishee has a lien upon property of defendant in his hands, the judgment should be conditioned that it be discharged upon the property being turned over to the sheriff, the proceeds to be applied to the original judgment, after satisfying the lien of the garnishee: *Hawthorn v. Unthank*, 52-507.

159. It would not be proper in such a case to render an unconditional money judgment against the garnishee and thus make him a purchaser of the property without his consent: *Ibid*.

160. Alternative judgment: While the judgment against garnishee may be, in one sense, conditional, that is, contingent upon final recovery of judgment against the principal debtor, it should be absolute as to the amount of his indebtedness. If the judgment is for one of two amounts in the alternative, depending upon a future contingency, it cannot be regarded as final: *Battell v. Lowery*, 46-49.

161. A judgment that plaintiff recover from garnishee, providing that the garnishee be first fully indemnified, as by law provided, or that the notes be surrendered, is not a final judgment: *Seals v. Wright*, 37-171.

162. Other points as to judgment: Where garnishee was under obligation to account to defendant for one-half the proceeds of certain uncollected notes and accounts, held, that judgment could not be rendered against him for one-half the amount thereof, as some of them might be uncollectible, and the garnishee, being owner of the other half of such notes and accounts, was not under obligation to turn them over to the sheriff to escape liability: *Cox v. Russell*, 44-558.

163. Where the judgment in a garnish-

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ment proceeding was rendered jointly against different garnishees who answered separately, and a reply was filed as to all of such answers, and no showing was made that a joint liability was not established, *held*, that the judgment was proper: *Boyd v. Rutledge*, 25-271.

164. Where the liability of the other garnishees would be increased by the discharge of one, such other garnishees have an interest in the determination of the liability of their co-garnishee: *Creasap v. Bower*, 41-210.

165. The judgment in the garnishment suit need not in express terms recite the satisfaction of the indebtedness from the garnishee to defendant: *Stadler v. Parmlee*, 14-175.

166. The statutory requirement (Code, § 2992) that judgment against a garnishee shall refer to the original judgment, *held* sufficiently complied with if the record entry of the judgment against the garnishee contains the title of the cause in which such original judgment was rendered: *Boyd v. Rutledge*, 25-271.

167. A justice has jurisdiction in proceedings against a garnishee, although the judgment on which garnishment issues be for more than one hundred dollars: *Gillett v. Richards*, 46-652.

168. A judgment discharging the garnishee cannot be rendered by a judge in vacation: *Laughlin v. Peckham*, 66-121.

169. Effect of judgment: The legal effect of a judgment against a garnishee is to satisfy, to the extent of such judgment, the indebtedness between such garnishee and the principal debtor: *Stadler v. Parmlee*, 14-175.

170. The garnishee is protected by the judgment, although for error therein it might be reversed on appeal: *Houston v. Walcott*, 1-86.

171. If the debtor brings a suit against the garnishee, in this state, for a debt due him, the latter can successfully defend by setting up the fact that he has been garnished upon such debt in another state: *Moore v. Chicago, R. I. & P. R. Co.*, 43-885; *Leiber v. Union Pacific R. Co.*, 49-688.

172. Although exemption laws can have no territorial effect, yet where the debtor and creditor both resided in this state, and the

creditor caused proceedings to be brought in another state, and an indebtedness due to the debtor in this state, and exempt here, to be garnished, *held*, that the debtor might maintain an action against the creditor to enjoin the prosecution of such proceedings, and that the creditor, having violated such injunction and collected the amount of the indebtedness in the foreign jurisdiction, might be held liable in damages therefor in the same action: *Teager v. Landsley*, 69-725; *Hager v. Adams*, 70—.

173. The judgment against the garnishee by a court having jurisdiction as to the subject-matter, that is, a debt due from the garnishee, is a judgment *in rem* and cannot be attacked in a collateral proceeding: *Moore v. Chicago, R. I. & P. R. Co.*, 43-885.

174. Where defendant relies upon garnishment proceedings in another state as a bar to an action, it is competent to show that the principal judgment on which the garnishment proceeding was based was invalid for want of service sufficient to give the court jurisdiction: *O'Rourke v. Chicago, M. & St. P. R. Co.*, 55-332.

175. The release of a garnishee who is in fact indebted does not estop the creditor from levying on property bought with money paid by the garnishee to the debtor and which was due and unpaid at the time of garnishment and release: *Milligan v. Bowman*, 46-55.

176. Where a judgment debtor has been garnished and judgment rendered against him without notice of a prior assignment of the judgment, the assignee cannot compel payment while the judgment in the garnishment proceeding remains in full force: *McGuire v. Pitts' Sons*, 42-535.

177. Money paid out by the garnishee in connection with the proceedings in the original case, but not in accordance with any judgment in such case, cannot be allowed in satisfaction of his indebtedness: *Myers v. McHugh*, 16-335.

178. Appeal: If the garnishee allows judgment to go against him for an amount in excess of his indebtedness, and does not appeal therefrom, he cannot be relieved, even on payment of the amount actually due: *Burlington & M. R. R. Co. v. Hall*, 37-620.

179. A judgment against a garnishee will

Delivery essential.—Conditions, declarations, etc.

not be reviewed on appeal when the appellant has taken no exceptions to any ruling of the court, or submitted any motion to set aside the judgment: *Eason v. Gester*, 81-475; *Robison v. Saunders*, 14-539.

180. The principal defendant may appeal from a judgment against the garnishee: *Sinard v. Gleason*, 19-165.

181. Where a judgment is rendered against the garnishee, defendant cannot complain thereof on appeal unless he has ground of objection to the judgment rendered against him for the indebtedness sued upon: *Fanning v. Minnesota R. Co.*, 87-879.

182. The decision that garnishee is indebted to defendant is not conclusive, although the garnishee does not appeal. If the case is again opened by appeal, other parties, claiming that the indebtedness is due to them, may intervene: *Daniels v. Clark*, 88-556.

GIFTS.

1. **Delivery essential:** A gift unaccompanied by delivery is void and cannot be enforced, either in law or equity. Use following the gift is not of itself sufficient: *Willey v. Backus*, 52-401.

2. **Conditions:** If the donee has knowledge of the terms of the gift, he cannot acquire title to the property by receiving it in violation of such terms, and even if he has not knowledge of such conditions, and receives the property from an agent who is authorized to deliver it only upon performance of such conditions, he does not acquire title which the agent was not authorized to convey. In neither case would the donor become bound by his simple failure to repudiate the gift. The donee cannot dictate the terms, nor change those made by the donor, but must take the gift with its conditions or not at all: *Berry v. Berry*, 31-415.

3. **Declarations; acceptance:** Where the payee of promissory notes tore them up and declared that in the event of her death she did not intend that the maker should be liable thereon, *held*, that the destruction of the notes and the declarations of the payee constituted a gift to the maker thereof, and that, not being coupled with any condition,

his acceptance would be presumed: *Darland v. Taylor*, 52-503.

4. **Improvements:** When a party for a period of seven years, at the request of the owner, who was his uncle, took charge and control of a piece of farm land, cultivating and improving the same, and paying taxes thereon, and during the last two years, under a vague and indefinite promise and inducements made by his uncle, erected a residence and other valuable improvements, and moved upon the land, neither accounting nor being requested to account for the rents and profits, but never claiming to be the owner of the premises, *held*, that the evidence was insufficient to justify a court of equity in enforcing, as against heirs of the grantor, a specific performance of an alleged parol gift of said real estate: *Johnston v. Johnston*, 19-74.

5. An executory contract to convey, made by a father to his child without consideration, will not be enforced unless the child has, upon the strength of such promise, made permanent and valuable improvements: *Moore v. Pierson*, 6-279.

6. Where a gift was made by mother to daughter of real property, and a conveyance therefor executed, which was, however, retained by the mother and not recorded, but possession of the land was taken by the daughter thereunder and improvements made thereon, *held*, that in an action in equity, the daughter might have her title to the land quieted, subject, however, to the lien of an obligation entered into in connection with the gift, to furnish one-third of the support of the mother during the remainder of her life: *Wamsley v. Lincicum*, 68-556.

7. **Advancements:** A conveyance without consideration by a parent to his child is *prima facie* an advancement, and the burden of proof is upon the party claiming it to be a gift: *Burton v. Baldwin*, 61-283; *McMahill v. McMahl*, 69-115.

Further as to advancements, see ESTATES OF DECEDENTS, §§ 268-272, and CONVEYANCES, §§ 180-182.

8. Evidence in a particular case *held* not sufficient to show a gift of land from father to son: *Huston v. Markley*, 49-162.

9. **Burden of proof:** It seems that where a party claims title to property under a gift,

In general.—Nature of the contract.

the burden of proof is upon him to establish such gift: *Samson v. Samson*, 67-253.

10. **Confidential relations:** A gift obtained by a person standing in a confidential or fiduciary relation to the donor is *prima facie* void. But in a case of gifts from parent to children, there being nothing to indicate that they were made under the influence of the children, and there being no fiduciary relationship between the parties, *held*, that the transaction would be sustained: *Ibid*.

GRAND JURY.

See JURORS, and CRIMINAL LAW.

GUARANTY.

I. IN GENERAL.

- a. *Nature of the contract; how shown to exist.*
- b. *Consideration.*
- c. *Assignability.*

II. RIGHTS OF PARTIES INTER SE.

- a. *In general.*
- b. *Demand and notice; diligence.*

I. IN GENERAL.

a. *Nature of the contract; how shown to exist.*

1. **Defined:** A guaranty is a contract by one person to another for the fulfillment of the promise of a third person, made to the latter: *Andrews v. Tedford*, 37-314.

2. A guarantor is a surety and may avail himself of the defense of usury to the same extent as the principal: *Conger v. Babbet*, 67-13.

3. **Distinguished from suretyship:** A guarantor is one who becomes bound for a prior or collateral contract upon which the principal alone is indebted. A surety is one who joins with his principal in the execution of a contract and becomes primarily liable thereon. The guarantor is not primarily liable upon his principal's contract, and only becomes liable upon the default of the latter: *Singer Mfg. Co. v. Littler*, 56-601.

4. **Blank indorsement:** By Code, § 2089, the blank indorsement of an instrument for the payment of money, property or labor,

by one not the payee, indorsee or assignee thereof, is deemed a guaranty, but a full indorsement of such instrument, or an indorsement thereof by a party, does not make the indorser a guarantor: *Stout v. Noteman*, 30-414; *Greene v. Thompson*, 33-293.

5. A writing on the back of a note, "I hereby indorse within note," signed by a person not a party to the note nor an indorsee or transferee thereof, constitutes in legal effect a blank indorsement within the terms of this section: *Conger v. Babbet*, 67-13.

6. Such a contract of guaranty is different from a contract of suretyship: *Robinson v. Reed*, 46-219.

7. Two such indorsers by successive blank indorsements, neither of them being parties to the note, are not co-sureties: *Knight v. Dunsmore*, 12-35.

8. **Absolute guaranty:** There is a distinction between an offer or proposition to guaranty and a direct promise to guaranty. The former requires notice of acceptance, and must be acted upon, while the latter does not. Hence, where the defendant agreed in writing to sign a note already executed by another, for the purpose of securing the same, and thus caused the payee of the note to part with the consideration, the writing was considered an absolute guaranty, and notice of the acceptance of the guaranty was held unnecessary: *Carman v. Elledge*, 40-409.

9. **Recommendation:** Where defendant wrote plaintiff a letter respecting one who desired credit on the purchase of a machine from plaintiff, in which defendant, in substance, recommended the proposed purchaser as one in whom confidence might be placed, and assured plaintiff that the money would be forthcoming at the proper time, *held*, that such letter did not amount to an undertaking or promise such as to render defendant liable, in the absence of fraud: *Case v. Luse*, 28-527.

10. **Notice of acceptance is not necessary** where the guaranty is absolute. The guarantor must ascertain for himself whether the person whom he has guaranteed has availed himself of the guaranty or not. The following form is an absolute guaranty: "If D. A. Hills purchases a case of tobacco on credit I agree to see the same paid for in four months." Notice of the acceptance of an ab-

Nature of the contract; how shown to exist.

solute guaranty like the above is not necessary. It needs only to be acted upon: *Case v. Howard*, 41-479.

11. The question whether a guarantor had notice that his guaranty was accepted and acted upon is a question of fact for the jury: *First Nat. Bank v. Carpenter*, 34-433.

12. Where a continuing guaranty exists, and is acted upon from time to time, the course of dealing between the parties and the connecting circumstances may be sufficient to establish notice to the guarantor that such guaranty is being relied upon: *First Nat. Bank v. Carpenter*, 41-518.

13. Hence the finding of a jury to the effect that the guarantor had notice that his guaranty was being acted upon is sufficiently sustained when it appears from the evidence that the party desiring credit had asked the guarantor to guarantee him; that he had told the guarantor that such guaranty was necessary in order to procure advances, and that the party making advances upon the strength of this guaranty had intrusted the collection of some of them from time to time to the guarantor: *Ibid.*

14. A continuing guaranty remains in force until shown to be rescinded. The burden of proof for that purpose is upon the guarantor: *Knight v. Fox, Mor.*, 805.

15. Defendant wrote plaintiff that a certain party wanted "a little money; if you want any one on the note, I will fix it when I come in." Held, that this did not amount to a letter of credit, and was not an absolute undertaking to pay money advanced upon the faith of the instrument; that in order to render such a proposition binding it must be accepted; the manner in which defendant should bind himself, whether as surety, guarantor, or indorser, should be pointed out, and he should be notified of the acceptance within a reasonable time, and that such steps not having been taken, he could not be held liable, although he knew of the fact that money was being lent on the strength of his letter: *Scribner v. Ruthersford*, 65-551.

16. **Waiver of notice; ratification:** Where a guarantor, upon being notified of sales made upon his guaranty as an existing obligation, promised to make it good, held, that he thereby waived any objection on account of failure to notify him of acceptance

of the guaranty when first acted upon: *Farwell v. Sully*, 38-387.

17. And held, that such a ratification by the guarantor was a waiver of any obligation to give notice at a future time of the amount of the liability as provided by the terms of the guaranty: *Ibid.*

18. Evidence: A memorandum book containing orders given to a seller's agent is admissible in evidence to show that a certain party had guaranteed the whole of an order sought to be charged against him, and not merely a part of the order, when it appears that the guarantor had written his name in the book in the middle of the order in question as a part of the transaction. It is competent evidence against him for whatever it is worth in order to show what his connection with the transaction really was: *Shadbolt v. Shaw*, 40-533.

19. Parol evidence will not be received to show that a written instrument, by which a party agrees to pay a certain sum of money at a certain time and place, was intended as a guaranty for the fulfillment of a promise by a third person to pay a different sum at another time and place: *Andrews v. Tedford*, 37-314.

20. **Construction in particular cases:** A. guaranteed to B. the "payment of all indebtedness by account, note, indorsement of notes or otherwise" incurred by his principal, C. C. then transferred to B. certain notes, guaranteeing their prompt payment, but not indorsing them. Held, that C.'s guarantors were liable for his simple words of guaranty without other indorsement: *Davis Sewing Machine Co. v. McGinnis*, 45-538.

21. Where guarantors undertook to guarantee the payment of notes of certain descriptions to be transferred and guaranteed by the principal debtor to his creditor, and the creditor accepted notes not corresponding to the descriptions contained in the contract, held, that the guarantors were not liable: *Ibid.*

22. Where a party, in answer to a letter demanding guaranty of payment for goods proposed to be sold, responded that defendant "has offered to assist me; if satisfactory please ship the goods," and to which was added, "I agree to the above," signed by defendant, held, that this was a sufficient written guaranty to render defendant liable for

Consideration.—Assignability.—Rights of parties inter se.—In general.

goods shipped in accordance with such letter: *Westphal v. Moulton*, 45-168.

23. A guaranty "to continue in full force for the sum of, etc., until countermanded in writing," held to be a continuing guaranty, but limited to that amount of indebtedness: *Clark v. Hyman*, 55-14.

b. Consideration.

24. Extension of time on an account is a sufficient consideration for an agreement by a third party to guarantee the payment of the account: *Taylor v. Wightman*, 51-411.

25. Parol evidence is admissible to show a consideration for such contract other than that expressed on its face: *Ibid.*

26. Implied: A written guaranty to pay a past debt to another will imply a consideration: *Henderson v. Booth*, 11-212.

27. A blank indorsement of an instrument by one not a party thereto (which by Code, § 2089, constitutes a guaranty) imports a consideration in the absence of evidence to the contrary: *Veach v. Thompson*, 15-380.

28. And such an indorsement, made without consideration for accommodation, will be binding in the hands of a purchaser for value even with knowledge of the fact that it was made for accommodation: *Berryhill v. Jones*, 35-335.

29. A contract of indemnity by the plaintiff in a garnishment proceeding to protect the garnishee against any liability which may be enforced by the garnishment defendant against such garnishee notwithstanding the garnishment, is upon sufficient consideration: *Lucy v. Price*, 39-26.

c. Assignability.

30. May be assigned; action by assignee: Under the provisions of the statute making all contracts assignable, a guaranty may be assigned and an action thereon may be brought by the assignee in his own name: *First Nat. Bank v. Carpenter*, 41-518.

31. A verbal assignment of a guaranty transfers to the assignee the right to maintain a suit thereon in his own name: *Green v. Marble*, 37-95.

32. Not negotiable: A contract of guaranty is not negotiable: *Carter v. Dubuque*, 35-416.

II. RIGHTS OF PARTIES INTER SE.

a. In general.

33. Out of particular fund; mistake: Where the guaranty of a note was modified before signature by adding thereto that payment of the guaranty would be made "out of the funds placed in my hands as assignee" of the maker, held, that the qualification did not limit the liability of the guarantor, and the fact that he was assured by the attorney of the payee that the qualification would have that effect was not admissible as evidence to vary his liability: *Wadsworth v. Smith*, 43-489.

34. Right of action arises when: Where a party agrees to indemnify another against a judgment, the party to be indemnified may bring action upon the failure of the other to perform his agreement, but the plaintiff must show that he himself has paid the judgment: *Bacon v. Marshall*, 37-581.

35. Liability of partnership: A guaranty given by one member of a firm will bind the firm when the giving of such a guaranty is within the scope of the partnership business. Thus a guaranty given in the firm name by one member of a banking firm binds the firm: *First Nat. Bank v. Carpenter*, 41-518.

36. A joint action may be maintained against the maker and guarantor of a promissory note: *Marvin v. Adamson*, 11-371; *Mia v. Fairchild*, 12-351; *Veach v. Thompson*, 15-380.

37. Not waived by taking note of principal: Where a purchase is made by a party on the strength of a guaranty given him by another, such guaranty is not affected by the fact that the creditor takes a note of the debtor covering that amount: *Case v. Howard*, 41-479.

38. Creditor need not exhaust other security: The fact that a creditor has security upon personal property which he fails to enforce until it becomes valueless does not release a guarantor of the debt: *Fuller v. Tomlinson*, 58-111; *Adams & French Harvester Co. v. Tomlinson*, 58-129.

39. Settlement: Matter accruing before the making of the guaranty, held not to be considered as constituting a settlement or a waiver: *Star Wagon Co. v. Szezy*, 59-609.

Demand and notice; diligence.

40. Subrogation upon payment: A guarantor who pays an indebtedness is entitled to have the principal undertaking assigned to him and to have the benefit of all securities which have been placed in the creditor's hands by the principal debtor. Thus a guarantor who pays a note becomes entitled to the ownership of the note, and becomes the equitable owner of a chattel mortgage given for its security, and his rights under the mortgage are not affected by satisfaction of the mortgage entered on the record by the mortgagee, no rights of innocent parties having intervened: *Rand v. Barrett*, 66-781.

b. Demand and notice; diligence.

41. Not necessary in case of absolute contract of guaranty: The guarantor under an absolute contract of guaranty is liable without proof of notice of non-payment: *Crittenden v. Steele*, 3 G. Gr., 588; *Henderson v. Booth*, 11-212.

42. In case of absolute guaranty of an instrument by a party thereto, demand of payment and notice of non-payment need not be alleged: *Peddicord v. Whittam*, 9-471; *Marvin v. Adamson*, 11-871.

43. So held in case of guaranty by drawer of sight draft: *Griffin v. Seymour*, 15-30.

44. So where the payee of a note, secured by mortgage, indorsed the note and guaranteed the mortgage, and the mortgage became due by its stipulations through failure to pay taxes, held, that the guarantor became liable, although the note was not yet due and he had no notice of presentment and dishonor: *Clafin v. Reese*, 54-544.

45. So where a non-negotiable instrument was guaranteed by the payee, held, that he became liable without demand and notice: *Peck v. Frink*, 10-193.

46. Guaranty by blank indorsement of person not a party: A blank indorsement of an instrument by a person not a party thereto (in the absence of the statutory provision below referred to) renders the indorser liable in accordance with the contract, in pursuance of which the indorsement is made, and the blank indorsement may be filled up accordingly. If that contract is one of guaranty, proof of demand and notice is not necessary, but want of demand and notice may

be set up as a defense, to the extent to which such guarantor can show himself to have been injured by want of such demand and notice: *Fear v. Dunlap*, 1 G. Gr., 331.

47. By statutory provisions (Code, §§ 2089, 2090) the guarantor by blank indorsement of an instrument to which he is not a party as payee, indorsee or assignee, cannot be held unless he has notice of non-payment within a reasonable time, or the holder shows affirmatively that such guarantor has received no detriment from want of such notice: *Picket v. Hawes*, 14-460.

48. But these provisions are not applicable to other forms of guaranty: *Griffin v. Seymour*, 15-30; *Peddicord v. Whittam*, 9-471; *Sabin v. Harris*, 12-87.

49. This statutory provision is not affected by the other provision (Code, § 2092) as to notice of non-payment of negotiable paper: *Sibley v. Van Horn*, 18-209.

50. Where a person becoming guarantor by blank indorsement of an instrument to which he was not a party, afterward indorsed an extension of time on such guaranty, held, that such second indorsement did not change the nature of his liability: *Picket v. Hawes*, 14-460.

51. What is reasonable notice: While the guarantor of a note should be notified within a reasonable time of the non-payment by the maker, yet the reasonable notice to which he is entitled is not the same as that which must be given an indorser: *Greene v. Thompson*, 33-293.

52. Delay in giving notice: Although the guarantor of a note ought to be notified of its non-payment, yet he cannot defend for want of notice unless it has been so long delayed as to raise a presumption of payment or waiver, or unless he can show that he has lost, by the delay, opportunities for protecting himself which an earlier notice would have secured him: *Second Nat. Bank v. Gaylord*, 34-246.

53. No detriment: Where there is testimony tending to show affirmatively that the guarantor by blank indorsement of an instrument to which he is not a party received no detriment from want of notice, that question should be left to the jury: *Mt. Pleasant Branch, etc., Bank v. McLeran*, 26-306.

54. Proof of the maker's insolvency at ma-

Demand and notice; diligence.

turity of the note and continuously afterwards is *prima facie* sufficient to show that the guarantor has received no detriment from want of notice: *Knight v. Dunsmore*, 12-85.

55. Demand is not necessary in such cases: *Ibid.*

56. Want of notice as a defense: The want of demand and notice to the guarantor of non-payment will constitute a defense only where the guarantor shows actual loss resulting to him from want of notice: *Ibid.*; *Fear v. Dunlap*, 1 G. Gr., 331; *Weller v. Hawes*, 19-443; *Rodabaugh v. Pitkin*, 46-544.

57. And the guarantor will be discharged for want of notice only to the extent that he has suffered injury from the want thereof: *Fear v. Dunlap*, 1 G. Gr., 331; *Sabin v. Harris*, 12-87.

58. How pleaded: It is for the guarantor to allege want of notice and detriment therefrom, if he relies thereon as a defense: *Marvin v. Adamson*, 11-371.

59. The burden of proof of injury from want of notice is upon the guarantor relying thereon as a defense: *Sabin v. Harris*, 12-87.

60. Waiver of notice: Where the guarantor of notes expressly waived notice and protest, held, that notice to him of default of the maker was not necessary, and that he was liable without proof that he had suffered no injury from want of such notice: *Star Wagon Co. v. Swezy*, 59-609; *S. C.*, 52-391; *S. C.*, 63-520.

61. Notice in case of continuing guaranty: Where there is a continuing guaranty, under which the liability of guarantor is subject to be increased or diminished from time to time, and there is uncertainty as to when it will cease, the party indemnified having the power to put an end to the contract guaranteed without the knowledge of the guarantor, must notify the guarantor, within a reasonable time after the transactions with the principal debtor are closed, of the amount or extent of his liability: *Davis Sewing Machine Co. v. Mills*, 55-543; *Singer Mfg. Co. v. Littler*, 56-601.

62. Want of diligence; detriment: In an action on an absolute guaranty it is not necessary to aver diligence in commencing suit, nor want of detriment to guarantor by reason of the failure to do so: *Peddicoord v. Whitlam*, 9-471; *Peck v. Frink*, 10-193.

63. Mere lack of diligence on the part of the holder in enforcing payment from the maker of a note will not estop him from looking to the guarantor: *Star Wagon Co. v. Swezy*, 63-520.

64. Guaranty of collectibility: Where the guaranty is of the collectibility of a note, the guarantor is entitled to have the note presented to the maker and to notice of non-payment within a reasonable time, unless it is shown that he suffered no detriment from the neglect to give such notice. The guaranty of collection implies that something is to be done by the holder towards securing the collection: *Peck v. Frink*, 10-193.

65. Due diligence, or excuse must be pleaded: Where the guaranty is of collectibility, the petition in an action against the guarantor must state that due diligence has been used in the effort to collect, or an excuse for not using such diligence. The facts constituting diligence must be stated; a general averment of diligence will not be sufficient: *Leas v. White*, 15-187.

66. If the holder fails to show diligence or an excuse for want of diligence in his efforts to collect from the parties liable on the note at the time its collectibility is guaranteed, he cannot recover from the guarantor: *Summers v. Barrett*, 65-292.

67. What constitutes due diligence in such case: Due diligence sufficient to hold a guarantor of collectibility would generally require suit to be commenced at the first regular term of court after maturity and the obtaining judgment and execution thereon as soon as practicable by the ordinary rules and practice of the court: *Voorhies v. Ailee*, 29-49.

68. Waiver of diligence: If, at the instance and request of guarantor, and upon the faith of his promise, diligence is not used in enforcing collection, the guarantor will be deemed to have waived the exercise of diligence: *Goodwin v. Buckman*, 11-308.

69. One who is jointly liable on the original contract cannot defend on the ground of want of diligence as against the principal joint contractor: *McLott v. Savery*, 11-323.

70. Indemnity against judgment; notice: Where a creditor agreed to indemnify a garnishee against any judgment which might

Natural guardian.—Appointment.—Bond.

be rendered against him in a subsequent action by the defendant, *held*, that if the indemnitor had notice of such subsequent action against the garnishee he would be bound by the judgment therein, and even in the absence of such notice a judgment would be *prima facie* evidence of his liability under his contract of indemnity: *Lucy v. Price*, 39-26.

71. **Loss or release of securities:** While the release of securities held by the creditor will release the guarantor to that extent because depriving him of the right of subrogation, yet where the creditor, although having a lien upon personal property as security, has no responsibility for its custody and care, the mere fact that he does not enforce such lien until the property is lost or destroyed will not release the guarantor: *Fuller v. Tomlinson*, 58-111; *Adams & French Harvester Co. v. Tomlinson*, 58-129.

72. **Laches of creditor in recording confession of judgment:** Where a party guaranteed a confession of judgment which by an agreement between the other parties without guarantor's knowledge was withheld from record until land upon which it would have been a lien, if recorded, was disposed of, and the principal debtor was insolvent, *held*, that such guarantor had a right to expect that the usual course would be pursued with the confession, and judgment entered thereon within a reasonable time, and that by the laches of the creditor in this respect the guarantor was released: *Hancock v. Wilson*, 46-352.

GUARDIANSHIP.

1. **Natural guardian:** In case of the death of the father, the mother has the right to sue as natural guardian for the earnings of her child: *Cain v. Devitt*, 8-116.

2. A minor is not bound by any contract made for him by his parent as natural guardian, without formal guardianship having been granted: *Jones v. Jones*, 46-466.

3. A step-father of minor children who are members of his family stands *in loco parentis* to such children: *Latham v. Myers*, 57-519.

4. But such person, although their natural guardian, is under no obligation to preserve their property by paying off incumbrances thereon, and is not debarred from acquiring

title to such property under foreclosure proceedings: *Otto v. Schlapkahl*, 57-226.

As to the right of the parent to custody and control of the person of the child, see PARENT AND CHILD.

5. **Appointment of guardian:** Where there is no parent or guardian qualified, the circuit court is by statute authorized to appoint a guardian, and the guardian thus appointed is the guardian of the person as well as of the property of the ward: *Burger v. Frakes*, 87-460.

6. **Bond:** It is proper to appoint one guardian for several wards jointly and to take a bond for their joint security, when the wards hold by common title, as, for instance, as tenants in common: *Pursley v. Hayes*, 22-11.

7. Where the guardian gave a joint bond as to four different wards, *held*, that the sureties thereon could not be liable as to the funds received for any one ward to more than a proportional amount of the sum mentioned in the bond: *Hooks v. Evans*, 68-52.

8. The duty of passing upon the sufficiency of the guardian's bond devolves upon the court and cannot be performed by the clerk in vacation. Therefore, *held*, that the clerk was not liable in damages for the acceptance of the bond of a guardian appointed in vacation without requiring sureties. The duty of approving the bond should have been performed by the court at the term following the appointment: *Reno v. McCully*, 65-629; *Reno v. McCully*, 66-730.

9. The sureties upon a guardian's general bond are not liable for moneys received by him in the sale of the ward's real estate, under the order of the court, a special bond being required in such cases by statute: *Madison County v. Johnston*, 51-152; *Bunce v. Bunce*, 65-106.

10. But where a sale of real property was made by a referee in a proceeding for partition, *held*, that the guardian was liable under his general bond for the proceeds of such sale, there being no provision for a special bond in such case: *Hooks v. Evans*, 68-52.

11. Where a guardian is required by order of court to give additional bond, on account of insufficiency of the first bond, the sureties on the additional bond are liable for default of the guardian previous to the giving of the new bond: *Douglass v. Kessler*, 57-63.

Powers.—Custody of ward.—Liability.

12. **Powers:** The power to manage the estate of an infant can only emanate from the court authorized to appoint a guardian: *Young v. Gammel*, 4 G. Gr., 207.

13. Where a guardian receives notes of third parties in satisfaction of an indebtedness, and afterwards as guardian receives the money upon such notes, such satisfaction of the original indebtedness is sufficient in equity: *Jones v. Jones*, 20-388.

14. Under the statute the powers of the guardian over his ward's property are more limited than at common law. The guardian can only act in pursuance of the direction of the court first obtained, and an act done without such direction will not bind the ward's property: *Bates v. Dunham*, 58-808.

15. A guardian cannot loan the ward's money to himself, nor without the order of the court invest it in land: and where, without authority, money of the wards was thus invested, and the probate court refused to recognize the transaction as binding upon the wards, *held*, that the property did not vest in them but remained in the guardian: *McReynolds v. Andersen*, 69-208.

16. A lease made by a guardian is invalid, or voidable at least, unless ordered or approved by the proper probate court: *Alexander v. Buffington*, 66-860.

17. A guardian has no authority to pay, out of the proceeds of the sale of the ward's property, claims of third persons against such ward: *Cassedy v. Casey*, 58-326.

18. The guardian has the power, under direction of the court, to superintend the education and nurture of the ward, and for that purpose he may pay out such portion of the ward's money as the probate court may, from time to time, order and direct. For this purpose the rents and profits of the real estate, and after that the interest of the ward's money, are to be first resorted to; but the guardian will not be permitted, without an order of the court to that effect, to encroach upon the principal sum of the ward's estate. As a general rule the expenses of the ward must be kept within the income of the ward's estate: *Foteaux v. Lepage*, 6-123.

19. Where the ward has received no consideration for a conveyance, the guardian may bring action for him to set the same aside without first procuring an order of

court authorizing him to do so, and without any formal act of revocation: *Gates v. Carpenter*, 48-152.

20. In such a case, if the validity of the guardian's appointment is not properly put in issue, evidence that the ward was not an inhabitant of the county at the time of the guardian's appointment, and that he had no foreign guardian, is not admissible: *Ibid*.

21. A guardian has authority to compromise a suit for his ward upon obtaining leave of court, and notice to the ward of an application for such permission is not essential, the proceeding not being one adversary as to the ward: *Hagy v. Avery*, 69-434.

22. **Custody of ward:** The guardian is entitled to the custody of his ward, and it is not competent for a judge or court in a *habeas corpus* case to review the proceedings under which the guardian is appointed, nor to inquire whether he should in any manner be relieved from the duties and rights of guardian, and order the custody of the child to be given to another more capable and better fitted to receive it: *Burger v. Frakes*, 67-460.

23. **Liability:** It is proper to render a personal judgment against a guardian who executes a bond for his ward in his individual capacity: *Oliver v. Townsend*, 16-430.

24. Proceedings to establish a claim against the ward's estate should be brought against the ward: *Bently v. Torbert*, 68-122.

25. Where a guardian collected pensions due to his ward, so far as they were necessary to support the ward, *held*, that it was not negligence on his part to allow arrears of pensions to accrue uncollected, although by the subsequent death of the ward the collection of such arrears from the government was, by reason of the provisions of the statutes of the United States, impossible: *Mattox v. Patterson*, 60-434.

26. Where a tax title was conveyed to the guardian as such, *held*, that the conveyance inured to his ward's benefit, and that subsequent purchasers of the property from the guardian were chargeable with notice of the rights of the ward: *Rankin v. Miller*, 43-11.

27. Where a person who had stood *in loco parentis* to a minor and was his guardian, soon after the coming of age of the minor, and before he had become emancipated from the

Sale of property.—Notice.

habit of obedience and deference, secured an unconscionable contract from him by the exercise of authority and solicitation, or by fear excited by false representations, *held*, that such contract would be regarded as procured by undue influence and would be set aside in a proper action: *Tucke v. Buckholz*, 43-415.

28. **Sale of property:** A father merely as natural guardian has no authority to sell land of his child, even when authorized to do so by order of the probate court, and a deed made by him will not be valid, even as against him when he subsequently acquires the title by inheritance from the child: *Shanks v. Seamonds*, 24-181.

29. A sale or mortgage of the ward's property will cover a reversionary interest therein owned by the ward, although he does not have a fee-simple title: *Foster v. Young*, 35-27.

30. **Authority of court to sell or mortgage:** Where the application to the court is for power to sell, the court has no jurisdiction to make an order authorizing the guardian to mortgage the property: *McMannis v. Rice*, 48-361.

31. The term "mortgage" in such connection means the granting of an estate, as pledge for the payment of money, without reference to the form which the grant assumes: *Foster v. Young*, 35-27.

32. **Application for authority to sell:** A general averment in the petition, in regard to the necessity of a sale of the ward's property, is sufficient to give the court jurisdiction to order such sale: *Bunce v. Bunce*, 59-533.

33. When the petition for authority to sell alleges the necessary jurisdictional facts, it is not requisite, after the hearing is had, that the final order by the court should recite them in detail: *Pursley v. Hayes*, 22-11.

34. Where the petition in an application for leave to sell did not set out the names of the wards, but described them simply as heirs, although the notice was to them by name and was served upon each, *held*, that the defect was not jurisdictional, and that proceedings thereunder could not be collaterally attacked, especially where the minor heirs named were the only ones, and the whole record showed that they were sufficiently named and described: *Ibid.*

35. **Notice:** The notice is essential to the jurisdiction of the court; without it the sale will be void; but a defective notice will be sufficient to give jurisdiction, and the proceedings thereunder cannot be collaterally attacked: *Lyon v. Vanatta*, 35-521.

36. The proceeding for the sale of the ward's property is not *in rem*, but an adversary proceeding, and a sale without the notice required by law is void for want of jurisdiction: *Ibid.*

37. A notice fixing the time for hearing at a time not during a term of court, or which does not fix any time, is no notice, and proceedings thereunder will be void: *Ibid.*; *Haws v. Clark*, 37-355.

38. If there is no service of notice, the proceedings will be void: *Rankin v. Miller*, 43-11.

39. But if there is defective service, which is by the court held sufficient, any error in such holding cannot be the subject of collateral attack: *Pursley v. Hayes*, 22-11, 38.

40. Where the notice of the sale contained an entirely erroneous description of the property, *held*, that the sale was entirely void. The fact that the court has properly acquired jurisdiction to appoint a guardian will not render subsequent want of notice as to the sale a mere irregularity. Jurisdiction as to the one matter does not necessarily confer jurisdiction as to the other: *Frazier v. Steenrod*, 7-339.

41. Where actual personal service of notice upon a minor was shown, and it appeared that the court had determined that the service had been duly made, as provided by law, and such determination was of record, *held*, that even though it did not appear that a copy of the petition was filed, as required by statute, the proceedings were not void: *Bunce v. Bunce*, 59-533.

42. Under a statute requiring notice to a minor of an application by his guardian for sale of his lands, *held*, that in the absence of proof of notice, or the finding by the court that notice had been given, the proceedings were void and no title passed: *Rankin v. Miller*, 43-11.

43. **Discretion to order sale:** A refusal by the court to order a sale when proper grounds therefor are shown is an error which will be corrected on appeal. The dis-

Sale of property.

cretion with which the court is clothed is not absolute, but a legal discretion: *Dickinson v. Hughes*, 37-160.

44. **Abatement:** The proceedings for the sale are not abated by the resignation of the guardian who files the petition and the appointment of another guardian: *Wade v. Carpenter*, 4-361.

45. **Bond:** Failure to give the bond required in case of authority to sell will not render the sureties upon the guardian's general bond liable for the proceeds of property sold by order of the court: *Bunce v. Bunce*, 65-106.

46. The sureties on the general bond are not liable for default of the guardian with reference to funds coming into his hands from the sale: *Ibid.*; *Madison County v. Johnston*, 51-152.

47. While it would be better to make the guardian's bond payable to the parties interested, the fact that it is payable to the county will not vitiate it, nor will the fact of its being thus made payable, or the failure of the judge to enter of record its approval, invalidate the title derived from the sale: *Pursley v. Hayes*, 22-11.

48. Action on the bond cannot be brought until the guardian has failed to obey some order of the court in respect to the proceeds of the sale: *O'Brien v. Strang*, 42-643.

49. Where real estate was sold by the guardian under order of court for the purpose of investing the proceeds, and on the settlement the guardian was ordered to pay over to the ward a sum in excess of the amount received from the sale of the real estate, *held*, that the surety on the bond for the sale was liable for the amount received therefrom, although in the settlement it did not expressly appear what portion of the amount ordered to be paid over was received from the real estate: *McWilliams v. Kalbach*, 55-110.

50. **Representations** made by the guardian at a sale of real property on his application, with reference to the legal title, which was a matter of record, *held* no defense in an action against the purchaser for the price: *Findley v. Richardson*, 48-103.

51. **Approval of sale:** The approval of the sale by the court as required by the statute is not a mere formality but is essential to its

validity. The approval is of the sale and not merely of the deed: *Wade v. Carpenter*, 4-361.

52. The record in a particular case *held* to sufficiently show the approval of the mortgage made by order of the court: *McMannis v. Rice*, 48-361.

53. Under a former statute allowing the clerk of the probate court to transact, in the absence of the judge, all probate business not requiring notice, subject to the supervision and approval of the judge, *held*, that the indorsement upon the deed of approval by the clerk of the sale and deed, and the approval by the judge of the sale when reported by the guardian, constituted a sufficient approval to render the deed valid: *Bunce v. Bunce*, 59-533.

54. It is at least doubtful whether, between the time of sale and the approval of the deed, the purchaser has any taxable interest in the property sold: *Ordway v. Smith*, 53-589.

55. **Presumption of regularity:** In the absence of anything in the record showing the order of sale or the sale itself to be void, the proceedings will be presumed regular: *Pursley v. Hays*, 17-310.

56. **Cannot be attacked collaterally:** If the court has jurisdiction of the subject-matter and the parties, its judgment, in the absence of fraud, is conclusive and cannot be collaterally attacked: *Pursley v. Hayes*, 22-11.

57. Where jurisdiction has attached and a sale has been approved, it cannot be successfully attacked in a collateral proceeding alleging the want of a sale bond: *Bunce v. Bunce*, 59-533.

58. Where it appears that there was service of notice, and the record of the court recites that notice, according to law, has been given, the regularity of the manner of giving notice cannot be inquired into collaterally: *Wade v. Carpenter*, 4-361.

59. As to the validity of proceedings as affected by defect in the notice, and as to what presumptions are to be indulged in in favor of their regularity, see *Cooper v. Sunderland*, 3-114. Also, on a parallel question, see *Shauhan v. Loffer*, 24-217.

And further on this point, see JURISDICTION, IV, b.

60. The validity of the sale cannot be at-

Sale of property.—Accounting by guardian.

tacked collaterally on account of insufficiency of the oath of the guardian: *Frazier v. Steenrod*, 7-339.

61. Revocation by ward: A minor, who, after attaining his majority, with full knowledge of all the facts attending the sale of his property by the guardian, and its alleged invalidity, and of his rights in the premises, elects to receive and still retains the purchase money, thereby ratifies the sale and is estopped from claiming that it is void: *Pursley v. Hays*, 17-810; *Deford v. Mercer*, 24-118.

62. Setting aside sale: A petition to set aside a guardian's sale is not subject to demurrer on account of failure to tender therein repayment of the purchase money, it not appearing but that by receipt of rents and profits, or in some other manner, the right to claim such repayment has been extinguished: *Washburn v. Carmichael*, 32-475.

63. Limitation of action attacking sale: In order that a party may avail himself of the statutory limitation of five years upon an action questioning the validity of a guardian's sale (Code, § 2265), he must show that he has been in continuous possession of the property for five years: *Ibid.*

64. The limitation does not apply when the sale is entirely void: *Ibid.*; *Rankin v. Miller*, 48-11.

65. But if the sale is made pursuant to an order of the court having jurisdiction, it cannot be attacked after five years for irregularities in the proceedings: *Pursley v. Hayes*, 22-11.

66. The limitation has no application to appeals or other proceedings bringing the matter of the validity of the sale up for review in the superior court: *Ibid.*

67. Nor does it prevent the heir from questioning, after five years, the validity of a sale by a person having no pretense of authority as guardian, or one where there has been no notice to the heir, and which is therefore made without jurisdiction, and where no possession has been taken under the purchase: *Ibid.*

68. A purchaser under a guardian's sale who has been in possession for five years from the time of sale will be protected from objections as to the regularity of the sale, not jurisdictional in character, especially when raised in a collateral proceeding: *Ibid.*

69. Accounting by guardian; support of ward: A guardian who stands *in loco parentis* toward the ward, being entitled to the ward's services, is responsible for the ward's support and maintenance and cannot charge therefor in his account as guardian: *Bradford's Heirs v. Bodfish*, 39-681.

70. Where the guardian of minor children, after his appointment, married their mother and took them with her into his own family, where they were provided for as his own children and rendered him such services as children generally render their parents, held, that notwithstanding the general rule that a guardian standing *in loco parentis* toward the ward cannot in ordinary cases have compensation for the ward's maintenance, an allowance made under the particular facts for the support of the wards would not be set aside upon appeal: *Latham v. Myers*, 57-519.

71. The fact that the record of an order made upon the application of a guardian giving him an allowance for the maintenance of the wards is imperfect or wanting will not prevent him from having credit for an expenditure on that account approved by the court: *Ibid.*

72. Claims for support of the ward may be allowed by the probate court without notice to the ward. Such proceedings are not adversary, but the court simply directs the guardian in the discharge of his duty as it would its officers: *Brewer v. Stoddard*, 49-279.

73. To justify an allowance being made from the ward's funds for past support by the parent, all the facts necessary to a future allowance must be shown, and a satisfactory showing must be made why application for such allowance was not made in advance: *Welch v. Burris*, 29-186.

74. Pension money granted to the ward's father while living, and passing to the ward on his death, is not exempt from liability for the ward's support: *Ibid.*

75. Separate accounts: It is unquestionably the duty of the guardian, when there are more wards than one, to keep the account of each one separate and to keep the estate of each to itself: *Foteaux v. Lepage*, 6-123.

76. If judgment is to be rendered against the guardian in such case, it should be for such sum, to be ascertained by the court, as

Report of guardian.—Settlement.—Compensation.

each ward is entitled to, and not for the whole amount in his hands due to all the wards: *Ibid.*

77. **Report:** The report of the guardian as to his account cannot properly be demurred to. If necessary in order to bring out the facts, a motion for more specific statements should be made and the case determined on the facts thus shown: *Gerdes v. Weiser*, 54-591.

78. The fact that an intermediate report by the guardian charges him with money improperly invested in land in the name of his ward is an error which cannot be corrected on an appeal by the guardian to which the ward is not a party. If the ward should retain the title to the property until majority, the charge would be erroneous: *Cassedy v. Casey*, 58-326.

79. Where the guardian reports a sale of property and investment of proceeds in other property in the name of the ward, the failure of the ward, until after coming of age, to disaffirm such transaction will prevent him from objecting to the report in that respect: *Ibid.*

80. **Settlement:** Where the accounts of a guardian have been settled in the probate court and a balance found due him, such settlement will bind the ward until it is set aside or in some way lawfully attacked, and a proper expenditure in behalf of the ward cannot be called in question in an action by the guardian against the ward to recover the amount found to be due on such settlement: *King v. King*, 40-120.

81. Where the ward after becoming of age accepted from the surety on the guardian's bond, in settlement of the indebtedness of the guardian, at that time deceased, a note received by the guardian for money of the ward loaned by such guardian, *held*, that the fact that at the time such note was accepted the maker and surety thereon were insolvent, that fact not being known to the parties, would not prevent the acceptance being binding upon the ward: *Smith v. McKee*, 67-161.

82. **Following proceeds:** Where the guardian has improperly invested the money of the ward, the latter may, at his election, instead of holding the guardian accountable, follow the money and claim the property in

which it has been invested: *Robinson v. Robinson*, 22-427.

83. The death of the ward terminates the power of the guardian. The settlement of the estate then devolves upon the administrator. Claims against the ward must be presented against the administrator of his estate: *Ordway v. Phelps*, 45-279.

84. **Liability for interest:** Where the guardian has failed to account and has encroached upon property of the ward's estate, he may be required to pay interest, compounded at the end of each year, at six per cent.: *Foteaux v. Lepage*, 6-123.

85. Where certain charges of a guardian for support of his ward were disallowed, *held*, that as it was the duty of the guardian to invest the money, he should be charged with six per cent. interest thereon compounded annually: *Bradford's Heirs v. Bodfish*, 39-681.

86. Where a guardian has improperly expended money of the ward in his hands, he may be charged with the amount received and thus improperly expended with eight per cent. interest thereon with annual rests: *In re Mells*, 64-391.

87. **Compensation:** Where a guardian had delayed for ten years to make a settlement, and instead of putting out the money of the ward at interest had used the same himself, *held*, that although he could not be charged a higher rate of interest than six per cent. compounded annually, he might properly be denied compensation: *Foteaux v. Lepage*, 6-123.

88. The action of the court in allowing the guardian no compensation, but in lieu thereof not charging interest on the balance in his hands, *held* proper: *Mattox v. Patterson*, 60-434.

89. **Action against guardian and sureties:** Under the statute the court has the sole right to determine what is a guardian's duty under the law, and nothing but a failure to obey its orders can be deemed a breach of the guardian's bond: *O'Brien v. Strang*, 42-643.

90. The surety's liability on the bond does not commence simultaneously with the ward's majority, but only upon failure of the guardian to comply with an order of the court in a proper proceeding for settlement of his accounts: *Ibid.*

91. A failure to pay over money by the

Persons insane or of unsound mind.—Civil proceeding.

guardian will not constitute a breach of his bond until the guardianship accounts are settled, or until he has failed to obey a mandate of the court requiring him to account: *Vermilya v. Bunce*, 61-605.

92. A surety in a guardian's bond should not be absolutely discharged upon his application, upon the minor's coming of age. The most that he is entitled to is a conditional discharge. If, after the majority of the ward and the final settlement with the guardian, the ward unreasonably delays to enforce what rights he may have against sureties on the bond, he may, upon application of the sureties, be ordered to commence and prosecute proceedings within a time to be named, and in the event of a failure to do so the sureties may be regarded as discharged: *Ibid.*

93. Right of action by a ward against his guardian arises when the guardianship ceases by the guardian's resignation or removal, or by reason of the ward arriving at full age, and such an action must be brought within the time limited by statute thereafter: *Humphreys v. Mattoon*, 43-556.

94. The guardian having conveyed certain land in trust for his ward as partial security for the ward's funds in his hands, but which was not actually purchased with such funds, held, that the ward having a remedy against his guardian and his bondsman should pursue such remedy and not insist upon the trust deed as against creditors seeking to make their debts out of such property: *Thomas v. Pyne*, 55-348.

95. Guardianship of persons insane or of unsound mind: The appointment of a guardian for an insane person is based upon the fact of insanity: *Wilson v. Shorick*, 21-332.

96. The appointment of a guardian upon a petition charging insanity will be regarded as a determination of the fact of insanity: *Ockendon v. Barnes*, 43-615; *Seerley v. Sater*, 68-375.

97. Who deemed of unsound mind: The statutory provision with reference to guardianship of persons of unsound mind relates to a condition different from idiocy, lunacy, or insanity. Weakness of mind is not necessarily unsoundness, but there may be a weakness short of idiocy, either congenital or superinduced by disease or old age, that

amounts to unsoundness: *Smith v. Hickenbottom*, 57-733.

98. A person of unsound mind is one who is incapable of transacting the particular business in hand. It is not necessary that he be insane or a distracted person, and he may be capable of transacting some kinds of business and yet be of unsound mind and incapable of transacting business of magnitude, or of some degree of intricacy: *Seerley v. Sater*, 68-375.

99. Powers and duties: The duties of guardians of insane persons in respect to the management of their property are, by statute, substantially the same as those of guardians of minors: *Gates v. Carpenter*, 43-152.

100. A tenant renting property belonging to a landlord who is under guardianship will be considered as holding the property under such insane owner, and as having notice of the rights of such owner, and a release by the guardian will not be regarded as defeating the rights of his ward: *Thode v. Spofford*, 65-294.

101. The guardian of an insane wife has not the power, on her behalf, to waive the right to have her dower interest in the estate of her deceased husband so set off as to include the homestead: *Ratcliff v. Davis*, 64-467.

HABEAS CORPUS.

1. Civil proceeding: A *habeas corpus* proceeding is civil, not criminal, and should be instituted in the name of the person restrained, as plaintiff: *State v. Collins*, 54-441.

2. Who deemed plaintiff: The person restrained is to be regarded as the petitioner or plaintiff: *Ibid.*; *Thompson v. Oglesby*, 42-598; *Rivers v. Mitchell*, 57-198.

3. Where to be brought: Under the statutory provision that the application must be made to the court or judge most convenient in point of distance, etc., to the applicant (Code, § 3452), the person to be deemed the applicant is the one whose liberty is restrained and not the one by whom the petition may be presented on behalf of such person, if it is presented by another than the person restrained: *Thompson v. Oglesby*, 42-598.

4. If the proceeding is for the recovery of the custody of a child, it may be brought in

Jurisdiction.—Military restraint.—Extradition.—Contempt.

any county wherein the sworn petition states that the child is to be found: *Rivers v. Mitchell*, 57-198.

5. **Jurisdiction:** Where the allegations of the petition are sufficient to authorize the writ, the judge acquires jurisdiction of the parties and the subject-matter, and an order made by him will not be void, but at most voidable, and subject only to attack in a direct proceeding: *Shaw v. McHenry*, 52-182.

6. **Attorney to represent state:** Where notice of the proceeding has not been given to the district attorney as required by statute (Code, § 8459), the court has no authority to appoint an attorney to represent the state and render the county liable for his fees: *Miller v. Buena Vista County*, 68-711.

7. **Right to office:** If the officer issuing the writ under which the prisoner is restrained acted under color of office, the question whether he is such officer *de jure* cannot be raised in a *habeas corpus* proceeding, but *aliter*, if he is a mere usurper without color of office. The right to an office cannot be contested in this proceeding: *Ex parte Strahl*, 16-369.

8. **Military restraint:** A return by respondent that he is a military officer of the United States holding the person restrained for the crime of desertion awaiting trial by court-martial is sufficient, and the prisoner will be remanded: *Ex parte Anderson*, 16-595.

9. A soldier while on furlough is not within the jurisdiction of the military authorities and may be arrested by civil authority without conflict: *Ex parte McRoberts*, 16-600.

10. **In extradition proceedings:** The court may, on *habeas corpus*, inquire into the sufficiency of the evidence to support a requisition under the provisions as to extradition. The determination of the governor as to the sufficiency of the evidence is not conclusive: *Jones v. Leonard*, 50-106.

11. **Action of committing magistrate:** The fact that the person arrested and brought before a committing magistrate waives preliminary examination does not debar him from the statutory privilege (Code, § 8482) of introducing evidence in a *habeas corpus* proceeding to question the sufficiency of the testimony to warrant his commitment: *Cowell v. Patterson*, 49-514.

12. A defect in the warrant of commitment will not entitle the prisoner to discharge if the court or jury is satisfied from the evidence that the prisoner ought to be committed for the offense charged, or any other, and in such case the prisoner should be remanded into custody and a proper order made in relation to the case: *Jackson v. Boyd*, 53-586.

13. It is not competent for plaintiff seeking to be released by *habeas corpus* from commitment on preliminary examination to state in his petition the substance of the evidence before the committing magistrate, and, by having defendant admit the correctness of such evidence, thereby make up the case which is to be presented to the court: *State ex rel. v. Rosencrans*, 65-382.

14. **Where prisoner is held under indictment:** An indictment is presumptive evidence of the guilt of the prisoner, and if it is for a capital offense, bail may be denied when applied for by *habeas corpus*. The court cannot be required in such cases to look behind the indictment and consider the evidence on which it was found: *Hight v. United States*, Mor., 407.

15. **In case of contempt:** Imprisonment for disobedience of an order of court which is erroneous only and not void cannot be inquired into by *habeas corpus*: *Ex parte Grace*, 12-208.

16. One court will not interfere by *habeas corpus* with proceedings in another court to punish a party for contempt, unless such proceedings are so grossly irregular as to be void: *Ex parte Holman*, 28-86; *Robb v. McDonald*, 29-330.

17. The supreme court cannot in a *habeas corpus* proceeding review an order of imprisonment for contempt and reverse it, unless the act constituting the alleged contempt was such that it can pronounce as a matter of law that it was not a contempt: *State ex rel. v. Seaton*, 61-563.

18. After conviction by a court having jurisdiction, though such conviction be irregular or erroneous, the party is not entitled to the writ, and this is true of a conviction before a magistrate; and where the defendant was found guilty before the proper police magistrate of a city, for violation of an ordinance of such city, and sentenced to imprisonment, *held*, that he could not be released

Proceedings in another court.—Custody of child.—Appeal.

on the ground that the ordinance under which he was convicted was invalid: *Platt v. Harrison*, 6-79.

19. Proceedings in another court having jurisdiction of the subject-matter and the person cannot be inquired into or corrected by a *habeas corpus* proceeding: *Ex parte Holman*, 28-88; *Zelle v. McHenry*, 51-572.

20. A judgment which is authorized by law, rendered in a court having jurisdiction, cannot be questioned by *habeas corpus*. Therefore, *held*, that a judgment of the lower court could not be attacked by *habeas corpus* on the ground that the judge had refused a change of venue and a jury trial: *Zelle v. McHenry*, 51-572.

21. The order of a judge having jurisdiction of the parties and the subject-matter, not being void, but, at most, voidable, cannot be set aside or evaded in a *habeas corpus* proceeding before another court or judge: *Shaw v. McHenry*, 52-182.

22. *Habeas corpus* cannot be invoked for the purpose of obtaining relief for mere errors and irregularities in the action of the court. Where the person has had a trial as to whether he was guilty of the crime for which he is imprisoned, the question of whether he committed the crime cannot be again determined upon *habeas corpus*, nor can an erroneous taxation of costs be questioned in that manner: *State v. Orton*, 67-554.

23. Proceedings in federal court: A state court cannot, on *habeas corpus*, release a person held in custody by the United States marshal by order of a federal court: *Ex parte Holman*, 28-88.

24. Custody of child: Proceedings by *habeas corpus* for the custody of a child are not criminal in their nature. The action should be in the name of the person alleged to be illegally restrained, and not in that of the state, and in case of failure to secure the discharge, the costs should not be taxed to the county: *State v. Collins*, 54-441.

25. In a proceeding by *habeas corpus* for the custody of a child, the controlling consideration is the interest of the child itself: *Fouts v. Pierce*, 64-71; *Drumb v. Keen*, 47-435.

26. But it is the best interests of the child and not its preferences and wishes which are to have a controlling influence: *Shaw v. Nachtwey*, 43-653.

27. The rule that the best interests of the child are to be considered is to be applied when the parent, seeking the custody of the child, has either by abandonment or contract surrendered his personal, legal right to such custody: *Bonnett v. Bonnett*, 61-199.

28. In a *habeas corpus* case it is not proper to review the proceedings for the appointment of a guardian or to inquire whether he ought in any manner to be relieved from the duties and rights of guardianship, or whether the custody of the child should be given to another more capable or better fitted to receive it: *Burger v. Frakes*, 67-460.

29. Where a writ was sought to recover the custody of a child from its father, *held*, that it was not a sufficient answer that he had sent the child out of the state, where it did not appear but that he could secure its return if he desired to do so: *Rivers v. Mitchell*, 57-193.

30. Method of trial: The trial is to be as in ordinary proceedings: *Drumb v. Keen*, 47-435.

31. Appeal: Therefore, upon appeal, the case will not be tried *de novo*: *Shaw v. Nachtwey*, 43-653.

32. The finding of the lower court as to the facts will have the effect of a verdict of the jury as in other cases by ordinary proceeding: *Drumb v. Keen*, 47-435; *Jennings v. Jennings*, 56-288; *Bonnett v. Bonnett*, 61-199; *Fouts v. Pierce*, 64-71.

33. The supreme court will reverse the action of the lower court as to its finding of facts only where such finding is manifestly unsupported by the evidence: *Kline v. Kline*, 57-386.

34. But the court may review the correctness of the action of the lower court as based upon its finding of facts: *Shaw v. Nachtwey*, 43-653.

35. Under the Revision, an appeal did not lie from an order by a judge of the supreme court in a *habeas corpus* proceeding: *In re Curley*, 84-184. (But this is now changed by Code, § 8165.)

36. The officer against whom the action is brought has, it would seem, sufficient interest to be allowed to appeal: *Jackson v. Boyd*, 53-536.

37. The taking of an appeal from an order of discharge and filing a *supersedeas* bond

What constitute; general jurisdiction.

does not stay the order of discharge: *State v. Kirkpatrick*, 54-373.

88. **Order of discharge:** The statutory provision as to certain orders of a judge made in vacation, that they shall be in force only during vacation and the first two days of the ensuing term of court, does not apply to the order in a *habeas corpus* proceeding made during vacation: *Shaw v. McHenry*, 52-182.

89. When an order of discharge is made, no further proceedings are to be had: *State v. Kirkpatrick*, 54-373.

40. **Costs:** Where defendant is successful it is not proper to tax the costs to the county, nor to the person restrained where the application is made by another for his release and it does not appear that the proceedings were brought by his consent. Whether they should be taxed to the person instituting the proceedings, *quære*: *State v. Collins*, 54-441.

HALF-BREED TRACT.

See PUBLIC LANDS, IV.

HIGHWAYS.

I. WHAT CONSTITUTE; GENERAL JURISDICTION.

II. PROCEEDINGS FOR ESTABLISHMENT.

As to highways by dedication or prescription, see DEDICATION.

III. CONTROL OVER; POWERS AND DUTIES OF SUPERVISORS.

IV. ROAD DISTRICTS; ROAD TAXES.

I. WHAT CONSTITUTE; GENERAL JURISDICTION.

1. **Easement:** A highway is nothing but an easement, comprehending the right of all the individuals in the community to pass and repass, with the incidental right of the public to do all acts to keep it in repair. The fee remains in the original owner: *Dubuque v. Maloney*, 9-450; *Overman v. May*, 85-89.

2. The prescriptive right to use material to keep the road in repair does not include the right to take material from the right of way for the repair of other public highways. Therefore, *held*, that the prescriptive right to span a river with a bridge, and use such bridge, did not include the right to quarry

stone under the bed of the river under such bridge for general use in the repair of highways: *Overman v. May*, 35-89.

3. Nothing passes as incident to the grant of an easement but what is requisite to its fair and reasonable enjoyment. Therefore, where a party dedicating a street reserved the right to construct a mill-race across it, *held*, that the reservation should be construed in the same way as the grant of a like privilege, and that the party was under obligation to restore the street, as nearly as possible, to its former condition by the construction and maintenance of a bridge across it: *Waterloo v. Union Mill Co.*, 59-437.

4. **What constitutes:** Something more than the mere right to use land for the purpose of travel is necessary to constitute a highway. It must be traveled or at least capable of use in that way to make it such: *State v. Shinkle*, 40-181.

5. By Code, § 1001, bridges are a part of the public highway, and are therefore under the general supervision of the board of supervisors. The board cannot be compelled by *mandamus* to build, that being discretionary: *State ex rel. v. Morris*, 43-192.

Further as to bridges, see *infra*, §§ 44-46, 121.

6. **Public highways:** It is the duty of the legislature to establish public highways for the passage and intercourse of the people of the state. It may properly provide for the establishment of such highways as are necessary to enable every citizen to discharge his duties to the state, have access to market, school, church, etc., and in that case it may properly provide for the taking of private property, although in a particular case but one person is primarily or principally benefited: *Bankhead v. Brown*, 25-540.

7. A citizen has the right to have access to the public roads, and the public has the right to have access to him, and a road which is the only one between a citizen and the public may properly be deemed a public road, although he is the only person reached: *Johnson v. Board of Supervisors*, 61-89; *Pagels v. Oaks*, 64-198.

8. **Private ways:** A former statute (11 G. A., ch. 127), providing for the establishment of roads which were denominated private, to be established on the petition of the applicant

 Proceedings for establishment.

alone, and at his cost, and which the public was not bound to work or keep in repair, and over which the party securing their establishment might exercise exclusive control, *held* unconstitutional as authorizing the taking of private property for a private and not a public use: *Bankhead v. Brown*, 25-540.

9. Jurisdiction: All the jurisdiction in relation to roads and highways formerly exercised by county judges is now conferred upon the board of supervisors: *Kennedy v. Dubuque, C. & M. R. Co.*, 84-421.

10. Under particular statutes, *held*, that the power to establish a highway within the corporate limits of a city existed in the same tribunal which had authority to establish highways outside of such corporate limits: *Knowles v. Muscatine*, 20-248.

11. A county has power to grade and improve its public roads, and issue warrants in payment therefor: *Long v. Boone County*, 82-181.

II. PROCEEDINGS FOR ESTABLISHMENT.

As to highways by dedication or prescription, see DEDICATION.

12. Petition: The petition for a highway need not follow the precise language of the statute: *McCollister v. Shuey*, 24-362.

13. If it asks for the appointment of a commissioner to locate a highway, etc., instead of for the establishment of the highway, it is not so materially defective as to invalidate the proceedings: *State v. Pitman*, 38-252.

14. Where the notice was that a petition would be presented for a new road, and the petition asked that a commissioner be appointed and the necessary steps taken to open a road, *held*, that there was a substantial compliance with the statute: *Stevens v. Board of Supervisors*, 41-841.

15. The petition need not specify the width of the proposed highway. Such specification is surplusage: *State v. Wagner*, 45-482.

16. A petition will not be insufficient to give the board jurisdiction, merely because it runs to the county auditor, who is the clerk of the board, instead of to the board itself, or because it does not expressly ask for the establishment of the road, when its object is abundantly evident, in that it states

that the road is needed and asks for the appointment of a commissioner: *State v. Barlow*, 61-572.

17. Under former statutes requiring that the petition for the establishment of a highway should be signed by at least twelve householders of the county, *held*, that the absence of an allegation that the petitioners were householders, or of a recital of such fact in the record, was not a fatal defect, if the road was otherwise a legal one: *Keyes v. Tait*, 19-123.

18. Bond: A failure to require bond as provided by statute will not invalidate the proceedings: *Woolsey v. Board of Supervisors*, 82-130.

19. If the auditor allows the petition to be filed without a bond, and proceeds to act upon it, his action cannot be said to be without jurisdiction, the provision in regard to a bond being simply directory: *State v. Barlow*, 61-572.

20. Location; appointment and action of commissioner: That the officer by whom the commissioner was sworn was not qualified to administer oaths is no such irregularity that the proceedings will be set aside on that account: *Woolsey v. Board of Supervisors*, 32-130.

21. An adverse report by the commissioner ends the proceedings under the petition, and the report of another commissioner appointed by the auditor would have no validity: *Cook v. Trigg*, 52-709.

22. A report against a road by the commissioner is an official determination, and the application cannot be considered as longer pending: *Morgan v. Miller*, 59-481.

23. The commissioner has no authority to lay out a highway beyond the termini fixed in the petition, and any proceeding as to a portion of the highway beyond such limits would be void: *State v. Molly*, 18-525.

24. The statutory provisions as to setting stakes, etc., in laying out a highway are directory only, and a failure to comply with them will not render the proceedings illegal or void: *McCollister v. Shuey*, 24-362.

25. Under the provisions of the Revision (§§ 827, 828) an appointment of a commissioner by the clerk in vacation was illegal, and a highway established by him was not a legal highway: *Bennett v. Fisher*, 26-497.

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26. Where it appeared that upon proper petition a commissioner was appointed to view and lay out a road, and that he made a survey and report but that no further action was taken, *held*, that this was not sufficient to show the establishment of the highway: *Carey v. Weitgenant*, 52-660.

27. Change of location by prescription: Where there have been proceedings to locate a highway and it has been established and used as such, pursuant to such proceedings, and by mistake the highway as used varies slightly from the one established, the use will not constitute a prescriptive right outside of the limits of the established highway: *State v. Welpton*, 84-144; *State v. Gould*, 40-372; *State v. Schilb*, 47-611.

28. Where by request of a land-owner the supervisor, in opening an established highway, deflects therefrom upon the land of such owner, and the road so located is worked and used by the public, the action of the owner amounts to a dedication as to the portion outside of the established highway: *Ryan v. Kennedy*, 62-37.

29. Where the public have traveled and used a road different from the established highway for the period of prescription, it acquires a right by prescription in the road thus traveled: *Kelsey v. Furman*, 36-614.

30. A mistake as to the location of the line used, by reason of which it varies from the section line on which the land-owner supposed he was allowing it to be used, will not give rise to a prescriptive right to the road as used, and the owner may correct the mistake and confine the travel to the intended line without being guilty of obstructing the highway: *State v. Crow*, 30-258.

31. The fact that a fence is built along a highway at the time it is laid out and thus remains for twenty years is sufficient evidence to show that it is not upon the highway, although by subsequent location from field-notes, the fence appears to be within the limits of the highway: *Cattell v. Wilhelm*, 39-288.

32. Resurvey: Where the necessary steps were taken to establish a road, but the clerk failed to record the field-notes, and no record of the final order was found, *held*, a proper case for the supervisors to order a resurvey: *Balke v. Bailey*, 20-124.

33. But where a highway has never been in fact established, a resurvey thereof is of no effect: *Carey v. Weitgenant*, 52-660.

34. The board cannot vary the line of road as originally surveyed to conform it to a way acquired by prescription. The alterations referred to in the provisions as to resurvey have reference to such changes in the road as have occurred by orders or surveys made after the original survey, and which tend to such confusion that the location of the road is not accurately defined or pointed out by the record: *Blair v. Boesch*, 59-554.

35. But it is competent for the board to hear evidence as to where the original survey was actually made, and being satisfied from the evidence that the resurvey is upon the line as originally surveyed, to approve and confirm such survey, although it does not conform to the original field-notes: *Ibid*.

36. Proceedings for resurvey will be void where there was no original establishment of the highway sought to be resurveyed. It is not the office of such proceedings to cure original proceedings which were fatally defective: *Barnes v. Fox*, 61-18.

37. Width: Under the statute requiring highways to be sixty-six feet in width unless otherwise provided, the auditor has no power to establish a highway of less width than sixty-six feet, and if he attempt to do so, the board of supervisors may set aside his action: *State v. Wagner*, 45-482.

38. Although the road is established by the auditor, and is less than sixty-six feet in width, if the record of his action is read over to and approved by the board, such action becomes substantially the action of the board, and is proper: *State v. Barlow*, 61-572.

39. The fact that the road as established is wider than authorized by statute does not render the order establishing it void. It is an irregularity which cannot be taken advantage of in a collateral proceeding: *Knowles v. Muscatine*, 20-248.

40. The statute (18 G. A., ch. 32, McClain's Ann. Stat., 343) authorizing street railways to extend their lines beyond the city limits over highways which are of the width of one hundred feet or more, contemplates and authorizes the establishment of highways more than sixty-six feet in width: *Linn County v. Hewitt*, 55-505.

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41. There is no presumption that a highway originating by prescription is of the width required in case of highways laid out under the statute. The width of such highway is a question of fact for the jury, to be determined from the facts and circumstances. The court cannot, as a matter of law, say that a road acquired by prescription or use is of any particular width beyond such portion as is actually used by the public: *Davis v. Clinton*, 58-389.

42. Where, by agreement constituting dedication of a highway to public use, it was stipulated that the road should be established as it had been used, and the width as thus used was found to be twenty-six feet, *held*, that the highway as established by the dedication was properly determined to be of that width: *Hugh v. Haigh*, 69-382.

43. Where an order of the county court establishing a highway was based upon the plat of the commissioner, upon which plat it was described as thirty-three feet in width, *held*, that it must be presumed to have been intended to establish a highway of that width although not so specified in the order of establishment: *State v. Schilb*, 47-611.

44. Width of bridges: Bridges in a public highway ought to be broad enough to permit all farm machinery to be drawn over them, and for the passage of all vehicles and machinery in use which are drawn upon the public highways: *Quinton v. Burton*, 61-471.

45. The action of a board of supervisors in contracting for a bridge of less width than sixteen feet, as required by law (Code, § 1001), is erroneous simply and not void: *Mallory v. Montgomery County*, 48-681.

46. The statutory provision as to the width of bridges is not to be construed to mean that a bridge is not required to be constructed under any circumstances more than sixteen feet in width. If the circumstances require that it shall be of greater width and it is so constructed, the liability for defects thereon will not be limited to sixteen feet but extend to the whole width: *Rusch v. Davenport*, 6-443.

As to liability for defects in bridges, see MUNICIPAL CORPORATIONS, III, d.

Further as to bridges in general, see *infra*, § 121, and WATERS, III.

47. Notice: When notice is given to the persons appearing by the transfer books to be the unconditional owners of the land, and also by publication, the jurisdiction becomes complete. Notice to conditional owners, or others not shown by the transfer books, is not necessary: *Wilson v. Hathaway*, 43-173.

48. Such notice should be served personally upon the owner as shown by the transfer books, when he resides in the county, but if he be a non-resident, then upon the actual occupant of the land, although the name of such occupant does not appear from such books: *Alcott v. Acheson*, 49-569.

49. It is only residents of the state, in actual occupancy of land, who are entitled to personal notice. Notice need not be given to a foreign railway company across whose right of way the highway passes, by personal service upon its officers or agents. Publication of notice is sufficient in such case. Also *held*, that as the railway company did not appear from the transfer books to be owner of its right of way, it was not entitled to notice: *State ex rel. v. Chicago, B. & Q. R. Co.*, 68-185.

50. Error in the description of the starting point of the highway in the petition and notice, *held* sufficient to render the proceedings thereunder void, although such error was discoverable by careful examination on the face of the petition and notice: *Butterfield v. Pollock*, 45-257.

51. Under a previous statute, requiring thirty days' notice to be given of the filing of a petition for the highway, but containing no provision requiring the recording of such notice and proof of posting thereof, *held*, that the court would be warranted from the evidence of the appointment of commissioners, and the giving of notice, and the long lapse of time during which the right of the public had remained unchallenged, in inferring that the requisite proof had been made and lost: *Keyes v. Tait*, 19-123.

52. Under such statute, *held*, that proof of the method of posting the notice might be made to the board of supervisors by parol evidence, and it would be presumed that proof in that manner was made although the affidavits filed showing proof were not sufficient: *Woolsey v. Board of Supervisors*, 33-130; *Carr v. Fayette County*, 37-608.

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53. In order to enable the auditor to act, it is not necessary that there be filed formal proof of publication of the notice required by statute; his determination that notice has been duly published, while not conclusive, is sufficient to cast upon any one questioning his action, the burden of proving want of publication: *Pagels v. Oaks*, 64-198.

54. Under the Revision (§ 824), *held*, that a recital in the record that due notice had been given was *prima facie* evidence of that fact: *State v. Pitman*, 38-253.

55. The failure to give notice as required renders the action in establishing the highway void, and notice will not be presumed from the fact of establishment alone: *State v. Anderson*, 39-274; *State v. Weimer*, 64-243; *McBurney v. Graves*, 66-314.

56. Action of county auditor: The fact that the only claim for damages which is filed is paid will not authorize the auditor to establish the highway, but the hearing must be continued to the next meeting of the board: *Ressler v. Hirshire*, 52-568.

57. Where an auditor set a day for final hearing one day beyond the limit authorized by statute, and afterward, in a proceeding to enjoin the road supervisor from opening the road so laid out, there was a trial involving the validity of the road, and the opening of the same was perpetually enjoined, *held*, that the same was a binding adjudication that no road had ever been established: *Dicken v. Morgan*, 59-157.

58. The action of the auditor is subject to review by the board: *Brooks v. Payne*, 38-263.

59. An appeal from the action of the auditor will not lie, but only from the action of the board with reference thereto: *Newell v. Perkins*, 39-244.

60. Proceedings before the board: Where two applications are, in effect, for the same road, by different routes, they may be considered together: *Brown v. Ellis*, 26-85.

61. Where, in a proceeding before the board, one of the members refused to be sworn as a witness unless required to, but it appeared that his evidence, if given, would have been cumulative and the action in the premises was not dependent upon it, *held*, that the discretion of the board in the matter would not be interfered with: *Ibid.*

62. Dismissal: The proceeding is not for the benefit of the person commencing it, but is by the state for the benefit and advantage of the public, and the petitioner acquires no rights or advantages by it. Therefore, an agreement by him for a consideration to abandon the proceeding is against public policy and void: *Jacobs v. Tobiasson*, 65-245.

63. The fact that previous proceedings for establishment of a highway have been dismissed by the board will not bar their right to establish a highway over the same lines, upon a subsequent application: *Pagels v. Oaks*, 64-198.

64. Time for hearing: Where final action appeared to have been had at a date subsequent to the one fixed, *held*, that it would be presumed that, by proper resolution, action was postponed to the day upon which it was had: *Woolsey v. Board of Supervisors*, 32-130.

65. The fixing of the date for final hearing less than sixty days distant is an irregularity which will not invalidate subsequent proceedings, nor render them subject to collateral attack: *State v. Kinney*, 39-226.

66. Where, upon failure of one of the appraisers to meet with the others on the day fixed, they adjourned instead of filling his place, *held*, that, in the absence of any proof of prejudice caused thereby, the proceedings would not be treated as erroneous upon a review by *certiorari*: *Johnson v. Board of Supervisors*, 61-89.

67. Condition of establishment: Where the establishment is conditioned on the payment of the expenses thereof, it is not necessary that the time for such payment be fixed in the order: *Brown v. Ellis*, 26-85.

68. Where the proceedings did not definitely locate a portion of the highway upon the ground, but left it to be located by the petitioners, *held*, that such establishment as to the portion thus left to be located not being shown, the highway could not be deemed established in any part: *Barnes v. Fox*, 61-18.

69. Where a highway is established upon conditions, it is not to be regarded as fully established so as to become a legal highway until the conditions are complied with: *State v. Glass*, 42-56.

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70. A final order once made as contemplated by statute acquires the character of an adjudication as to the establishment of the highway and the amount of damages, if any, and the parties cannot again litigate the question in a new proceeding. The judgment is conclusive until set aside: *Hupert v. Anderson*, 35-578.

71. Although the road is established on a different line from that requested and recommended, the action, while it may be erroneous, will not be void: *Davenport Mutual Savings, etc., Ass'n v. Schmidt*, 15-213.

72. Consent to the establishment of a highway will not confer jurisdiction to establish a particular line contemplated, and in the absence of proper notice the proceeding will be void: *Barnes v. Fox*, 61-18.

73. Where a highway was established by consent in pursuance of a written contract executed through mistake of fact, *held*, that a court of equity might reform and correct the written contract, and enjoin the laying out of the highway as established: *Mastelar v. Edgerton*, 44-495.

74. Record: The record with reference to the establishment of a road is admissible in evidence where it shows substantially the same route as petitioned for, and the petition need not be offered to render the record admissible, if it appears that it was presented, filed and acted upon: *State v. Lane*, 26-228.

75. Vacation of highway: Where the auditor acts improperly in establishing a highway, the board may set aside his action and vacate the highway thus improperly established: *State v. Wagner*, 45-482.

76. The statutory provisions by which the same steps are required to vacate as to establish a highway are not applicable to the vacation of streets and alleys. The city council has authority to vacate streets and alleys by ordinance: *Dempsey v. Burlington*, 66-687.

77. Where two roads were established on the same line, and upon due notice one of them was vacated, *held*, that such order of vacation would not operate upon both but only upon the road as to which notice was given: *Larkin v. Harris*, 36-93.

78. Under the provisions of Rev., §§ 853, 854, that if money was advanced for the payment of damages caused by the location of a

highway, the highway could not be discontinued without repayment of such damages, and that the claim for the refunding of the damages was a lien on the land covered by the highway, *held*, that an action in equity to recover the amount paid to the land-owner for a highway afterwards discontinued might be maintained: *Brown v. Bridges*, 36-279.

79. Damages: In estimating the damages resulting from the fact that the location of a highway will render the construction of fences by the adjoining property owner necessary, the jury may be limited to considering the cost of constructing such fence as is proper under the circumstances, and should not estimate the cost of a fence sufficient to turn sheep and hogs, they not being permitted to run at large. The fact that a fence which will become necessary upon the establishment of a highway will be of advantage to the owner cannot be taken into consideration in estimating his damages: *Bland v. Hixenbaugh*, 39-532.

80. It is improper in estimating the damages to allow the owner as part of his compensation a certain amount for fence thereby made necessary. If by the establishment of the road the land is thrown open and left unfenced, this fact may enter into the consideration in determining the depreciation in value of the remaining premises. But the owner should not be allowed for the cost of fence, as such: *Hanrahan v. Fox*, 47-102.

81. One of the owners in common of land may recover damages caused by the establishment of a highway to the extent of his ownership, although no claim for damages is made by the other one: *Ibid*.

82. If the land-owner, after the assessment of damages and pending an application to establish the road, erects a fence upon the proposed highway, he cannot have damages for the removal thereof allowed to him on appeal: *Holton v. Butler*, 22-557.

83. Timber growing upon the land appropriated for the purpose of a public highway remains the property of the former owner, and is not to be taken into account in estimating his damages: *Deaton v. Polk County*, 9-594.

84. It is the duty of the jury assessing the compensation for real estate appropriated to the use of the public as a street, to personally

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examine the premises: *Des Moines v. Layman*, 21-153.

85. Damages for relocation: The true rule for estimating damages in case of relocation of a highway over land of the same party is to determine the amount which the damages for the new or relocated line would exceed the damages sustained by reason of the old one: *Jewett v. Israel*, 35-261.

86. And this rule is applicable whether damages for the location of the first line were allowed or not. But the damages by reason of the location of the new line are not to be diminished by reason of advantages and benefits which tend to increase the value of the land to be set off against damages caused by the relocation: *Israel v. Jewett*, 29-475.

87. Damages for vacation: A party whose right to the use of a highway is simply that enjoyed by the general public cannot recover damages for its vacation, whether his land abuts upon a part of the highway not vacated or upon a portion of the highway actually vacated: *Ellsworth v. Chickasaw County*, 40-571; *Brady v. Shinkle*, 40-576; *Barr v. Oskaloosa*, 45-275.

88. A claim for damages cannot be considered after the final order of establishment: *Smiths v. Dubuque County*, 1-492.

89. Where no claim for damages is filed, or the claim is disallowed because not filed within proper time, or upon consideration of the claim no damages are allowed by the appraisers, a property owner cannot object to the establishment of the highway on the ground that his property is taken without compensation. While he has a constitutional right of compensation, it must be claimed and established in the manner pointed out by law: *McCrory v. Griswold*, 7-248; *Connolly v. Griswold*, 7-416; *Dunlap v. Pulley*, 28-469; *Abbott v. Board of Supervisors*, 36-354.

90. The land-owner may, by appeal from the appraisement, have the amount of his damages assessed by a jury of twelve. If he fails to take such appeal and have such assessment, he cannot afterwards complain that his property is taken for public use without due process of law: *Tharp v. Witham*, 63-566.

91. Review of proceedings by certiorari: The question as to the propriety of establish-

ing the road, and the legality of the proceedings to that end, may be reviewed by certiorari: *McCrory v. Griswold*, 7-248.

92. An order establishing a highway is a matter affecting the public only, and an individual can have no interest in that question such as to warrant him in appealing from the order of establishment, but he may be entitled to an appeal from the action of the board in regard to the allowance of damages: *Ball v. Humphrey*, 4 G. Gr., 204; *Myers v. Simms*, 4-500.

93. Upon a writ of certiorari from the proceeding of the board, it is not proper to review its decision upon the question whether the public interests demand a proposed road, or whether it is practicable and expedient to establish it. The circuit court can only determine whether the board is proceeding within its jurisdiction or not: *Tiedt v. Carstensen*, 61-334.

94. Where a certiorari proceeding is instituted against the board of supervisors, calling in question their action in establishing a highway, and such action is held to be illegal, the costs should be taxed, not against the board, but against the petitioners for the highway: *Tiedt v. Carstensen*, 64-131.

95. Appeal: The propriety of the action, with reference to the allowance of damages, can only properly be raised by appeal: *McCune v. Swafford*, 5-552; *Warner v. Doran*, 30-521.

96. Upon an appeal, not only the amount of damages, but also the right to any damages may be determined: *Spray v. Thompson*, 9-40.

97. An appeal lies from the action of the board entirely rejecting a claim for damages: *Vancleave v. Clark*, 87-184.

98. Therefore, held, that an appeal from the action of the board in disallowing a claim for damages on the ground that claimant was not the owner of the land, but in which it was expressly stated that no objection was made to the amount of the damages assessed by the jury, properly raised the question as to the correctness of the action of the board in rejecting the claim for damages: *Ibid.*

99. An order for the establishment of the highway conditioned upon the payment of damages is such a final order as may be appealed from. It is not necessary to wait for

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the unconditional order which follows the payment of the damages: *McNichols v. Wilson*, 42-885.

100. The fact that petitioners for the highway have renounced all right thereto that they might have by the action of the board in making the location conditional upon their payment of the damages assessed, does not defeat the right of the claimant to prosecute his appeal from the assessment of damages, where petitioners do not entirely retire from the controversy and renounce all benefits which may arise from any action in the premises: *Ibid.*

101. Under previous statutory provisions allowing the county auditor to act in the matter of establishing highways, subject to the final approval of the board of supervisors, *held*, that an appeal would not lie from the orders of such auditor, but only from the final action of the board: *Newell v. Perkins*, 89-244.

102. Notice of appeal: The twenty days within which notice of appeal may be served commences to run from the time of making the conditional order for the establishment of the highway, upon payment of damages, and not from the making of the final unconditional order, after such damages have been paid: *McNichols v. Wilson*, 42-885.

103. Where a claim for damages is disallowed by the commissioners, and its payment is not required by the order establishing the highway, the statute (Code, § 959) does not require that service of notice of an appeal by the claimant be made upon the petitioners: *Raymond v. Clay County*, 68-130.

104. Appearance: Where the notice is served within twenty days, and the only objection is as to the sufficiency of proof of such service, an appearance and objection to the service confers jurisdiction: *Libbey v. McIntosh*, 60-329.

105. If the notice is not served upon the applicant within proper time, he may appear and move to dismiss the appeal, and such appearance will not confer jurisdiction nor waive his rights: *Spurrier v. Wirtner*, 48-486.

106. Parties to the appeal: It is not proper to make the road itself defendant in the appeal: *Myers v. Old Mission, etc., Road*, 7-315.

107. The county is not a proper party to the appeal unless the damages have been ordered paid out of the county treasury, in which case the statute provides that the county shall be defendant: *Deaton v. Polk County*, 9-594.

108. Although a claim for damages is disallowed and no order for its payment made in establishing the road, the county should be made defendant on an appeal by the claimant: *Raymond v. Clay County*, 68-130.

109. Transcript: The fact that the transcript is made out and filed with the clerk of the circuit court before the service of the notice of appeal upon the auditor is a mere irregularity in no manner affecting the jurisdiction of the court: *Libbey v. McIntosh*, 60-329.

110. Filing fee: A rule of court providing that, upon failure of appellant to pay the filing fee, appellee might pay it and have the appeal dismissed, *held* not applicable where appellant had paid the fee before motion to dismiss by appellee was filed: *Cole v. Laub*, 35-590.

111. Trial of the appeal: The owner of the land is entitled to have his damages assessed anew upon appeal although no damages whatever were allowed by the appraisers: *Deaton v. Polk County*, 9-594.

112. The question as to the amount of damages may be tried *de novo*, upon appeal: *Prosser v. Wapello County*, 18-327.

113. The appellant is entitled to a new assessment of his damages by jury upon the appeal: *Des Moines v. Layman*, 21-153.

114. It is not necessary, in order to secure a hearing, upon appeal, as to the amount of damages, that a motion should have been made before the board to set aside the report of the appraisers: *Sigafoos v. Talbot*, 25-214.

115. It is necessary that the party claiming damages on the appeal, if he seeks to recover damages to the tract out of which the right of way is taken, should show that he is owner thereof, and if the evidence fails to establish title in him, he can recover only for such immediate and necessary damages as result to him as an occupant of the land: *Costello v. Burke*, 63-361.

116. Costs: The recovery of costs by the claimant upon his appeal is not made contingent upon whether the amount of his

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damages is increased by the circuit court: *Hanrahan v. Fox*, 47-102.

117. Final action after determining damages on appeal: When the amount of damages has been fixed by the trial of the appeal, the board of supervisors may proceed to final action as if that amount had been originally allowed by them: *McNichols v. Wilson*, 42-885.

118. If the amount of damages is increased on the appeal, the board may reconsider their action and refuse to establish the highway: *Nelson v. Goodykoontz*, 47-32.

119. A curative act to render valid defective proceedings for the establishment of highways is constitutional: *Bennett v. Fisher*, 26-497.

III. CONTROL OVER; POWERS AND DUTIES OF SUPERVISOR.

120. Streets: As incorporated towns are given power to provide for grading and repairing their streets, they must have control over such streets, and the road supervisors and township trustees have no power over them: *Clark v. Epworth*, 56-462.

121. Bridges: It is not the duty of the supervisor to build bridges requiring a large expenditure of money, nor is he liable for failure to keep such bridges in repair when such repair would involve a considerable expense. Such matters are under the control of the board of supervisors: *Wilson v. Jefferson County*, 18-181.

Further as to bridges, see *supra*, §§ 5, 44-46.

As to liability of county for defective bridges, see MUNICIPAL CORPORATIONS, III, d.

122. Liability of supervisor: A supervisor is subject to the same liability for improper or careless exercise of his powers as a city or town is in relation to its streets; and *held*, that he was personally liable for damages to an adjacent land-owner resulting from the diversion of a stream of water from his land, by reason of alteration in the highway made by the supervisor: *McCord v. High*, 24-336.

123. A road supervisor may be guilty of trespass in removing an obstruction, as, for instance, a dwelling-house, if the act is not done for the purpose of opening the highway, but for the malicious purpose of injuring the owner: *Wilding v. Hough*, 87-448.

124. A road supervisor may be restrained by injunction from repairing the highway in such a manner as to interfere with the rights or wishes of an adjoining owner: *Bills v. Belknap*, 36-583.

125. Obstruction; fences; shade trees, etc.: It is not absolutely necessary that a fence shall be across the track where the travel passes in order to constitute an obstruction of the highway, and if the highway is thereby so obstructed as to render it unsafe or dangerous to public travel, this will amount to a direct obstruction: *Mosher v. Vincent*, 89-607.

126. To constitute an obstruction of the highway it is not necessary that it should be rendered impassable; and *held*, that trees standing near the middle of the highway, so as to render one-half of it impracticable for use, constituted an obstruction which should be removed: *Patterson v. Vail*, 43-142.

127. Shade trees which do not obstruct the highway, and the removal of which is not necessary to properly improve it, are not to be removed in opposition to the wishes of an adjoining owner on whose portion of the highway the trees are growing: *Bills v. Belknap*, 36-583; *Everett v. Council Bluffs*, 46-66.

128. Shade trees at the side of the highway which would not obstruct or interfere with the traveled track, if it were located in the middle of the highway, should be permitted to stand: *Quinton v. Burton*, 61-471.

129. Where a hedge was planted after a highway was in use, and for the purpose of fencing between a field and the highway, *held*, that the planting and maintenance of the hedge amounted to a dedication of the land outside of the hedge for the purpose of the highway, although at the time the hedge was planted a fence for its protection was maintained outside of the hedge: *Ibid*.

130. Improvement by supervisor: While the public have a right to the full width of the highway they cannot use it so as to injure adjoining property, and if the construction of a bridge at one side of the road would cause injury to the property on that side, the supervisor may be required to build it in the center of the highway: *Ibid*.

131. The judgment of the road supervisor must govern as to the construction, etc., of

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the highway, and no one has a right to make a material change in his plans without being guilty of defacing the highway within the meaning of the statute (Code, § 3392½): *State v. Hunter*, 68-447.

132. Injunction against supervisor: The acts of a supervisor in the exercise of his ministerial duties in the construction of bridges, etc., are subject to control by an action to enjoin the improper exercise of his powers: *Quinton v. Burton*, 61-471.

133. Threatened illegal action of a supervisor in opening a highway, removing fences, interfering with water-courses, etc., in the discharge of his official duty, may be restrained by injunction: *Bolton v. McShane*, 67-207.

134. Correction of mistake: Proof that a mutual mistake as to the line of a highway, as used, by which it varies from that intended, and that an obstruction in the highway, as used, is an attempt to correct such mistake, will make the obstruction legal: *State v. Crow*, 80-258.

135. Obstructing impassable highway: If the right to use a way is acquired by the public, but its nature is such that the right cannot be exercised on account of natural obstacles, a person cannot be held guilty of the crime of obstructing such highway, as it cannot be said that the public are by his acts prevented from using it: *State v. Shinkle*, 40-181.

136. A party cannot be prevented by injunction from closing or obstructing a highway that is in such condition that it cannot be used by the general public: *Prince v. McCoy*, 40-533.

137. But where a highway was impassable as laid out, by reason of standing timber, and a track was used for the period of prescription, crossing the highway at different points, *held*, that the existence of such natural obstruction in the highway as laid out would not excuse the obstruction of the traveled track, whether upon the established highway or upon the line used by prescription: *State v. McGee*, 40-595.

138. Relief against unlawful obstruction: Equity will afford relief to one specially injured by the erection of an obstruction upon a highway, by directing and requiring its removal and enjoining its continuance.

Such obstructions are public nuisances and will be abated and enjoined by a court of equity at the suit of the party aggrieved thereby: *Hougham v. Harvey*, 83-203.

139. An unlawful obstruction of a public highway is a public nuisance not generally actionable, and a private person has a right of action only when he suffers an injury distinct from the public as a consequence of the wrongful act: *Ingram v. Chicago, D. & M. R. Co.*, 88-869.

140. A person operating a ferry outside of the city limits cannot maintain an action for damages against the city for failure to keep a street leading to his ferry open and in repair. His injuries in that respect are not different from those of the general public: *Prosser v. Ottumwa*, 42-509.

141. A party does not, in an action for *mandamus*, show himself entitled to have a public highway opened by showing that such highway is located near his lands, and that the public travel is upon his lands and not upon the highway. It would not follow that such travel would be upon the highway even if opened: *Moon v. Cort*, 48-508.

142. Opening highway: The map which the township clerk is required to furnish to the supervisor, showing the highways within his district, is not essential to the authority of the supervisor in opening a highway, and gives him no additional power: *Mosier v. Vincent*, 34-478.

143. Such map is in no legal sense a process, and is no protection to the supervisors in opening a highway indicated thereon: *Campbell v. Kennedy*, 84-494.

144. Notice: The statutory provision as to notice regarding removal of obstructions is applicable in case of obstructions placed in a highway after it is opened, and a fence directly obstructing travel cannot be thrown down without notice, although the party maintaining it may be liable for indictment for obstructing the highway: *Mosier v. Vincent*, 34-478.

145. The reasonable notice required to be given by a supervisor in case of opening a highway is such notice and for such a length of time as, under all the facts and circumstances of the case, is reasonably proper to enable the party notified to perform the act which the notice is intended to give him op-

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portunity to perform, and in the ordinary manner. It need not be six months in all cases: *Blackburn v. Powers*, 40-681.

146. The verdict in a particular case finding that a notice of three days for the removal of a fence was sufficient notice, held not reversible error in the absence of the evidence on which the jury acted: *Mosher v. Vincent*, 39-607.

147. The obstructions which the supervisor is authorized to remove in opening the highway are obstacles, impediments, or hindrances, or anything impeding progress thereon. They need not be such as to render the highway impassable: *Patterson v. Vail*, 48-142.

148. The supervisor may be compelled by *mandamus* to perform the duty of opening the highway as required by statute: *Larkin v. Harris*, 86-93.

149. Criminal obstruction: The landowner is not liable to indictment for obstructing the highway by reason of his not removing fences where a newly established highway crosses his land, at least until he has had reasonable notice from the supervisor to do so: *State v. Ratliff*, 82-189.

150. Failure to remove an obstruction placed in a highway by another, for instance by a former owner, does not, at least in the absence of notice, constitute the offense of obstructing a highway: *State v. Robinson*, 52-228.

Further as to the crime of obstructing highways, see CRIMINAL LAW, §§ 687-698.

Nuisance: Obstruction of highway constituting, see NUISANCE, §§ 13-17.

IV. ROAD DISTRICTS; ROAD TAXES.

151. A road district cannot be sued: *White v. Road District*, 9-202; *Wilson v. Jefferson County*, 18-181.

152. District does not include city: The power given to township trustees to divide the township into road districts does not extend to such portions as are embraced within a city, and they have no power to levy a road tax in such portions. The city council have control of the highways and streets of the city: *Marks v. Woodbury County*, 47-452; *Hawley v. Hoops*, 12-506.

153. Redistricting: The township trustees may redistrict the township, and if by such redistricting the supervisor of the district becomes a resident of another district than that for which he was elected, his office becomes vacant: *Mauck v. Lock*, 70—.

154. Expenditures by trustees: The township trustees have no authority to contract indebtedness for the purchase of tools and machinery until a tax is levied and set apart for that purpose. They may, after the tax is levied and set apart, anticipate its collection and purchase tools and machinery on credit: *Wells v. Grubb*, 58-384; *Hanks v. North*, 58-396; *Revolving Scraper Co. v. Tuttle*, 61-423.

155. The funds of which the township trustees are allowed to make such disposition as they may deem expedient for highway purposes are unexpended balances of the money originally set apart by them as the general township fund. All other money is to be expended by each supervisor in the road district in which it is collected, and the fact of its coming into the hands of the clerk upon collection by the county treasurer is a mere incident and does not affect its disposition: *Henderson v. Simpson*, 45-519.

156. Powers of clerk: The clerk may maintain an action for funds belonging to his township in the hands of third persons. If he deposits the funds in his individual name without notice to the banker of their character, such act amounts to conversion and the deposit belongs to him individually, and if seized by garnishment process under attachment on his individual debt, without notice as to the character of the fund, it cannot be recovered back: *Long v. Emsley*, 57-11.

157. The township clerk is the proper party to bring suit on the supervisor's bond for failure to account for taxes. Such duty does not pertain to the trustees: *Wells v. Stomback*, 59-376; *Keller v. Bare*, 62-468.

158. District orders: Orders upon the district issued by the township trustees on their settlement with the supervisor are payable in money out of the general township fund. If such fund is not sufficient the trustees may be compelled to levy a tax for their payment. The provision that they are receivable in payment of road taxes is simply

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an additional method of payment, and the supervisor is not required to secure his payment in that way: *Tobin v. Township of Emmetsburg*, 52-81.

159. Working highways; exemption: A man who is not able-bodied is not liable to the penalty for not appearing to work on the highway when summoned. The fact that he does not make known his condition when summoned, or sends a substitute who is rejected as incompetent, will not deprive him of the benefit of his exemption: *Martin v. Gadd*, 81-75.

160. A failure to notify a tax-payer to work out the portion of his tax which may be paid in work will not defeat the collection of the entire tax: *Sioux City & St. P. R. Co. v. Osceola County*, 45-168, 177.

161. Levy of tax: Road taxes may be levied upon the property of railway companies although such property is not placed upon the assessor's book: *Ibid*.

162. Irregularities in the clerk's return or in the manner of placing the taxes upon the treasurer's books will not invalidate the tax: *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41-153, 177; *Iowa R. Land Co. v. Sac County*, 39-124; *Iowa R. Land Co. v. Carroll County*, 39-151, 154.

163. Collection: Road taxes, when collected by the county treasurer, become no part of the county fund and cannot be appropriated or disbursed by the county. If the collection is illegal, they cannot be refunded to the tax-payer out of the county revenue, and the county is not liable in an action for their recovery: *Stone v. Woodbury County*, 51-522.

164. Road taxes collected by the county treasurer and paid over to the township clerk, except as far as they belong to the general fund, are to be distributed in the same manner as other road taxes, without any special action of the township trustees: *Henderson v. Simpson*, 45-519.

165. A road supervisor who fails to pay over the proportion of the road taxes collected by him, which has been by the trustees apportioned to the general fund, is liable therefor in an action on his bond, although he may have expended for road purposes all the money collected by him: *Wells v. Stomback*, 59-878.

HOMESTEAD.

I. WHO MAY CLAIM EXEMPTION; NATURE AND EXTENT OF; ABANDONMENT.

II. CONVEYANCE OR INCUMBRANCE OF THE HOMESTEAD.

III. CLAIMS UPON AND LIENS AGAINST; HOW ENFORCED.

IV. RIGHTS OF SURVIVOR; DESCENT.

I. WHO MAY CLAIM EXEMPTION; NATURE AND EXTENT OF; ABANDONMENT.

1. Head of family: The surviving widow of the owner of the homestead is as much the head of the family and entitled to control the rents and profits of the homestead as was the husband when living: *Floyd v. Mosier*, 1-512.

2. A widower without children acquiring and occupying property as a homestead for himself and mother, whom he supported, held to be entitled to the homestead right: *Parsons v. Livingstone*, 11-104.

3. So held, also, as to an unmarried woman who had accepted, protected and was providing for the children of a deceased sister: *Arnold v. Waltz*, 58-708.

4. The fact that a divorce is granted to the wife, allowing her the custody of the only child, will not deprive the husband of the right to hold a homestead exemption: *Woods v. Davis*, 34-204.

5. In what property: Purchase, payments and possession under bond for a deed, constitute sufficient ownership to make the property the homestead of such purchaser: *Stinson v. Richardson*, 44-373, 375.

6. A tenant in common may have a homestead right in his interest in the undivided premises: *Thorn v. Thorn*, 14-49.

7. And this is true even when he has only an equitable title thereto: *Hewitt v. Rankin*, 41-35, 44.

8. There may be a homestead right in a leasehold interest in real estate so as to render the assignment of the lease, by the husband alone, invalid: *Pelan v. De Berard*, 13-58.

9. Where there is an exchange of homesteads, and one of the parties remains temporarily after the exchange in his former homestead at the will of the other party.

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his right is less than and antagonistic to the possession required to constitute a homestead: *Windle v. Brandt*, 55-221.

10. One partner cannot acquire a homestead exemption in real estate belonging to the firm in which he is a member as against either the claims of firm creditors or co-partners, even though he holds the legal title of the property: *Drake v. Moore*, 66-58; *Hoyt v. Hoyt*, 69-174.

11. One who purchases a pre-emption claim to public lands and takes possession thereof does not, before acquiring title from the government, have such an interest in the property as to support a homestead exemption: *De Land v. Day*, 45-37.

12. Where the house used as a home is situated upon lands of the wife, the homestead may also include land owned by the husband. It is entirely immaterial whether the legal title be in the husband or wife, or whether one of them holds the title to one tract and the other to another tract, where the two tracts are used as a homestead: *Lowell v. Shannon*, 60-718.

13. A conveyance of the homestead property by the husband to the wife does not destroy its character as a homestead nor change the time to which the exemption dates: *Green v. Farrar*, 53-426.

14. If under the same roof with the homestead there shall be a floor or floors, room or rooms, which are not used for the purpose of a homestead, they are no more exempt than if under another roof, and if a portion of the building shall come within the definition of a homestead, and a portion not, then the one portion may be exempt and the other not. The use of other portions of the building cannot make that portion liable which would otherwise be exempt: *Rhodes v. McCormick*, 4-368.

15. So where the upper story or stories of a building in a city are used by the owner as a home and the first story is rented for store purposes, the portion rented as store-rooms may be sold under execution, while the portion used as a home will be exempt: *Ibid.*; *Mayfield v. Maasden*, 59-517.

16. Where the owner of a lot and building thereon used the first and fourth floors and the cellar for business purposes, the value of such portion of the premises being greatly in

excess of the value of the shop which he would be entitled to hold exempt in connection with the homestead (Code, § 1997), and occupied the second and third stories for a residence, *held*, that the portions occupied for business purposes might be sold under execution: *Johnson v. Moser*, 66-536.

17. After a portion of a building has thus been sold and the owner remains in occupancy of the other portion as a homestead, the owners of the two portions are not tenants in common but are adjoining tenants possessing separate and distinct interests: *McCormick v. Bishop*, 28-283.

18. Where a two-story frame building, with cellar, was originally erected for a dwelling-house and occupied exclusively by the owner, who used the first floor for business purposes and the cellar jointly in connection with his business and residence, *held*, that the whole building was exempt: *Wright v. Ditzler*, 54-620.

19. In such case the exemption of the portion used for business is allowed on the same principle as where a shop situated within the requisite distance of the dwelling of the person occupying it, is exempt as a part of the homestead: *Smith v. Quiggans*, 65-637.

20. In such case *held*, also, that the fact that the use of the lower story for business purposes passed to another person than the owner, the stock being taken possession of to be sold out by such other person, would not defeat the homestead exemption in such lower story, the intention of the owner being to abandon its use for business purposes and occupy it as a part of the residence: *Ibid*.

21. Nature of the interest: The wife's homestead interest in property owned by the husband is present, fixed and substantial, and not merely possible, remote and contingent, and is not in general liable to be affected by the omission, neglect or default of the husband: *Adams v. Beale*, 19-61.

22. Her interest in the husband's property used as a homestead is real property within the meaning of a former statute providing for the redemption from tax sale of the property of a married woman: *Ibid*.

23. The right of the wife in the homestead is of a higher character, and more in the nature of a vested interest or title, than is the

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dower right in the other real estate of her husband: *Chase v. Abbott*, 20-154.

24. The legal title to the homestead, upon actual occupancy by the husband and wife, does not vest jointly in them. The homestead title is one of exemption rather than one conferring affirmative rights: *Burns v. Keas*, 21-257.

25. Exemption, part of the contract: The homestead law in force at the time a contract is made enters into and becomes a part of it, and a subsequent repeal of the law will not impair the rights of parties thereunder: *Bridgman v. Wilcut*, 4 G. Gr., 563.

26. Pertains to remedy: The homestead exemption is a part of the remedy, and is not to be regulated by the law of the place of contracting: *Helpenstein v. Cave*, 3-287.

27. Extent of the homestead: Under the statutory provision (Code, § 1996) that if the number of acres allowed do not amount in value to over \$500 the homestead may be increased to that value, *held*, that the value is to be ascertained on the basis of the fee-simple title. The fact that a person claiming a homestead has less than the fee-simple title does not authorize the exemption of his interest in a larger amount of property: *Yates v. McKibben*, 66-357.

28. The statutory limitation as to the size of a homestead within a town plat does not apply unless the homestead is situated within the platted portion of a town, and if it is within the limits of a town but remains unplatted, it may be of the same extent as though not within town limits: *McDaniel v. Mace*, 47-509.

29. So *held* where the limits of a town were so extended as to include a homestead previously existing and which was not platted: *Finley v. Dietrick*, 12-516.

30. To constitute a town plat in this sense, the plat must be that of a city or incorporated village. The plat of an unincorporated village is not a town plat so as to limit the homestead right therein to one-half acre: *Truax v. Pool*, 46-256.

31. In an action attacking a sale on the ground of homestead exemption in the property sold, the party setting up the exemption must make such allegations as to the value of the property, and its not being within the limits of a city or town plat, as are neces-

sary to show its exemption as a homestead: *Helpenstein v. Cave*, 3-287; *Helpenstein v. Cave*, 6-374.

32. But under present statutes, if any part of the property is a homestead, and such part is not set off before sale, the sale is void: *Goodrich v. Brown*, 68-247.

And see *infra*, §§ 206-214.

33. Other buildings appurtenant: A stable kept for domestic use, in connection with the house, is appurtenant to the homestead, and exempt without regard to value: *Wright v. Ditzler*, 54-620.

34. The homestead cannot include buildings used as shops, etc., rented to tenants and a source of revenue: *Kurz v. Brusch*, 18-371.

35. Distinct tracts: The homestead may contain tracts not contiguous, but it must appear that they are "used as part of the same homestead." It is not sufficient for that purpose to show that the owner "used, worked, and occupied them:" *Reynolds v. Hull*, 36-394.

36. Platting: Failure to plat and record the homestead does not defeat the homestead right: *Sargent v. Chubbuck*, 19-37; *Nye v. Walliker*, 46-306; *Linscott v. Lamart*, 46-312.

37. Nor does the failure to plat deprive the parties of the right to claim more than forty acres by reason of the value not reaching the statutory limit: *Green v. Farrar*, 53-426.

38. To render a selection and platting of the homestead valid, the plat must be recorded: *White v. Rowley*, 46-680.

As to platting by officer in sale of execution, see *infra*, §§ 206-214.

39. Occupancy: The exemption of the homestead is based upon its actual occupancy as such, and is not dependent upon the marking out and platting: *Yost v. Devault*, 9-60.

40. Such marking and platting alone do not give property the character of a homestead; use by the family as a home is essential: *Cole v. Gill*, 14-527.

41. Assent of the wife to the action of the husband in fixing the homestead is not essential. If he adopts it as his home, the fact of absence of his wife will not make it any the less his homestead: *Williams v. Sweetland*, 10-51.

42. The homestead character does not attach to property until it is actually occupied

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and used by the family as a home. The mere intention to occupy, though subsequently carried out, does not make the premises a homestead until there is actual residence: *Charles v. Lamberson*, 1-485; *Christy v. Dyer*, 14-488; *Elston v. Robinson*, 23-208; *Givans v. Dewey*, 47-414.

43. But where a portion of the furniture was placed in a house which was undergoing repairs and the family moved to the neighborhood expecting to occupy it, but on account of repairs not being completed did not actually sleep and eat in the building, *held*, that it became invested with the homestead character: *Neal v. Coe*, 35-407.

44. Property acquired as a homestead in exchange for another homestead will remain exempt for a reasonable time for the purpose of effecting the removal of the family from the old homestead, although the new one is not yet actually occupied: *Cougell v. Warington*, 66-666.

45. Abandonment: An actual removal from the homestead with no intention to return will forfeit the homestead right, even though no new homestead be acquired, but where the removal is temporary and with intention to return, unless others have been misled thereby to their prejudice, it will not work a forfeiture of the homestead right. Facts discussed, *held* to indicate an intention to return: *Fyffe v. Beers*, 18-4.

46. An averment that the party has abandoned the homestead and is a non-resident, and a resident of another state, is sufficient to make out a *prima facie* case of abandonment; such fact would not be conclusive if there were an intention of returning, but such intention should be set up in the answer and need not be negatived in the petition: *Orman v. Orman*, 26-361.

47. However, the premises do not lose the homestead character by being left for a merely temporary purpose: *Davis v. Kelley*, 14-523.

48. In such case they will remain exempt even though in the absence of the owner they are rented to a tenant: *Robb v. McBride*, 28-386.

49. A removal from the homestead for a temporary purpose will not amount to abandonment where no prejudice has resulted therefrom: *Morris v. Sargent*, 18-90.

50. In a particular case, *held*, that the fact that the wife left the homestead with the husband for a temporary purpose, with the intention of returning and occupying, did not constitute an abandonment by her: *Bradshaw v. Hurst*, 57-745.

51. In such case, *held* also, that the intention to return must have existed and would be presumed to continue until a contrary intent was shown: *Ibid*.

52. The length of time of the absence is not conclusive as to abandonment, but it is an important fact in determining the intention to return, where there are no other acts or circumstances indicating such intention: *Dunton v. Woodbury*, 24-74.

53. Stronger proof of abandonment is required where the lien set up is claimed to have attached during actual occupancy, than where it arises when the party claiming the premises was not in actual possession: *Ibid*; *Davis v. Kelley*, 14-523.

54. Absence of the husband while working at his trade, and the wife while boarding their only child during his attendance upon school, the homestead farm being in the meantime leased with the reservation of two rooms for storing household goods, there being an intention to return, *held* not to constitute an abandonment of the homestead: *Shirland v. Union Nat. Bank*, 65-96.

55. The fact that the head of the family is absent from home does not deprive the property occupied by the family during his absence of the character of a homestead: *Griffin v. Sheley*, 55-513.

56. The homestead exemption being for the benefit of the family, so long as the family desires to retain the homestead as such, and does actually occupy it, it remains exempt, although the head of the family may have gone to another state and acquired property and a residence there with the intention of subsequently removing his family: *Savings Bank v. Kennedy*, 58-454.

57. The removal of the husband, even with intent to abandon the property, does not affect the homestead right so long as the wife, having the right to occupy, remains in such occupancy: *Lunt v. Neeley*, 67-97.

58. A subsequent abandonment will not render valid a conveyance by the husband or

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wife alone: *Ibid.*; *Bruner v. Bateman*, 66-488.

59. A conveyance by the husband to the wife does not destroy its character as a homestead nor change the time to which the exemption dates: *Green v. Farrar*, 53-426.

60. Conveyance of the homestead standing in the husband's name by the husband and wife to a third party in trust, to be reconveyed to the wife, is not an abandonment or fraudulent conveyance rendering the homestead subject to debts contracted subsequent to its acquisition and before such transfer: *Huginin v. Dewey*, 20-368.

61. Where a husband being the owner of the fee conveyed the homestead to a third party who afterwards reconveyed it to the wife, the occupancy remaining unchanged, *held*, that such conveyance amounted to an abandonment, it not appearing that the conveyance was for the purpose of vesting the title in the wife and without intention of abandoning the homestead right: *Jones v. Currier*, 65-583.

62. Where the family did not cease to occupy the homestead, but another party took possession of a portion thereof under a transfer which was invalid, *held*, that the facts did not constitute an abandonment: *Stinson v. Richardson*, 44-878.

63. Where a wife holding the title to a homestead under a voluntary conveyance from her husband, which is void for fraud as to creditors, dies, and the husband and children afterwards abandon the homestead, it becomes liable to the claims of such creditors: *Gardner v. Baker*, 25-848.

64. Where the owner leaves the premises and acquires a new home, it will be presumed that he intended to abandon the old homestead: *Davis v. Kelley*, 14-523.

65. An actual removal from the homestead with no intention to return will amount to a forfeiture of the homestead right as against purchasers and creditors, even when a new homestead has not been gained: *Newman v. Franklin*, 69-244.

66. While the length of a person's absence may not be conclusive proof of his intention to abandon his homestead, yet where such absence is continued for some years, and there is no circumstance or act which indicates his intention to return and occupy the

homestead, in such case, the length of his absence may become a controlling circumstance: *Ibid.*

67. Absence from the homestead for about three years without any manifest intention to return, with repeated offers to sell or trade the property and frequent expressions of a purpose not to return to it, one of these being made at the time of the incurring of liability, *held* sufficient to constitute an abandonment as to the party to whom such liability was incurred: *Dunton v. Woodbury*, 24-74.

68. Where it appeared that a party owning and occupying a farm as a homestead moved to town to practice law, with the intention of pursuing his profession permanently if he was able to make a living by it, *held*, that the intention was such as to constitute an abandonment of the homestead: *Kimball v. Wilson*, 59-638.

69. Where the owner with his family removed permanently from the property, resided in different places, voted at elections where so residing, and had no definite intention of returning to the property, but intended to exchange it for another homestead when possible, *held*, that the facts showed an abandonment. Abandonment may be shown without proof of the acquisition of a new homestead: *Cotton v. Hamil*, 58-594.

70. The fact that the owner removed with his family to another county and repeatedly voted there, *held* conclusive evidence of the abandonment of the homestead: *Ross v. Hellyer*, 26 Fed. Rep., 418.

71. Upon sale of the portion of the homestead upon which the house is situated, without intention to build upon and occupy the residue as a homestead, the remaining portion loses its homestead character: *Givans v. Dewey*, 47-414; *Windle v. Brandt*, 55-221.

72. The mere intention to place the remainder of the property in condition for occupancy at a future time will not continue the homestead character: *Givans v. Dewey*, 47-414.

73. Continuing to occupy the house as a tenant at will after its conveyance will not continue the homestead right: *Windle v. Brandt*, 55-221.

74. Evidence that at the execution of a mortgage upon property which had been the

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homestead, by the wife alone, she being owner of the fee, she stated that she was not living upon it and did not intend to do so, *held* admissible to show that at the execution of a subsequent mortgage the homestead right did not exist, there having been no occupation of the premises in the meantime as a homestead: *Van Bogart v. Van Bogart*, 46-859.

75. Where the wife, while absent from the homestead, requested a creditor of the husband to levy an attachment thereon, *held*, that she thereby abandoned her homestead right and could not insist upon it as against such attachment: *Parsons v. Cooley*, 60-268.

76. A lease to a mining company of the right to mine coal from the homestead does not constitute such severance of the unmined coal as to subject it to judicial sale: *Sibley v. Lawrence*, 46-563.

77. Where defendant sets up a homestead right the burden of proving abandonment is upon plaintiff: *Bradshaw v. Hurst*, 57-745.

78. But where it is claimed that surrender of possession is not voluntary and does not constitute an abandonment, the burden of proof is upon the party claiming the homestead right to establish his intention to return: *Newman v. Franklin*, 69-244.

79. Facts in particular cases, as bearing upon the question of abandonment, considered: *Stewart v. Brand*, 28-477; *Leonard v. Ingraham*, 58-406.

80. Change of homestead: By statute (Code, § 2000), a change of the homestead is permitted, and the new homestead will be exempt from execution to the extent in value of the old, as against an indebtedness contracted during the occupation of the latter, but such change cannot prejudice previous liens and conveyances: *Sargent v. Chubbuck*, 19-37.

81. The lien of a judgment which has already attached cannot be affected by a change of the homestead to property upon which it is a lien: *Elston v. Robinson*, 21-531.

82. Where the owner of two pieces of property changed his homestead from one to the other, *held*, that a judgment lien existing on the second would become a lien on the first; but that the homestead right in the second would be superior to such judgment lien, to

the same extent that it was in the first: *Furman v. Dewell*, 35-170.

83. Where a party sells his homestead with the intention of purchasing a new one, he will be allowed a sufficient time within which to exercise that right, and if he does not gain credit on account of the transaction, debts contracted in the interim cannot be enforced against the new homestead: *Benham v. Chamberlain*, 39-358.

84. The act of acquiring a new homestead and moving into it cannot be simultaneous. After the purchase the owner should be allowed a reasonable time to make the change and to remove the family to his new home, and during the time intervening between the purchase of the new house and actual occupation, it is exempt as a homestead: *Cowgell v. Warrington*, 66-666.

85. The new homestead is liable for debts contracted prior to the acquisition of the old one: *Bills v. Mason*, 42-329.

86. But not for those contracted subsequently, and not put in judgment before the acquisition of the new one: *Pearson v. Minturn*, 18-86; *Robb v. McBride*, 28-386.

87. The purchase of a second homestead with the proceeds in part of the first and other means entitles the owner to hold it exempt from debts contracted subsequently to the occupancy of the old homestead, where the value of the second homestead does not exceed that of the first: *Lay v. Templeton*, 59-684; *Benham v. Chamberlain*, 39-358.

88. It is not necessary that the old homestead be sold for cash which is immediately invested in a new one. The sale may be on time, and if the intention is to invest the proceeds, when realized, in the new, such proceeds will be exempt: *State v. Geddis*, 44-537.

89. Where plaintiff owned a homestead and also a half-interest in other property subject to execution, and exchanged the homestead for the other half-interest in such property, *held*, that the half-interest originally owned remained liable to be sold under execution on a judgment for a debt existing at the time of the exchange: *Thompson v. Rogers*, 51-333.

90. Where defendant relies upon the fact that his homestead was procured with the proceeds of a previous homestead in order to establish its exemption from a claim which

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antedates the last homestead, the burden of proof to establish that fact is upon him: *First Nat. Bank v. Baker*, 57-197; *Paine v. Means*, 65-547.

91. Where a farm exceeding in extent the amount which could be held exempt, and incumbered for a portion of its value, was exchanged for another tract of land no greater in value than was capable of exemption as a homestead, and the latter was occupied as such, *held*, that as it was not practicable to establish what portion of the value of the original tract was exempt, no portion of the new homestead could be held exempt from a debt existing at the time of the exchange: *Paine v. Means*, 65-547.

92. The proceeds of the homestead when invested in a new homestead in another state do not remain exempt. Therefore, where a party sold his homestead in Iowa and purchased one in Missouri, and thereafter sold his homestead in Missouri and invested the proceeds in a homestead in Iowa, *held*, that he could not hold the last homestead in Iowa exempt from debts existing at the time of its purchase, even though they did not antedate the first homestead: *Rogers v. Raisor*, 60-355.

93. Where a debtor holding a homestead exempt from execution for his debts exchanged the same for other property which he procured to be conveyed directly to his wife, *held*, that the property thus conveyed to the wife did not become subject to payment of his debts, and that such conveyance to the wife was not fraudulent: *Jones v. Brandt*, 59-332.

94. The change of metes and bounds which is authorized by statute has no reference to a conveyance or mortgage of a portion of the land which may be claimed as a homestead, and a change cannot be effected in that way without the consent of the husband or wife, unless it be for the acquisition of a new homestead: *Goodrich v. Brown*, 63-247.

95. Under particular facts, *held*, that a new homestead, practically of the same value as the old, remained exempt, but that other property, acquired and used in connection with the homestead, but not procured with the proceeds of the former homestead, was not exempt from prior indebtedness: *Atkinson v. Hancock*, 67-452.

96. Under particular facts, *held*, that the intention to change the homestead was not shown: *Coad v. Neal*, 55-528.

II. CONVEYANCE OR INCUMBRANCE OF THE HOMESTEAD.

97. Consent of both husband and wife necessary: Neither the husband nor the wife can by any separate act affect the homestead rights of the other and change the homestead character of the property. When the right of a homestead is once attached to the property, it can be relinquished or divested only by a joint conveyance or by an abandonment of the property as a homestead by both husband and wife: *Lunt v. Neeley*, 67-97.

98. But the subsequent purchaser without notice that property conveyed by the husband or wife holding the legal title thereto was made at a time when the property was invested with the homestead character, is not affected with notice of the invalidity of such conveyance and will be protected: *Ibid*.

99. Where an unmarried man, owning and occupying property as a home, made application for a loan secured by mortgage upon the land, and before the execution of the mortgage, but without the knowledge of the lender, was married, *held*, that the mortgage was subsequent to the wife's homestead right: *Tolman v. Leathers*, 1 McCrary, 829.

100. A mortgage upon the homestead by the husband alone, even though given to secure a debt antedating the homestead, *held* void, and the record thereof not sufficient to constitute notice to a subsequent purchaser. The creditor whose claim antedates the homestead right has no lien as against a purchaser without notice, until he recovers judgment on his claim: *Higley v. Millard*, 45-586.

101. A sale and conveyance of the homestead by husband and wife will transfer a valid title to the purchaser as against a prior sale by the husband alone, although the second purchaser had knowledge of the first conveyance: *Garlock v. Baker*, 46-334.

102. A contract by the husband to convey property which has been acquired by him in exchange for the homestead, with the intention of occupying it for a new homestead

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within the period reasonably required for making a removal, will be void, although the property acquired has not yet been actually occupied: *Cowgell v. Warrington*, 66-666.

103. Where the homestead right exists in property, the whole of which is greater in amount than can be claimed under the homestead law, the boundaries of the homestead not having been established, the owner of the fee cannot, by conveying a portion of the property by an instrument in which the other does not join, limit the homestead right to another portion thereof. No valid sale of any portion can be made until the provisions of law as to platting have been complied with: *Goodrich v. Brown*, 63-247.

104. The rights of the wife and family in the homestead cannot be affected by the fraudulent acts of the husband: *Eli v. Gridley*, 27-376.

105. The subsequent adoption of property as a homestead will not affect conveyances previously made: *Yost v. Devault*, 3-845.

106. Where, prior to the execution of a mortgage on real estate, no part thereof is occupied as a homestead, and an adjoining tract is used and held out as such, third persons being influenced by such representations, the mortgagor's wife, though not joining in the mortgage, cannot afterwards set out the homestead by plat, and record it so as to include part of the mortgaged premises: *Lucas v. Pickel*, 20-490.

107. Incumbrances: Under a statute not forbidding the incumbrance of the homestead, but only the conveyance thereof by one party alone, *held*, that a mortgage was a conveyance: *Babcock v. Hoey*, 11-375.

108. Assignment; lease or contract: Where premises held under a lease are occupied as a homestead, an assignment of the lease by the husband alone will not be valid: *Pelan v. De Bevard*, 13-53.

109. The rights of a wife in the homestead cannot be prejudiced by a lease made by her husband or by a holding by him in recognition of a mortgagee's title as against him: *Morris v. Sargent*, 18-90.

110. Where the title to the homestead is held under a contract of purchase, the husband having such contract cannot, without the consent of the wife, make an assignment

thereof so as to divest the homestead right: *Drake v. Moore*, 66-58.

111. The verbal assent of the wife to a conveyance of the homestead or an assignment of the title bond under which it is held will not make it binding: *Donner v. Rodenbaugh*, 61-269; *Stinson v. Richardson*, 44-373.

112. An oral agreement by the parties to execute a mortgage upon the homestead, for money borrowed to redeem the same from execution, cannot be specifically enforced, nor can the money so advanced be made a lien upon the premises by judicial decree: *Clay v. Richardson*, 59-483.

113. The fact that the wife has knowledge of and approves the sale of the homestead, and even an express agreement on her part to convey the same, if it is not in writing, will not render a contract of sale by the husband alone valid: *Anderson v. Culbert*, 55-233.

114. Ratification: Where there is an attempt to execute a proper instrument, which, however, is void by reason of defects in form, the parties may bind themselves by a ratification of such instrument, either express, or presumed from their acts: *Spafford v. Warren*, 47-47.

115. Where it was attempted to show ratification by the wife of a parol contract to convey the homestead, made during the lifetime of her husband, *held*, that mere acceptance of the benefits of such parol contract during three or four weeks of ill-health following the death of the husband was not sufficient to prove such parol ratification: *Clark v. Everts*, 46-248.

116. Duress: Where the concurrence of a wife in the mortgage of a homestead is procured by duress, it cannot be enforced: *First Nat. Bank v. Bryan*, 62-42.

117. Insanity: Where the wife is insane at the time of a conveyance in which she attempts to join for the purpose of conveying the homestead, it will be void for want of her consent: *Alexander v. Vennum*, 61-160.

118. The fact that the wife, at the time of making a note secured by mortgage on the homestead, was mentally unsound, will not defeat the mortgage in the ordinary course of business, if the transaction is fair and reasonable, and the mental condition of the wife

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was not known to the other party: *Abbott v. Creal*, 56-175.

119. **Fraud:** If the wife actually signs an instrument of conveyance or incumbrance, she will not be allowed to dispute its validity on the ground that she was ignorant of its contents or that she was induced to do so by fraud or deception of her husband, in the absence of a showing that the grantee or mortgagee was cognizant of such deception and fraud: *Edgell v. Hagens*, 53-223; *Van Sickles v. Town*, 53-259.

120. The fact that a wife's signature to a mortgage of the homestead is obtained by fraud and misrepresentation on the part of her husband will not defeat the mortgage, where no knowledge of the fraud can be imputed to the mortgagee: *Aetna L. Ins. Co. v. Franks*, 53-618.

121. Where the husband, to whom the wife owning the fee of the homestead intrusted the entire control of the business, secured a loan thereon upon the representation that he would furnish a valid mortgage upon the property signed by the wife and himself, and afterwards furnished such security, held, that the wife was estopped by his action from relying upon a defense to such mortgage based upon erasures and interlineations claimed by her to have been made by her husband, but not readily apparent upon inspection: *Sawyer v. Perry*, 62-238.

122. **Mortgage for husband's debts:** The wife may join in a mortgage of the homestead for the payment of a note of her husband and will be bound thereby to the extent of the property mortgaged, but she would not thereby become entitled to the proceeds of the loan effected or property purchased therewith: *Rock v. Kreig*, 39-239.

123. The homestead is bound by a mortgage executed by the husband and wife to secure their joint note, it being expressly stipulated that the intention is to bind the homestead: *Low v. Anderson*, 41-476.

124. A purchase-money mortgage given at the time of the acquisition of the homestead, to the vendor, is valid, though executed alone by the party taking the legal title: *Christy v. Dyer*, 14-438.

125. B. having become bound as surety for one L. L. to A. L., and being at the same time indebted by mortgage for the purchase

money of land which included the homestead, an arrangement was made by which B. assumed the payment of the debt to A. L., securing it by a mortgage on the same property, and the amount thus assumed was, by the procurement of L. L., indorsed upon the purchase money notes; held, that A. L. could not claim to be the assignee of a portion of the purchase money, or of the vendor's rights, and took the mortgage subject to the unpaid residue of the first mortgage and subject to the homestead rights of B.'s wife, who had not joined in the mortgage: *Burnap v. Cook*, 16-149.

126. The renewal by the husband of a debt, by an admission or new promise sufficient to take the case out of the statute of limitations, will also keep in force a mortgage given on the homestead to secure the same, although such renewal is without the wife's consent: *Mahon v. Cooley*, 36-479.

127. A conveyance for right of way by the husband, owner of the legal title of the homestead, in which the wife does not join, is not necessarily invalid: *Chicago & S. W. R. Co. v. Swinney*, 38-182.

128. Damages assessed for the taking of a right of way through the homestead are exempt from execution. Whether the proceeds of a voluntary conveyance by the husband for that purpose would be exempt, *quære*: *Kaiser v. Seaton*, 62-463.

As to damages for injuries by fire being exempt, see *infra*, § 221.

129. A license to mine upon the homestead, executed by the owner alone without concurrence of the wife, is not necessarily invalid, and even if her assent should be considered necessary, it would be presumed from knowledge on her part that work was being done thereunder or expenses incurred to which she made no objection: *Harkness v. Burton*, 39-101.

130. A lease to a mining company of the right to mine coal from the homestead does not constitute a severance such as to subject the unmined coal to judicial sale: *Sibley v. Lawrence*, 46-563.

131. **How conveyance effected:** Under the provisions of Revision (§ 2279), which did not use the language of the present Code (§ 1990), requiring signature of both parties to "the same joint instrument," it was held doubtful

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as to whether a conveyance of the homestead by separate deeds or equitable mortgages of the husband and wife, in neither of which the other joined and which were made at an interval of a year apart, would pass title to the common grantee; but it was held that such deeds would not be considered invalid in equity upon complaint of a subsequent grantee taking title for a fraudulent purpose at a nominal consideration and with a knowledge of all the circumstances: *Luther v. Drake*, 21-92.

132. An instrument in which the wife only joins for the purpose of releasing her dower is not such a joint instrument as is required to convey or incumber the homestead: *Sharp v. Bailey*, 14-887; *Fuller v. Hunt*, 48-163; *Wilson v. Christopherson*, 53-481; *Eisenstadt v. Cramer*, 55-753.

133. Apparently *contra*, see *Reynolds v. Morse*, 52-155.

134. It is not necessary that the conveyance or incumbrance should specifically state that the property sought to be conveyed or incumbered is the homestead: *Babcock v. Hoey*, 11-875; *O'Brien v. Young*, 15-5; *Reynolds v. Morse*, 52-155; *Van Sickles v. Town*, 53-259; *Waterman v. Baldwin*, 68-255.

135. A conveyance of the homestead property from the husband to the wife will not vest in her such title that she alone can make a valid conveyance thereof: *Spoon v. Van Fossen*, 53-494.

136. Effect of conveyance by one party alone: An agreement to convey, made by the husband or wife alone, is absolutely void, and a specific performance thereof cannot be enforced: *Yost v. Devault*, 9-60.

137. A mortgage upon the homestead executed by the husband alone while his wife is living is not binding upon him even after the death of the wife: *Larson v. Reynolds*, 13-579.

138. Where one party alone enters into a contract to convey the homestead no damages can be recovered for the breach of such contract from the party executing it: *Barnett v. Mendenhall*, 42-296; *Clark v. Evarts*, 46-248; *Cowgell v. Warrington*, 66-666.

139. Where the husband enters into a contract to convey, to which both parties expect to secure the assent of the wife, but such assent is not secured, the purchaser cannot

recover from the husband the excess in the value of the land over the purchase price. The case is not one of fraud, and it is doubtful whether anything can be recovered except the purchase money paid and interest: *Donner v. Rodenbaugh*, 61-269.

140. Specific performance: Where the husband caused the homestead to be advertised for sale at auction and it was so sold, *held*, in the absence of any consent to such sale by the wife, specific performance could not be enforced: *Garlock v. Baker*, 46-884.

141. Subsequent abandonment of the homestead will not make a conveyance or mortgage by the husband alone, while the property was occupied as a homestead, valid: *Bruner v. Bateman*, 66-488; *Lunt v. Neeley*, 67-97.

142. Improvements by purchaser in good faith: Where a party takes possession of a homestead under a void transfer thereof, but in good faith, believing that he has acquired a good title, and makes improvements which are judicious and necessary and not inconsistent with the circumstances of the owner, he is entitled to allowance for such improvements: *Stinson v. Richardson*, 44-373.

143. Rents and profits: Whether in such case the wife of the party who has attempted to convey the homestead can maintain action for rents and profits against the person thus taking possession under such conveyance, *quere*; but *held*, in a particular case, that a decree applying such rents and profits on a judgment against the homestead was proper: *Ibid*.

144. Where plaintiff's husband before his death assigned to defendant a bond for a deed by which he held a tract of land, including the homestead defendant agreeing to pay certain judgments and other considerations, in which assignment plaintiff did not join, *held*, that upon this being set aside, at the suit of plaintiff, and defendant declared entitled to be subrogated to the rights of the holder of the judgments which he had paid off in a supplemental proceeding by the wife after the husband's death, the rents and profits of the portion of the premises which was the homestead should be applied to the satisfaction of these judgments, but not the rents and profits from the portion not a part

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of the homestead, and that a like application should be made of the value of a horse given to defendant by plaintiff's husband in the trade: *Stinson v. Richardson*, 48-541.

III. CLAIMS UPON AND LIENS AGAINST; HOW ENFORCED.

145. **Unpaid purchase money:** The homestead right is subordinate to the right of the vendor for unpaid purchase money: *Christy v. Dyer*, 14-438; *Cole v. Gill*, 14-527; *Burnap v. Cook*, 16-149; *Hyatt v. Spearman*, 20-510.

146. In such case, a general judgment and execution is the proper method of enforcing the vendor's lien: *Bills v. Mason*, 42-329.

147. The assignment of a note given for the purchase money of property constituting a homestead carries with it the vendor's lien and all the equities and rights which the vendor would have had if he had never parted with the debt: *Ibid*.

148. **Fraud:** Where the title to property has its inception in fraud, its homestead character cannot be set up to defeat the claims of the person from whom it was obtained: *Muir v. Bozarth*, 44-499.

149. **Debts contracted prior to acquisition:** The homestead is liable, under the statute, for debts contracted prior to its acquisition and occupancy as such, provided no other property is found subject to execution: *Greeley v. Sample*, 22-338.

150. The statutory provision that "the homestead may be sold for debts contracted prior to the purchase thereof" (Code, § 1992), means that it may be thus sold for debts contracted prior to the time when the homestead right attaches by virtue of actual occupancy as a homestead. Debts contracted after the purchase of the property, but before it acquires the homestead character by occupancy as such, may be enforced against the property: *Hale v. Heaslip*, 16-451; *Hyatt v. Spearman*, 20-510; *Elston v. Robinson*, 23-208.

151. The entry of land under the United States homestead laws, which is afterward occupied as a homestead, constitutes the purchase of the homestead within the meaning of this section. The exemption dates from such entry and not from the issuance of a patent: *Green v. Farrar*, 53-426.

152. A homestead is liable to foreign as

well as domestic debts created prior to its acquisition: *Laing v. Cunningham*, 17-510; *Brainard v. Van Kuran*, 22-261.

153. Where a debt contracted prior to the acquisition of the homestead has become barred, and is renewed by a new note given subsequently to such acquisition, the homestead remains liable: *Sloan v. Waugh*, 18-224.

154. Where a party has derived a pecuniary advantage from a wrong done by him, and it is competent for the person suing thereon to waive the tort and maintain action on an implied promise, the obligation to pay is a debt within the meaning of the statutory provision above referred to, from the time of the wrong; but if the wrong results in no pecuniary advantage and the action must be in tort, and sound only in damages, then the obligation is not a debt until ascertained by judgment: *Warner v. Cammack*, 37-642.

155. The homestead being liable for debts created before its acquisition, the execution of a mortgage thereon to secure such a debt creates no additional burden so far as the rights of the wife are concerned, and, therefore, such mortgage executed by the husband alone would be valid as to the wife, but it would not be valid as to innocent purchasers before judgment on the debt secured, and the recording of such a mortgage would therefore not affect them with notice: *Higley v. Millard*, 45 586.

156. The liability of the homestead to debts contracted before it acquires the homestead character attaches at the time they are contracted, and not merely from the time judgment is rendered thereon: *Bills v. Mason*, 42-329.

157. **Lien of judgments:** As between the parties, or as against persons chargeable with notice of the character of the debt, a judgment upon a debt contracted prior to the time when the property acquired a homestead character, although not rendered until after that time, becomes a lien upon the homestead, and a party claiming under the homestead right (as by mortgage) is bound to ascertain when such right began, and whether it was prior to the debt on which the judgment was rendered: *Hale v. Heaslip*, 16-451.

158. And where it does not appear from the judgment itself that the debt was con-

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tracted prior to the acquisition of the homestead, that fact may be shown by evidence *aliunde*: *Delavan v. Pratt*, 19-429; *Phelps v. Finn*, 45-447.

159. A judgment defendant who is surety for his co-defendant has such an interest as against his co-defendant that he may show that the judgment is for a debt antedating the acquisition of the homestead of his principal: *Delavan v. Pratt*, 19-429.

160. It is not sufficient, in order to make a judgment a lien upon the homestead otherwise than as a mechanic's lien, to show that it was for material furnished and labor performed upon the homestead property, unless the indebtedness arose before its acquisition as a homestead: *Ibid*.

161. A judgment for a debt antedating the homestead right is a lien on the homestead in such sense that the holder thereof may redeem from an execution sale by a senior creditor, and as against such senior creditor purchasing at his own sale may show by evidence *aliunde* that his debt antedates the homestead: *Phelps v. Finn*, 45-447.

162. A creditor whose claim antedates the homestead has no lien as against a purchaser without notice, until the recovery of his judgment: *Higley v. Millard*, 45-586.

163. The homestead being subject to the lien of a judgment for a debt contracted before its acquisition from the time such judgment is rendered, a purchaser after the lien attaches takes subject thereto, and in case of sale of the property under such judgment has no other right than that of making statutory redemption from the sale: *Kimball v. Wilson*, 59-638.

164. A judgment under which a homestead is not liable to sale does not attach as a lien thereon, and a conveyance of such homestead to a third person passes title free from such judgment: *Lamb v. Shays*, 14-567; *Cummings v. Long*, 16-41.

165. But when, by abandonment, the homestead loses its character, the liens of prior judgments attach in the same manner as the lien of a judgment attaches to property subsequently acquired by the judgment debtor: *Lamb v. Shays*, 14-567.

166. A conveyance of the homestead cannot be set aside as a fraud upon creditors

whose claims are not a lien against it: *Aultman v. Heiney*, 59-654.

167. A voluntary conveyance of the homestead will not be fraudulent as to creditors having no lien thereon: *Delashmut v. Trau*, 44-618; *Officer v. Evans*, 48-557.

168. Decree for divorce; alimony: Where a decree of divorce merely gives the wife a personal judgment for alimony, the homestead, which the husband still continues to occupy as the head of the family, cannot be sold to satisfy the judgment: *Byers v. Byers*, 21-268; *Whitcomb v. Whitcomb*, 52-715.

169. The homestead is for the benefit of the family and not of the husband alone, and the law of homestead has no application in a suit for divorce and alimony. The court in adjusting the rights of the parties may make such provision or disposition of it as may appear just and equitable, and the attachment authorized in actions for alimony (Code, § 2327) may therefore be levied on the homestead: *Daniels v. Morris*, 54-369.

170. Written contracts making homestead liable: The statutory provision that "the homestead may be sold for debts created by written contract executed by the persons having the power to convey, and expressly stipulating that the homestead is liable therefor" (Code, § 1998), has reference to the manner in which the creation of the debt is to be evidenced rather than to the time when the liability arises. This section applies as well to debts evidenced by written contract subsequently to their creation as to debts so evidenced at the very time they are contracted: *Stevens v. Myers*, 11-188.

171. The written contract here specified need not be a mortgage or other conveyance; any writing containing necessary stipulations and executed by the proper persons is sufficient: *Foley v. Cooper*, 43-376.

172. The homestead cannot be rendered liable for the debts of its owner by mere verbal agreement to charge it with the payment thereof and to execute a writing to that effect, which by mistake is not done: *Rutt v. Howell*, 50-535.

173. A provision in a confession of judgment that execution might be issued thereon "against any property belonging to said defendants, homestead included," held not sufficient to render the homestead liable: *Ibid*.

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174. The fact that the husband and wife execute a mortgage upon their homestead to secure a particular creditor does not subject it to the payment of the claims of other creditors, nor can a general creditor be subrogated to the rights of the mortgagee. If the owner afterwards makes a general assignment for the benefit of creditors, the holder of the mortgage is entitled to a *pro rata* share with the other creditors, and the homestead is only liable for the balance remaining unpaid: *Dickson v. Chorn*, 6-19.

175. Foreclosure of incumbrances against the homestead: The wife cannot be affected by any decree foreclosing a mortgage on the homestead to which she is not made a party: *Burnap v. Cook*, 16-149.

176. The lien of a mortgage of the homestead, executed by the owner before marriage, is prior to any claim the wife may have by the subsequent marriage; but in a foreclosure suit the wife must be made a party in order that the judgment be binding upon her, and that a sale thereunder may cut off her dower rights: *Chase v. Abbott*, 20-154.

177. Where a mortgage is invalid because not joined in by the wife, who afterwards dies, and the mortgagor at the time of foreclosure has a second wife, her rights cannot be cut off unless she is made a party: *Larson v. Reynolds*, 13-579.

178. But the wife is not a necessary party in every action affecting the homestead: *Ibid.*

179. Even where more property than can be held as a homestead is occupied, no foreclosure can be had as to any part thereof under a mortgage not joined in by the wife; and therefore a foreclosure of such a mortgage cannot be had against the husband alone: *Goodrich v. Brown*, 63-247.

180. Where the occupancy of property as a homestead commences subsequently to the commencement of an action to foreclose a mortgage executed by the husband, before the property acquired the homestead character, a sale under such foreclosure cuts off the wife's homestead rights, although she is not made a party thereto. She has no rights in such homestead which she can assert as against the mortgage, even to compel plaintiff to first exhaust other property: *Kemerer v. Bourne*, 53-172.

181. Receiver: An application for the appointment of a receiver pending proceedings to foreclose a mortgage on a homestead may properly be refused where the amount due under the mortgage is in dispute: *Callanan v. Shaw*, 19-183.

182. Whether in any case a receiver should be appointed to take possession and charge of a mortgagor's homestead pending proceedings to foreclose, *quære: Ibid.*

183. Failure to set up homestead right in the foreclosure proceeding bars any such right: *Larson v. Reynolds*, 13-579.

184. And it cannot afterwards be set up against the purchaser at a sale under the judgment recovered under such proceeding: *Haynes v. Meek*, 14-320.

185. Where a defendant failed to set up his homestead right in an action to charge his property with a lien, *held*, that he could not, after judgment, maintain an action to prevent the enforcement of such lien on the ground that he was ignorant of his rights; and *held* also that his minor children had no interest which could be interposed in that manner: *Collins v. Chantland*, 48-241.

186. Where a homestead was sold under special execution and the surplus in the sheriff's hands was applied upon other executions against the defendant, and it was shown that such other executions were not upon judgments which could be enforced against the homestead, but such application of the surplus was made without objection on the part of plaintiff, *held*, that he could not recover such surplus in an action against the sheriff: *Brumbaugh v. Zollinger*, 59-384.

187. Where, in an action for divorce, the wife asked alimony, and a certain amount was granted and made a special lien on land otherwise involved in the suit, which land was afterwards sold to satisfy the decree, *held*, that the husband could not afterwards contest the sale on the ground that the property was his homestead. The homestead right should have been set up before the decree: *Hemenway v. Wood*, 53-21.

188. Who may interpose the defense: The invalidity of a mortgage on the homestead executed by the husband alone may be set up by a junior mortgagee, in a proceeding to foreclose the senior mortgage, although such

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defense is not interposed by the owners: *Alley v. Bay*, 9-509.

189. Sale of homestead under execution: It is the policy of the law to require all other property of the defendant in execution to be exhausted before the sale of the homestead: *Twoood v. Stephens*, 19-405.

190. The statutory provision (Code, § 1992) requiring that, where the homestead is liable to execution, it shall be resorted to only after exhausting "other property of the debtor liable to execution," applies to his interest in partnership property: *Lambert v. Powers*, 36-18.

191. Where the homestead is sold before other property is exhausted, the sale may be set aside and a resale ordered: *Lay v. Gibbons*, 14-377.

192. Where the holder of a senior mortgage on property, including the homestead, took a conveyance of the entire property without releasing his mortgage or otherwise indicating his intention that it should be merged in his legal title, *held*, that as to junior mortgages, he had the right to have his mortgage debt satisfied first, if possible, out of the portion not included in the homestead, to the exclusion of junior liens which were not a lien upon the homestead: *Linscott v. Lamart*, 46-312.

193. A party claiming that the homestead is not liable because other property has not been exhausted must make such fact appear. It is not necessary to negative that fact in the first instance in order to make the sale valid: *Hale v. Heaslip*, 16-451; *Stevens v. Myers*, 11-183.

194. The fact that a judgment creditor, under a claim prior to the homestead, has delayed until the other property of the debtor has been otherwise exhausted, will not release the homestead from his claim: *Denegre v. Haun*, 14-240.

195. The right to compel a creditor to exhaust other property subject to his mortgage before subjecting the homestead does not exist in favor of a third person who has purchased the homestead after the execution of the mortgage under which the sale is had: *Barker v. Rollins*, 30-413; *Kemerer v. Bournes*, 53-172.

196. If the mortgagor has sold the other property which might have been applied to

the satisfaction of the debt, he cannot require that it be proceeded against in the hands of a third party before the homestead is sold: *Dilger v. Palmer*, 60-117.

197. Where a mortgage is given covering the homestead and other land, and then a second mortgage is executed upon the same land so far as not included in the homestead, and the second mortgage is foreclosed and the land covered by it sold to the mortgagee therein, such mortgagee cannot insist that the homestead be first subjected to the payment of the first mortgage, but the mortgagor may insist, on the foreclosure of the senior mortgage, that the property covered thereby not included within the homestead shall first be applied to the satisfaction of such mortgage: *Equitable L. Ins. Co. v. Gleason*, 62-277.

198. Although by statute (Code, § 8323) a junior mortgagee is entitled to pay off a senior mortgage covering the same premises and other property, and have an assignment thereof and enforce it first as against the property not covered by his junior mortgage, yet if the property thus embraced in the senior mortgage and not covered by the junior is the mortgagor's homestead, the junior mortgagee is not entitled to such assignment, as the homestead cannot be first subjected to the satisfaction of the senior mortgage: *Grant v. Parsons*, 67-31.

199. Where the sheriff at a sale on foreclosure of a mortgage covering the homestead and other tracts offers the land not included in the homestead in separate tracts without receiving bidders, that is a sufficient exhausting of other property as required by statute, and a subsequent sale of the entire property including the homestead is not irregular: *Burmeister v. Dewey*, 27-468; *Eggers v. Redwood*, 50-289; *Brumbaugh v. Shoemaker*, 51-148.

200. If the officer's return of the execution recites the sale of the whole for a certain sum, but does not state whether the portion not included in the homestead was first offered separately, it will be presumed that the officer did his duty, and that the portion not included in the homestead was first offered: *Eggers v. Redwood*, 50-289.

201. The debtor cannot restrain the sale of the homestead under execution upon the

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ground that his other property has not been exhausted without an averment or showing that he has other property: *Stevens v. Myers*, 11-183.

202. The right to compel a sale of other property before the homestead is sold is not to be enforced by a cross-action, but by a special direction in the execution, and the right may be set up in the answer or obtained upon a summary supplemental showing: *Barker v. Rollins*, 30-412.

203. Where a party who has the right to insist that other property before the homestead shall be applied to the satisfaction of the debt has notice of the proposed sale of the homestead and makes no objection thereto, he will be regarded as acquiescing and cannot afterwards object to the sale on that ground: *Foley v. Cooper*, 43-376.

204. Where a party attacked a judicial sale of his property on the ground that he owned no interest subject to execution, and it appeared incidentally merely that part of the premises were occupied as a homestead, but it did not appear whether the homestead right was acquired subsequently to the date upon which the judgment was rendered or not, *held*, that the sale of the property in a lump without setting off the homestead was not void: *McCleary v. Ellis*, 54-311.

205. Where it does not appear that defendant has other property subject to execution, the sale of the homestead which is liable to the indebtedness will be valid unless defendant points out other property: *Owens v. Hart*, 62-620.

206. Platting homestead before sale under execution: A sale under execution of a tract of land in a lump, which includes the homestead or a part of it, without the homestead being platted by the owner or by the officer making the sale as required by statute (Code, § 1998), is void: *Linscott v. Lamart*, 46-312; *Goodrich v. Brown*, 63-247; *Vissek v. Doolittle*, 69-602.

207. A sale by the officer of any portion of the property which might have formed a part of the homestead without such platting is invalid: *White v. Rowley*, 46-680; *Lowell v. Shannon*, 60-713.

208. It is immaterial in such cases that no objection to the sale of the homestead en

masse without platting is made: *Owens v. Hart*, 62-620.

209. The fact that the sale is made under a special execution is immaterial in this respect: *Ibid*.

210. Failure of the owner and the sheriff to select and designate the homestead before execution sale of property in which the homestead is included does not render the sale void. The statute is directory: *Newman v. Franklin*, 69-244.

211. It may be that in such case the sale is voidable, but where it appeared that after the sale the homestead was abandoned, *held*, that the trustee of the owner of the homestead could not maintain an action to set it aside: *Ibid*.

212. Where a portion of defendant's farm, upon which he resided, was sold without platting a homestead, but the dwelling and more than enough land for a homestead were left, *held*, that the sale might be set aside as between the parties, but was not void: *Martin v. Knapp*, 57-336.

213. Where a tract of land including the owner's homestead was sold on special execution in a lump, after first having been offered in *forties*, *held*, that there was no prejudice to the owner resulting from failure of the sheriff to mark out and plat the homestead: *Brumbaugh v. Zollinger*, 59-384.

214. Even though a homestead right may exist in the undivided interest of a tenant in common, yet in case of an execution sale of such tenant's interest, it is not proper for the officer to set off any specific portion as a homestead: *Farr v. Reilly*, 58-399.

215. Reference: The statutory provision (Code, § 2002) for a reference under direction of the sheriff to determine whether any land or buildings are a part of the homestead is not for the purpose of making a selection of the homestead, but to determine whether certain land claimed to be exempt really is so: *White v. Rowley*, 46-680.

216. This section contemplates the case where it is conceded that the claimant of the homestead rights has rights of that character which he is entitled to set up, but there is a controversy as to where the line is to be drawn between what is exempt and what is not. It does not apply to a case where

Claims against.—Rights of survivor; descent.

it is a question as to whether the debtor has any homestead rights at all as against the claims of the creditor: *McCrackin v. Weitzel*, 70—.

217. Proportional liability: Where a husband has contributed a portion of the purchase price of a homestead, the title of which is in the wife, the creditors of the husband under claims antedating the acquisition of the homestead may subject such property, to the extent of the husband's contribution thereto, to the payment of their claims, such proportion being treated as equitable assets and sold to satisfy judgments on such claims: *Croup v. Morton*, 49-16; *S. C.*, 53-599; *Hamill v. Henry*, 69-752.

218. Earnings of the wife not derived from separate property or business, but acquired in connection with her husband's property and in the management of the family affairs, do not become the wife's separate property in such sense that when invested in a homestead that proportion thereof thus procured is exempt from indebtedness to which the homestead in the hands of the husband is liable: *Hamill v. Henry*, 69-752.

219. Taxes and repairs: A husband who occupies with his family a homestead owned by his wife may pay taxes and interest on incumbrances thereon, as well as make expenditures for repairs, without becoming a creditor of the wife and acquiring any claim against the property which can be enforced by his creditors: *Ibid.*

220. Exemption of proceeds: Where a portion of the homestead is, by proper proceedings, condemned for right of way, the damages allowed are exempt from execution. Whether the proceeds of a voluntary conveyance by the husband of a portion of the homestead for right of way would be exempt, *quære*: *Kaiser v. Seaton*, 62-463.

221. The right of action against a railway company for damages caused to the homestead property by fire negligently set out by such company is exempt from execution for a reasonable time, to the same extent that the homestead is, and the railway company cannot be garnished for such indebtedness under a judgment which could not be enforced against the homestead: *Mudge v. Lanning*, 66-641.

IV. RIGHTS OF SURVIVOR; DESCENT.

222. Occupancy by survivor: Upon the death of the wife, the husband is entitled to possess and occupy the whole homestead regardless of whether he or the wife is owner of the fee, or whether or not there is issue of the marriage: *Burns v. Keas*, 21-257.

223. Upon the death of the husband, the wife, though she marries again, may continue to occupy the whole homestead, and it is not liable to partition at the suit of the husband's heirs at law: *Nicholas v. Purcell*, 21-265.

224. Occupancy of homestead in lieu of distributive share: A survivor electing to retain the homestead in lieu of the distributive share has only the right to use and occupancy, during life, and has no interest which can survive to a second husband or wife: *Stevens v. Stevens*, 50-491.

225. Rights of occupant: The survivor thus occupying cannot change the homestead for another: *Size v. Size*, 24-580.

226. The surviving widow is entitled to control the rents and profits of the homestead while she remains in possession thereof: *Floyd v. Mosier*, 1-512.

227. A widow continuing to occupy the homestead belonging to her former husband has such right to occupancy as to entitle her to sue for injuries, to her enjoyment of the property by a wrong-doer, although it may not appear but that her right to the property is subject to be divested at any time: *Cain v. Chicago, R. I. & P. R. Co.*, 54-255.

228. The rights of occupancy and possession on the part of the survivor do not confer any title which can be conveyed or can become subject to the lien of a judgment: *Meyer v. Meyer*, 28-359; *Butterfield v. Wicks*, 44-810; *Smith v. Eaton*, 50-488.

229. A judgment against a surviving wife, recovered after the death of the husband, does not become a lien upon the homestead in her hands: *Briggs v. Briggs*, 45-318; *Nye v. Walliker*, 46-306.

230. The right of the wife to occupy the homestead after the death of the husband is not a right or interest in his estate which she takes by inheritance, but a mere personal right unaccompanied by title or property interest: *Mahaffy v. Mahaffy*, 68-55.

231. Therefore, held, that a stipulation in

Rights of survivor; descent.

an ante-nuptial contract, by which the wife accepted the provision therein made in lieu of dower and inheritance, did not constitute a relinquishment of the right to occupy and possess the homestead during her life: *Ibid.*

232. The right of the survivor may be lost by abandonment of the homestead: *Butterfield v. Wicks*, 44-810.

233. And after such abandonment it ceases to have the homestead character, and the survivor becomes a tenant in common with other heirs: *Orman v. Orman*, 26-361.

234. And partition among such heirs may then be had: *Size v. Size*, 24-580.

235. While the survivor is entitled to occupancy, the heirs cannot interfere therewith, nor claim partition: *Dodds v. Dodds*, 26-811.

236. Setting off distributive share: The right of occupying the homestead or any part of it cannot be retained in addition to the distributive share: *Meyer v. Meyer*, 28-359 (explaining *Nicholas v. Purcell*, 21-265); *Butterfield v. Wicks*, 44-810.

237. The survivor has only the right to retain such occupancy in lieu of so much of the distributive share, or such share may be set off to include the homestead: *Whitehead v. Conklin*, 48-478.

238. The homestead right does not become extinct until the distributive share has been finally set off: *Burdick v. Kent*, 52-583.

239. Election to hold in lieu of dower: The survivor is entitled to occupy the homestead for a reasonable time in which to make an election whether to retain such possession for life, or take a distributive share of the property: *Cunningham v. Gamble*, 57-46.

240. During occupancy for such reasonable time the survivor should be allowed to receive the income and profits therefrom. So held as to rent of coal mine on premises: *Ibid.*

241. Where the entire homestead exceeds in extent the dower interest of the wife, and she continues occupying it for ten years without making claim to have dower ad-measured, she will be regarded as having elected to take the homestead for life in lieu of the distributive share: *Conn v. Conn*, 58-747.

242. The occupancy of the property as a homestead will be considered as an election to

hold it as a homestead and not merely a part of it as dower: *Butterfield v. Wicks*, 44-810.

243. The acts of a surviving husband in retaining possession of the homestead after his wife's death, where its value was greater than his one-third interest in her property would have been, held an election to occupy the homestead during life in lieu of dower: *Stevens v. Stevens*, 50-491.

244. While the surviving husband is occupying the homestead in the absence of an election to take a distributive share, it is not competent for a court to dispose of his right to occupancy by forcing upon him in lieu thereof a distributive share. His continued occupancy as a survivor will be deemed an election to occupy as survivor, even though the distributive share should appear to be the more valuable: *Holbrook v. Perry*, 66-286.

245. The occupancy of a homestead under a devise of a life estate of land including the homestead will not be considered as an election defeating the widow's right to dower: *Blair v. Wilson*, 57-177.

246. The survivor electing to retain the homestead for life relinquishes his distributive share, but such relinquishment applies only to the one-third which the survivor is entitled to, where there are children or other descendants entitled to inherit, and not to the additional portion (one-sixth), which the survivor may be entitled to as heir at law, where there are no children: *Smith v. Zuckmeyer*, 53-14.

247. If the widow is entitled as heir at law to one-half of her husband's property, the other heirs cannot, in the partition of the realty, insist that she include the homestead in her share: *Nicholas v. Purcell*, 21-265.

248. Where a widow has her distributive share in the real property of her deceased husband set out to her from the homestead, she can continue to hold the same free from the lien of a judgment against her, not antedating the original homestead right: *Briggs v. Briggs*, 45-318; *Knox v. Hanlon*, 48-252.

249. Descent: The legal title of the homestead property, upon the death of the owner thereof, descends to the heirs of such owner, subject to the right of occupancy in the surviving husband or wife: *Burns v. Keas*, 21-257; *Cotton v. Wood*, 25-43.

250. Minor children have no such interest

Descent.— Mutual rights and liabilities.— Property.

in their parents' homestead during the life of the latter as the law will enforce against the contracts or acts of the parents: *Collins v. Chantland*, 48-241.

251. Devise: A wife may devise the homestead in which she holds the legal title, and the right thereto will pass to the devisee subject to the rights of the surviving husband: *Stewart v. Brand*, 28-477.

252. A mortgage given by the devisee creates a lien and may be foreclosed, subject, however, to the homestead rights of the surviving husband or wife: *Ibid*.

253. Exemption in hands of heirs: The heir holds the property free from any debts of the ancestor which could not have been enforced against it in his life-time, but it remains liable to debts contracted by the ancestor prior to its acquisition as a homestead: *Moninger v. Ramsey*, 48-368.

254. It remains exempt in the hands of the heirs even from charges and expenses of the last sickness and funeral expenses: *Knox v. Hanlon*, 48-252.

255. Occupancy of such property by the heirs as a homestead is not essential to its exemption in their hands from antecedent debts: *Johnson v. Gaylord*, 41-862.

256. Where the widow abandons the homestead it descends as free from the debts of the ancestor as if there had been no widow: *Ibid*.

257. Where, at the time of the death of the wife, owning the fee of the homestead, she and the husband were absent from the homestead, but without having as yet abandoned it, *held*, that there could not subsequently be an abandonment by the husband of his life interest, except by a setting off of a distributive share, and that upon his death the property descended to the heirs free from his debts: *Bradshaw v. Hurst*, 57-745.

258. Where the husband or wife surviving the owner of the fee elects to take a distributive share instead of the right of occupancy as a homestead during life, but such distributive share is not yet set off and the possession of the homestead continues in the survivor until death, the property descends or passes by devise free from the debts of such survivor: *Burdick v. Kent*, 52-583.

259. Where a conveyance of the homestead was made by the husband and wife to

their son, subject to the right of either grantor to occupy during life, and the husband surviving resided until death with his son, who did not reside on the homestead, *held*, that the son did not acquire the property as a homestead and that it was not exempt from his debts: *Reifenstahl v. Osborne*, 66-567.

HUSBAND AND WIFE.

I. MUTUAL RIGHTS AND LIABILITIES.

- a. *Mutual property rights.*
- b. *Contracts and conveyances between.*
- c. *Remedy by one against the other.*
- d. *Liability of each for acts, contracts and debts of the other; family expenses.*
- e. *Agency of the one for the other.*

II. POWERS, RIGHTS AND LIABILITY OF MARRIED WOMEN WITH REFERENCE TO THIRD PERSONS.

I. MUTUAL RIGHTS AND LIABILITIES.

a. *Mutual property rights.*

1. Joint property: Where the husband and wife take property jointly, they take as tenants in common: *Hoffman v. Stigers*, 28-302.

2. Where property is owned jointly by husband and wife the interest of the husband may be sold on execution for his debts, and the wife cannot have an injunction to entirely prevent the sale: *McTighe v. Brin golf*, 42-455.

3. Rights of husband in wife's property: The mere fact that the husband acts for the wife in the collection of notes belonging to her does not vest the title in him: *Peck v. Hendershott*, 14-40.

4. Under former statutes, *held*, that while the wife's choses in action did not, by mere operation of law, pass to her husband so as to authorize him against her consent to sue upon them jointly or in his own name, yet he would be authorized to do the latter in case she should give and deliver them to him: *King v. Gottschalk*, 21-512.

5. *Held*, also, that money belonging to a *feme sole* did not, as at common law, vest upon her marriage, and in consequence of her marriage, in the husband, nor could it by

 Mutual property rights.

mere operation of law ever become his: *Logan v. Hall*, 19-491.

6. Also *held*, that the husband did not, by marriage, acquire title to property held by the wife in trust nor could he recover rents and profits for such property against the party beneficially interested: *Claussen v. La Franz*, 1-226.

7. Also *held*, that the wife's right of survivorship in choses in action was terminated by their being reduced to possession by the husband, and that, therefore, where the real estate of the wife was sold after coverture and the notes and mortgages received therefor were made payable to the husband, the proceeds thereof received by the wife after the death of the husband and as executrix of his estate were held by her as such executrix and not in her own right: *McCrorry v. Foster*, 1-271.

8. *Held*, also, that a lease executed by the husband alone of real property belonging to the wife before marriage terminated upon the granting of a divorce: *Wilhelm v. Mertz*, 4 G. Gr., 54.

9. The fact that the wife claims to own personal property and treats it as her own, and her husband has knowledge thereof and acquiesces therein, is sufficient to establish her title thereto: *Woolheather v. Risley*, 38-486.

10. **Wife's earnings:** Where the husband is resting under no disability, he and not the wife is, as a matter of law, the head of the family. He is bound for her support and entitled to her earnings when she is not engaged in business on her own account: *Van Doran v. Marden*, 48-186.

11. The wife is entitled to her wages for services performed for others, but the husband is entitled to her labor and assistance in the discharge of those duties and obligations which grow out of the marriage relation: *Mewhirter v. Hatten*, 42-288.

12. The wife is entitled to no claim against the husband or his estate for services rendered him, such as caring for him during insanity, etc., and a contract for such services would be void: *Grant v. Green*, 41-88.

13. The wife cannot recover wages from a third party for work performed for the husband, as boarding hands, etc., under a contract between the husband and such party.

The husband may, under such circumstances, contract for the services of his wife and receive compensation in discharge thereof without her consent: *Lyle v. Gray*, 47-158.

14. Where boarding for a prisoner, whom it was impracticable, by reason of his condition, to confine in the county jail, was furnished in the family of the sheriff, *held*, that the sheriff, as husband, had authority to claim and collect the charges for the services of his wife as well as himself in the boarding of such prisoner, and that an assignment of the claim of the wife for her services was not necessary: *Miller v. Dickinson County*, 68-102.

15. The wife's earnings, unless acquired in carrying on an independent business of her own, cannot be made the basis of a claim against the husband which will support a conveyance by him to the prejudice of his creditors: *Triplett v. Graham*, 58-185.

16. The wife cannot regard earnings made in connection with her husband's property in the management of family affairs, where she has no separate property, as her individual earnings, and where such earnings are expended in the purchase of property, it does not become exempt from her husband's debts: *Hamill v. Henry*, 69-752.

Where the wife has a separate employment, she and not the husband can recover for loss of time resulting from personal injuries: See *infra*, § 159.

17. Under statutory provisions not now in force, *held*, that while the property of the wife owned by her at the time of the marriage, and such as was subsequently acquired by her by gift or inheritance, was not subject to the debts of her husband, yet that property acquired by her during life-time, whilst she was receiving the protection and support of her husband, vested in him, and if taken by her in her own name was held in trust for her husband and his creditors: *Duncan v. Roselle*, 15-501.

18. Where the wife has separate property, she may use it for trading in real estate without subjecting the reinvested profits to seizure for the payment of the husband's debts: *Mitchell v. Sawyer*, 21-582.

19. Where property was purchased by the wife, partly with her earnings and partly with the income from her separate property,

Mutual property rights.—Contracts and conveyances between.

held, that so far as her earnings (which by the law then existing belonged to her husband) had been used in the purchase, the property was liable to the payment of the husband's debts: *McTighe v. Bringolf*, 42-455.

20. Mortgage on husband's property: The wife may buy in a mortgage upon the homestead standing in the name of the husband and hold such mortgage against the homestead: *Knox v. Moser*, 69-341.

21. Action for torts to wife: At common law it was a well-settled rule that for injuries to the wife during coverture she must join with the husband in an action. But whenever the injury was such that the husband received special damage, such as loss of society or expense, he might sue in his own name: *McKinney v. Western Stage Co.*, 4-420.

22. Although the husband may not recover for injuries to the wife, yet he may maintain an action for consequential injuries suffered by him, such as loss of services, etc., and such right of action is not merged in the right of action which accrues to the wife: *Mewhirter v. Hatten*, 42-288; *Tuttle v. Chicago, R. I. & P. R. Co.*, 42-518.

23. The husband may recover for medicine and medical attendance and expenses incurred on account of the injury to the wife. But if the husband authorizes the wife to prosecute a suit for such expenses and aids her therein, and permits her to recover and receive the amount recovered, he will be estopped afterwards to claim recovery for the same matters: *Neumeister v. Dubuque*, 47-465.

24. In such case, the fact that the wife has claimed in a former action to have been carrying on a separate business in her own name and has sought to recover for a loss occasioned to her in such business by the injury, will not preclude the husband from setting up loss of services of the wife: *Ibid*.

25. In an action by the husband to recover for loss of services of the wife resulting from an injury to her, he may show the inability of the wife to perform labor or service resulting from the injury and the value of the service thus lost: *Ibid*.

As to wife's right to recover in her own name for a tort, see *infra*, §§ 156-164.

b. *Contracts and conveyances between.*

26. An ante-nuptial contract freely and voluntarily entered into, without any fraud or imposition, by which it is provided that each party is to retain control of his or her own property, and also making provision for descent of the property to children by a former marriage, upheld in a particular case: *Jacobs v. Jacobs*, 42-600.

27. Under an ante-nuptial contract by which it was agreed that each should have the untrammelled and sole control of his or her own property, real and personal, as though no such marriage had taken place, *held*, that the dower right of the wife was completely waived: *Ibid*.

28. An ante-nuptial contract cannot be enforced by a wife, who after marriage abandons her husband and lives apart from him without his consent and without lawful cause, that is, without cause which would be a good ground for divorce. In so doing, the wife does not discharge the duties and obligations of a wife: *York v. Ferner*, 59-487.

29. An ante-nuptial contract by which the proposed wife, in consideration of an agreed sum to be paid out of the estate of the proposed husband on his death, relinquishes and renounces all rights of dower and inheritance, *held* not sufficient to bar the right which she had to the occupancy of the homestead after the death of the husband: *Mahaffy v. Mahaffy*, 68-55.

30. Facts in a particular case *held* not sufficient to show fraud in an ante-nuptial contract by which the proposed wife accepted a sum of money in lieu of dower: *Ibid*.

31. Conveyances before marriage: A voluntary settlement or conveyance of property by husband or wife in favor of a third person prior to marriage will be held fraudulent as to the marital rights of the other party to the marriage, only when made in contemplation of matrimony and pending a treaty of marriage between the parties: *Gainor v. Gainor*, 26-387.

32. A wife cannot, on account of the marriage relation, set aside and overthrow the husband's contracts and conveyances made by him before marriage, and of which by the registry laws she is chargeable with notice: *Patterson v. Mills*, 69-755.

Contracts and conveyances between.

33. Contracts between husband and wife:

The promise by the husband to pay or give money to his wife to induce her to again live with him is not binding, especially where it does not appear that she had any ground for not living with him: *Owen v. Owen*, 22-270.

34. A contract for the purpose of enabling the husband to obtain a divorce without having any legal cause for it will confer no rights upon the wife enforceable at law against the husband. If the wife agrees for a consideration that she will interpose no defense to an action for divorce by her husband, he having a legal cause of divorce, and then makes defense, she cannot enforce the contract against her husband: *Pearson v. Cummings*, 28-344.

35. Where a deed from the husband to the wife was given in consideration of a dismissal by the wife of a proceeding for divorce, *held*, that, no fraud being made to appear, the deed was valid: *Chew v. Chew*, 38-405.

36. Where a wife places money in the hands of her husband upon an agreement by him to account to her for it, the transaction creates a debt between them which will constitute a valid consideration for a conveyance of real estate by the husband to the wife, if made before any lien thereon attached: *Jones v. Brandt*, 59-332.

37. The wife cannot insist in a court of equity, as against *bona fide* creditors whose rights have intervened, upon a secret, parol agreement with her husband to repay money received from her, and, under such agreement, receive and hold his estate for their mutual benefit. As between husband and wife the rule is otherwise: *Hatch v. Gray*, 21-29.

38. Where the legal title to the homestead was in the husband, and means derived from the wife's father had gone towards the purchase and improvement thereof, *held*, that an agreement between the husband and wife, by which she joined in the mortgage thereof and was to have the residue remaining after the incumbrance was paid out of the proceeds of the sale, was valid and could be enforced against the creditors of the husband as well as himself: *Wright v. Wright*, 16-496.

39. While courts of equity recognize the rule that contracts between husband and wife after marriage are a mere nullity, yet they will, under particular circumstances,

give full effect and validity to such contracts, although they are not executed by the intervention of a trustee; but to sustain such contract as against the wife the husband must be held to the utmost good faith. A slight circumstance of fraud or circumvention would be sufficient to render it invalid: *Blake v. Blake*, 7-46.

40. Therefore, *held*, that a contract between husband and wife by which the latter, for a valuable consideration, after decree of divorce, released to the former all her dower interest in his real estate was binding: *Ibid*.

41. The wife may make a loan of money which she has in her own right, to her husband, and take security therefor upon land owned by him: *Doyle v. McGuire*, 38-410.

42. A post-nuptial contract is valid as to parties and creditors, if made for an honest purpose and a good consideration: *Butler v. Ricketts*, 11-107.

43. Agreement relinquishing dower interest: The present statutory provision (Code, § 2208) renders invalid any agreement between husband and wife, even in contemplation of a separation, for the relinquishment of their respective interests, including dower interest in each other's real property: *Linton v. Crosby*, 54-478.

44. The wife's right to alimony in case of divorce is not property within the meaning of the statutory provision above referred to, and a contract between the husband and wife to convey property to the wife in lieu of alimony may be valid: *Martin v. Martin*, 65-255.

45. Before the enactment of this statutory provision, it was held that, while the law would not sanction an agreement between husband and wife contemplating a future separation, nor enforce an agreement to separate if one of the parties was unwilling to do so, yet an agreement fairly entered into under a resolution of present separation, as to property rights and terms of separation, and partly executed in good faith, would be upheld against the other party, where justice should demand it: *McKee v. Reynolds*, 26-578.

46. And *held* that a conveyance by wife to husband under an agreement of separation, relinquishing her right of dower in his real estate and releasing all claim for support and

Contracts and conveyances between.— Remedies.

maintenance, would be upheld in the absence of fraud when supported by a consideration: *Robertson v. Robertson*, 25-350.

47. *Held*, also, that a deed of separation by which, in consideration of a release from liability of the wife's debts and relinquishment by her of claim of dower, the husband undertakes to pay the wife a sum by way of maintenance, couched in such language as not to be calculated to encourage separation, might be supported, and an action for the maintenance agreed upon might be maintained: *Goddard v. Beebe*, 4 G. Gr., 126.

48. **Transfers of property between husband and wife:** While, in dealings between husband and wife with reference to her property, by which the wife's property passes into the husband's hands, the husband will be held to the strictest fairness and integrity, yet if no fraud, circumvention or undue influence appears, the transaction will be upheld: *McCorry v. Foster*, 1-271.

49. **Advancement to wife:** If a husband purchases land and takes the title in the name of the wife, or if he permits the wife to use his money in the purchase in her own name, the presumption is very strong, if not conclusive, as between them, and as between the wife and the heirs of the husband, that it was intended as an advancement and provision for the wife, and not as a trust in favor of the husband: *Sunderland v. Sunderland*, 19-825.

50. **Conveyances in fraud of creditors:** A secret parol transfer of notes by the husband to the wife will not necessarily be void if for a consideration: *Nicholas v. Higby*, 35-401.

51. Where land is bought by the husband and the legal title taken in the wife's name, and the purchase money paid from products of the estate, such facts will not give the wife an equity or claim thereto paramount to that of existing creditors from whom the property is sought to be secreted: *Ticonic Bank v. Harvey*, 16-141.

And further as to fraudulent and voluntary transfers between husband and wife, see FRAUDULENT CONVEYANCES.

52. **Husband's contributions to purchase or improvement of wife's property:** Where a husband has contributed to the purchase and improvement of property standing in the name of the wife, his interest therein, pro-

portionate to the amount of such contribution, may be subjected to the payment of his debts to the extent to which his money has been invested therein: *Croup v. Morton*, 49-16; *S. C.*, 53-599; *Hamill v. Henry*, 69-752.

53. A husband who occupies with his family a homestead owned by his wife may pay taxes and interest on incumbrances thereon, as well as expenditures for repairs, without becoming a creditor of the wife or rendering her property liable to that extent for his debts: *Hamill v. Henry*, 69-752.

54. Creditors of the husband have no lien upon the land of the wife by reason of improvements made thereon by him to the extent of the money thus invested, if she is not guilty of collusion or fraud, although she has knowledge of and assents to the expenditure: *Corning v. Fowler*, 24-584.

55. The increase of the personal property of the wife belongs to her, and is not subject to her husband's debts, although he expends labor and care in the keeping thereof: *Russell v. Long*, 52-250.

56. Any devise whose object is to enable a married woman to accumulate property in her own name through the labor of her insolvent husband will be looked upon with suspicion, and may under proper circumstances be considered an intent to defraud the husband's creditors; but the mere fact that the insolvent husband performs labor upon the farm owned or rented by his wife will not necessarily evince such intent. An insolvent man should, as a matter of duty, provide himself and family with food and clothing, and if the design of performing labor upon the farm owned or rented by his wife is merely to furnish reasonable family support, the intention will not be considered fraudulent: *Carr v. Royer*, 55-850.

c. Remedies by one against the other.

57. **Action by wife against husband:** Under a former statutory provision giving a married woman the right to sue in her own name, when the action concerned her separate property, *held*, that a wife, compelled to leave her husband for cause, or driven away by him without cause, might maintain an action of replevin against him in her own

Remedies by one against the other.—Liability of each for debts of the other.

name to obtain possession of her separate property: *Jones v. Jones*, 19-236.

58. The fact that there has been a separation of the husband and wife without cause will not authorize the wife to maintain an action against the husband to recover property owned by her before marriage: *McMullen v. McMullen*, 10-412.

59. Whether an action at law will lie during coverture by the wife against the husband for the recovery of a money judgment, *quære*: *Owen v. Owen*, 22-270.

60. The statutory provision authorizing the wife to sue in her own name does not give a right of action generally against her husband. Such right of action exists only under Code, § 2204, which authorizes the husband or wife to maintain an action against the other for the recovery of property, or for any right growing out of the same: *Peters v. Peters*, 42-182.

61. Therefore the husband or wife has no right of action against the other for tort: *Ibid.*

62. Claims of the one against the estate of the other: Where the husband borrows the separate money of the wife and promises to repay it, especially where the promise is reduced to writing and the rights of creditors are not prejudiced or defeated, equity will enforce the contract against him, or, if he is deceased, against his estate: *Logan v. Hall*, 19-491.

63. So where the wife loaned to the husband money out of her separate estate with the expectation and promise that it should be repaid to her, and the husband afterwards executed and delivered to her notes for the amount received, *held*, that such notes constituted a valid and binding claim against the husband, which after his death could be enforced against his estate: *Ibid.*

64. But in such case, *held*, that the wife was not entitled to interest on the sum loaned: *Ibid.*

65. Where the wife took from her husband while sick a large sum of money, subsequently evading his request to return it except as to a small portion, and after her death the husband's assignee filed a claim for the sum against her estate, *held*, that the possession of the money by the wife was the possession of the husband during her life, and

after her death the husband or his assignee might assert his right to its possession as against her executor: *Davidson v. Smith*, 20-466.

The wife has no claim against the husband's estate for money of hers used by him in the support of the family: See *infra*, §§ 116-118.

66. Where the wife gives the husband money for the purpose of aiding in purchasing a homestead, which is so used, his estate cannot be held liable for the money advanced: *Garrett v. Baldwin*, 40-688.

d. *Liability of each for acts, contracts and debts of the other; family expenses.*

67. Liability of husband for wife's torts: Prior to the enactment of Code, § 2205, expressly providing that the husband shall not be responsible for civil injuries committed by the wife, the husband was liable for torts of the wife as at common law: *McElfresh v. Kirkendall*, 36-224; *Luse v. Oaks*, 36-562.

68. Husband's liability for wife's necessities: In order to enable a party to recover against a husband for necessities furnished to the insane wife, it need only be shown that she was compelled to leave the husband's house on account of cruel treatment or improper conduct on his part. In such case the husband is presumed to extend to his wife a general credit for necessities, such as meat, drink, clothes, medicine, etc., suitable to his degree and circumstances: *Descelles v. Kadmus*, 8-51.

69. The husband is liable on an implied undertaking for necessities supplied to the wife. Whatever is suitable and proper for the wife, considering her station in life, is included in necessities, and that term is not confined to the supply of things demanded for her sustenance, apparel and health, but extends to whatever is necessary for her happiness, comfort and enjoyment in the station she occupies as to wealth and fashion: *Porter v. Briggs*, 38-166.

70. Husband's liability for attorney's fees of wife in divorce suit: Therefore, *held*, that the husband was liable for services rendered to the wife by an attorney in establishing her innocence of the charge of adultery

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made by the husband in an action for divorce: *Ibid.*

71. There is an implied liability of the husband to pay fees of the wife's attorney in a divorce suit brought by her if it is shown that the attorney acted in good faith, and there is no evidence of collusion or that the suit was brought for oppression: *Preston v. Johnson*, 65-285.

72. But in an earlier case it was held that the attorney's fees incurred in carrying on a suit for divorce were not necessities for which the husband could be held liable: *Johnson v. Williams*, 8 G. Gr., 97.

73. The husband's liability for his wife's debts contracted before marriage could be enforced at common law by an action against husband and wife jointly: *Reunecker v. Scott*, 4 G. Gr., 185.

74. Liability of wife's property for husband's debts: Under the provisions of Rev., §§ 2499, 2502, rendering the wife's property left in the control of the husband subject to his debts, unless a claim of ownership thereof was signed by the wife, acknowledged and recorded (which provisions are entirely superseded by Code, § 2203, declaring that the wife's property shall not under any circumstances be liable for the husband's debts), held, that if the married woman allowed her personal property to pass under the control of the husband without having filed notice of her ownership, it was liable to be taken in execution for the claims of a person who gave credit to the husband, while the property was in his possession, without notice of the wife's ownership: *Mazouck v. Iowa Northern R. Co.*, 31-559.

75. Held, also, that the wife could exempt her property in the husband's hands from liability for his debts contracted while the property was under his control, only by filing the notice provided for, before the debt had been contracted: *Stewart v. Bishop*, 33-584.

76. Also held, that where the husband having the wife's property within his control, without such notice having been filed, afterwards exchanged it for other property, the latter became likewise liable for his indebtedness: *Fresnall v. Herbert*, 34-539.

77. Also held, that the property of the wife under the control of the husband, in the ab-

sence of such notice, was subject to seizure upon execution for costs in a criminal prosecution against the husband: *Gray v. Ferreby*, 36-146.

78. But held, that in order to render the wife's property liable, the control of the husband over it must be permissive on her part or with her assent: *Nicholas v. Higby*, 35-401.

79. And that where the wife had notes in her own right, and which she placed in her husband's hands for the purpose of having them left in a place of deposit and they were so left, a receipt therefor having been taken in her name and for her own use and benefit, such notes were not liable for his debts: *Ibid.*

80. Also held, that the wife's interest as mortgagee not being inconsistent with the husband's possession, she need not give notice of her right in mortgaged property except so far as such notice was imparted by the recording of the mortgage: *Goodrich v. Munger*, 30-343.

81. Under such provisions, held, that where household furniture, fixtures and the like were used in the house occupied by the husband and wife, the property was considered as being in the possession of the husband and under his control: *Smith v. Hewett*, 13-94; *Odell v. Lee*, 14-411; *Miller v. Steele*, 39-527.

82. Also held, that a wife who made a loan to her husband, taking his notes therefor at the time, need not file with the recorder her claim thereto as separate property, in order to preserve such claim against his creditors: *In re Alexander*, 37-454.

83. But under such provisions the personal property of the wife did not, as at common law, vest at once in the husband, and as between him and the wife it continued to be the property of the wife, although under the husband's control; but in favor of third persons acting in good faith without knowledge of the real ownership, the property under the husband's control would be presumed to have been transferred to him, which presumption could be rebutted only by pursuing the course prescribed in the statute with reference to notice of ownership: *Miller v. Steele*, 39-527; *Jones v. Jones*, 19-236.

84. The wife remained owner of the property and might dispose of it at pleasure be-

Liability for family expenses.

fore the rights of the creditors attached: *Root v. Schaffner*, 89-875.

85. Under this statutory provision it was held, also, that the wife's property left in the control of the husband after marriage did not thereupon become liable for debts of the husband contracted before marriage: *Patterson v. Spearman*, 87-86.

86. Under such provisions, *held*, also, that failure of the wife to give the required notice would not entitle heirs or personal representatives of the husband to claim property of the wife left under the husband's control, and that the statute of limitations as against the wife's right to recover from her husband's estate the value of such property did not commence to run until his death or their separation: *Lower v. Lower*, 46-525.

87. Under the provisions of the present Code (§ 2203), the property of the wife cannot be taken in payment of the husband's debts, even where it is reduced to the possession of the husband and the creditor has no notice of the wife's ownership: *Schmidt v. Holtz*, 44-446.

88. But in so far as this section renders property of the wife which would, under the previous statute, have been liable to execution on a judgment against the husband, exempt therefrom, it does not apply to contracts made before the taking effect of the Code: *Ibid*.

89. The previous statutory provisions have no application to a case where the creditor has become such, after the taking effect of the present Code provisions: *Jones v. Brandt*, 59-332.

90. Liability of husband and wife for family expenses:¹ Although this section provides that family expenses are chargeable upon the property of both husband and wife, it has been treated the same as if it provided that both shall be personally liable for family expenses. The evident object and purpose of the statute is that the property and means of the husband and wife shall be devoted to the support of the family so far as necessary for that purpose: *Devendorf v. Emerson*, 66-698.

91. In the absence of fraud and collusion between the husband and the creditor, the

acts, agreements and promises of the husband in relation to family expenses, etc., are binding upon the wife, without any express consent or action on her part. The husband may change the form of indebtedness, as by giving a new note, without releasing her: *Lawrence v. Sinnamon*, 24-80.

92. A change by the husband contracting the indebtedness, of the evidence thereof, from an oral contract to a note and from note to a judgment, will not terminate the liability of the wife, and the note will continue enforceable against the property of the wife as long as the right of action against the husband exists: *Frost v. Parker*, 65-178.

93. The statute of limitations commences to run in favor of the wife as against an indebtedness for family expenses incurred by the husband, only from the maturity of the indebtedness as contracted by the husband; and where the husband gave his note in payment of an account for family expenses, *held*, that an action against the wife was not barred until the expiration of the statutory period on the note: *Lawrence v. Sinnamon*, 24-80; *Davidson v. Biggs*, 61-309; *Waggoner v. Turner*, 69-127.

94. The fact that a creditor has brought an action against the husband alone, and obtained judgment thereon by consent, does not extend the statute of limitations as against the wife until the judgment shall become barred: *Polly v. Walker*, 60-86.

95. Where the husband, after the indebtedness was contracted, gave a note therefor drawing ten per cent. interest and providing for attorney's fees, *held*, that a recovery could not be had against the wife for the attorney's fees, nor for interest beyond six per cent.: *Fitzgerald v. McCarty*, 55-702.

96. The wife is liable although the vendor made the contract with, and extended the credit to, the husband alone: *Smedley v. Felt*, 41-583.

97. In the cases contemplated in this section, the wife is jointly liable with the husband and the indebtedness is the debt of both: *Ibid*.

98. And she may be sued thereon alone: *Farrar v. Emery*, 52-725.

99. A personal judgment may be rendered

¹ Code, § 2214. The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, and in relation thereto they may be sued jointly or separately.

Family expenses.

against the wife where she is sued jointly with the husband for family expenses, notwithstanding the husband has a discharge in bankruptcy: *Jones v. Glass*, 48-345.

100. The creditor may, if he sees proper, join the wife and husband in the same action. The allowance of a separate action against the wife is simply an additional remedy and is optional: *Waggoner v. Turner*, 69-127.

101. The remedy against the wife for family expenses incurred by the husband is not limited to a personal judgment. By a proper proceeding, the wife's property may be pursued without such judgment being had: *Frost v. Parker*, 65-178.

102. Where the proceeding against the wife is brought by an assignee of the claim against the husband for family expenses, the remedy against the property of the wife will not be defeated by the fact that no assignment of the claim against the wife is shown: *Ibid.*

103. What deemed family expenses: Under the statutory provision above referred to, expenses of the family are not limited to necessary expenses. Any expenditure is contemplated which is incurred on account of articles to be used in the family: *Smedley v. Felt*, 41-588.

104. *Held*, that the purchase of a cook-stove and fixtures come properly under the head of family expenses: *Fynn v. Rose*, 12-563.

105. So *held*, also, as to the purchase of a piano: *Smedley v. Felt*, 41-588.

106. Also as to the purchase of an organ: *Frost v. Parker*, 65-178.

107. So, where the husband purchased a watch and chain and other jewelry, a part of which was presented to his wife and the remainder used in the family, *held*, that the wife was liable therefor as a family expense, although she had no knowledge that the articles were not paid for until some time after their purchase: *Marquardt v. Flaugh-ter*, 60-148.

108. The purchase of a reaping machine, used by the husband in prosecuting his business of farming, by which he supports his family, is not a family expense for which the wife is liable: *McCormick v. Muth*, 49-536.

109. Nor is the purchase of a plow: *Russell v. Long*, 52-250.

110. Expenses for the treatment of an insane wife in a hospital provided by the state, where such treatment is not given by any contract with the husband, express or implied, cannot be regarded as a family expense for which he is liable: *Delaware County v. McDonald*, 46-170.

111. To constitute a family expense, it is essential that the thing for which the expenditure was incurred should have been used or kept for use in the family: *Fitzgerald v. McCarty*, 55-702.

112. It is not the purpose of this statutory provision to declare what expenditures are to be regarded as family expenses, but simply to provide a remedy therefor against both husband and wife. Expenses for medical service furnished to an adult daughter at her request, while living at her father's house as a member of his family, are not chargeable upon his property as family expenses, there being no liability therefor on his part at common law: *Blachley v. Laba*, 63-22.

113. Where the wife has purchased goods of a merchant with whom the husband has no account, and to whom he has given notice in writing not to sell goods to the wife and charge them to him, it not appearing but that the husband otherwise provides necessities for the family, the merchant cannot hold the husband liable as for family expenses: *Devendorf v. Emerson*, 66-698.

114. A party who furnishes money to the husband to pay indebtedness for family expenses has no right of action against the wife therefor, where the money is not furnished at her request, nor upon an assignment of the account: *Sherman v. King*, 51-182.

115. Money borrowed for and used in purchasing articles which, if obtained on credit, would constitute proper items of family expense, cannot itself be treated as a family expense: *Davis v. Ritchey*, 55-719.

116. Wife's property used for expenses of the family: Where a wife allows her husband to expend her money for expenses of the family without any agreement with him for repayment, she cannot recover back from him or his estate the sum so used: *Courtright v. Courtright*, 53-57.

117. Money of the wife in the husband's hands, invested by her consent in the busi-

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ness from which the support of the family arises, will be deemed devoted to the support of the family, provided that the amount so used is within the sum necessary for the family support; and where it appears that money of the wife has been collected by the husband and not accounted for, it will be presumed that it was so applied, and the wife cannot maintain a claim therefor against the estate of the husband: *Patterson v. Hill*, 61-534.

118. No obligation to reimburse: The statutory provision, making the property of both husband and wife chargeable for family expenses, is applicable not only as to third persons but also as between husband and wife, and the duty of supporting the children is cast equally upon both. If such duty is performed by one parent, a promise cannot be inferred or implied that the other shall reimburse the one who furnishes the support. So held with reference to the support of the children by the mother after abandonment by the father: *Johnson v. Barnes*, 69-641.

e. Agency of the one for the other.

119. By ratification: The husband may act as agent for the wife, but in order to bind her he must be previously authorized to so act, or she must subsequently, with express or implied knowledge of his act, ratify it. The evidence necessary to establish such ratification must be of a stronger and more satisfactory character than that required to establish a ratification by the husband of her acts as his agent, or as between independent parties: *McLaren v. Hall*, 26-297.

120. A wife, who has knowledge of the fact that debts are contracted by her husband for the improvement of her separate property and acquiesces in the appropriation of the property purchased to the improvement of her own separate estate, subjects her property to an equitable lien for the value of the material furnished: *Miller v. Hollingsworth*, 36-163.

121. Inferred: While the husband is not, by virtue of the marital relation, agent of the wife in respect to the wife's property, yet as to the shipment or preservation of the household goods jointly used by them, something may be inferred from the marital re-

lation, and the agency of the husband may be inferred from slighter circumstances than would be necessary to establish agency on the part of a stranger. In such case, it is error to charge the jury that the proof of agency must be of the same character and the same weight as between husband and wife as is required to show agency in any other person: *Furman v. Chicago, R. I. & P. R. Co.*, 62-395.

122. Where the husband delivered household goods of a wife to a railroad company for shipment, taking a bill of lading in the name of the wife, and transacted with the company the entire business relating to the shipment, and afterwards had such bill of lading in his possession and exhibited it to the agent of the company, and gave directions as to the reshipment of the goods, held, that such facts were entitled to consideration as tending to prove the authority of the husband to act for the wife in the premises, and that under such circumstances the company had the right to consider the husband as the wife's duly authorized agent in regard to the shipment, unless notified to the contrary: *Ibid.*; *S. C.*, 68-219.

123. By necessity: Where the husband deserts the wife and leaves her to provide for the family as best she can, out of such means of support as she has, she may sell property of the husband for the purpose of supporting the family, nor is she bound to wait until destitution has become complete, before resorting to such sale: *Rawson v. Spangler*, 62-59.

124. The wife of an absconding husband holding property which was exempt in his hands may sell the same and appropriate the proceeds, free from any claim for his debts, in the same manner that he might have done: *Waugh v. Bridgeford*, 69-334.

II. POWERS, RIGHTS AND LIABILITIES OF MARRIED WOMEN WITH REFERENCE TO THIRD PERSONS.

125. Conveyances; acknowledgment apart from husband: At common law a wife could convey her real estate only by uniting with her husband in levying a fine. The mode prescribed in the statute formerly in force in this state, and which is the mode

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generally adopted in this country, of alienating the property by a deed acknowledged apart from the husband, is a substitute for the common-law fine and an enlargement of the power of alienation; but in order that her deed may be operative to any extent and for any purpose, it is necessary to conform fully to the provisions of the statute; therefore, *held*, that a deed by a married woman, the acknowledgment of which failed to state that she was made acquainted with the contents thereof as required by such statute, was void: *Heaton v. Fryberger*, 38-185.

126. Further, *held*, that the omission of the name of the grantor in such an instrument was fatal to it as a conveyance: *Ibid*.

127. A court of equity had no power, prior to the passage of a statute to that effect (not now in force), to correct a mistake or defect in the deed of a married woman: *Ibid*.

128. Under the statutory provisions as to examination of wife apart from husband, *held*, that the fact of separate examination not appearing from the certificate of acknowledgment could not be shown by parol evidence: *O'Ferrall v. Simplot*, 4-381.

129. But *held*, that the fact that the acknowledgment was defective could not be taken advantage of by one purchasing the title with notice of a prior conveyance by a married woman, thus defectively acknowledged, she, herself, making no objection to the prior deed or the title attempted to be conveyed thereby: *Dussaume v. Burnett*, 5-95.

130. During the existence of the statutory requirement just referred to as to private examination of the wife, the steps required by the statute were essential to the validity of a release of dower by the wife or a conveyance of her lands by a voluntary deed executed by herself and husband: *Simms v. Hervey*, 19-273.

131. Joint deed: Under a statute providing that real estate owned by a married woman might be sold by the joint deed of the husband and herself, *held*, that the married woman was not authorized to convey such property as a single woman, without her husband joining in the deed: *Miller v. Wetherby*, 12-415.

132. Estoppel: Where the particular statutory provisions required as to the convey-

ance of land by the wife had not been complied with, *held*, that the deed being void would not operate to defeat her title by estoppel. Neither would the acceptance by her of a mortgage from the grantee in such void deed estop her from asserting title in conflict therewith: *Ibid*.

133. The act of the wife in joining with the husband in a warranty deed of his property will not bind her personally to such conveyance nor estop her from afterwards asserting title to the property under a subsequent conveyance to her procured in her own name: *Childs v. McChesney*, 20-431.

Further as to how far a married woman is estopped or bound by covenants in deeds in which she joins with her husband, see CONVEYANCES, §§ 23, 24.

134. Present power to convey: Under later statutory provisions than those above referred to, a married woman may incur or convey real estate held in her own right, and may subject it to a mechanic's lien: *Sanborn v. Casady*, 21-77.

135. Married women being empowered by statute (Code, § 1935) to convey or incur any real estate or interest therein belonging to them, it seems that a wife may contract with the purchaser of property from her husband to relinquish her dower interest by a separate contract from that of the conveyance: *Dunlap v. Thomas*, 69-358.

Further as to relinquishment of dower, see ESTATES OF DECEDENTS, §§ 306-321.

136. Fraud of husband: False representations made to the wife by the husband, or undue influence exerted by him to induce her to execute a mortgage on her separate property for his benefit, which is afterwards duly acknowledged by her, will not prejudice the rights of the mortgagee, if such conduct was without his instigation, procurement, knowledge or consent: *Green v. Scrannage*, 19-461.

To the same point with reference to conveyances or incumbrances of the homestead, see HOMESTEAD, §§ 116-121.

As to conveyances procured by fraud and duress, see CONVEYANCES, §§ 44, 45.

In general, as to conveyances by married women, see, also, CONVEYANCES, §§ 14-24.

137. Mortgaging separate property as security for others: Under previous statutory provisions which did not confer upon the

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wife the unlimited power to contract which she enjoys by present statutes, *held*, that a wife might execute a mortgage conveying her separate property to secure either her own or husband's debts, although she could not bind herself as surety for her husband by a contract not relating to her separate property: *Wolff v. Van Metre*, 19-134; *Simms v. Hervey*, 19-273; *Green v. Scrannage*, 19-461.

138. But *held* that the execution of such mortgage upon her separate property to secure her husband's debts did not render her personally liable beyond the extent of such security: *Wolff v. Van Metre*, 19-134.

139. Where the wife gave her note, secured by mortgage on real estate standing in her own name, but of the title to which she knew nothing until about the time the note was given, and received no consideration for such note, *held* error to direct a general execution to issue against her, in case the mortgaged property failed to pay the debt: *Johnson County v. Rugg*, 18-137.

140. Under the same statutory provisions, *held*, that the contracts of the wife, binding her separate property as security for the debts of others than her husband, could, in equity, be enforced against her separate property although they were not enforceable at law: *First Nat. Bank v. Haire*, 86-443; *Low v. Anderson*, 41-476.

141. And that, in such case, the wife would be estopped from setting up the invalidity of such contract as to a person who had parted with money or property on the faith of such security, and of which she had the benefit: *First Nat. Bank v. Haire*, 86-443.

142. Liability as surety: Under the Revision of 1860, which did not confer upon the wife the full power to contract which she now possesses, *held*, that she was not personally liable upon a note signed by her as surety for her husband: *Wolff v. Van Metre*, 19-134; *S. C.*, 23-397; *Van Metre v. Wolf*, 27-341.

143. But that if the wife failed to make defense to an action against her on such note, and judgment was rendered against her, it would be as binding as any other personal judgment: *Ibid.*; *Guthrie v. Howard*, 32-54.

144. Under the same statutory provisions, *held*, that the separate estate of the wife

could not be charged with the payment of a note signed as surety by her for her husband: *Sweazy v. Kammer*, 51-642.

145. At common law, a debt contracted by a married woman during coverture, either as surety for her husband or jointly with him, is generally chargeable upon her separate estate without proof of a positive intention to make it so: *Greenough v. Wiggington*, 2 G. Gr., 435.

146. Liability on other contracts: Under statutes previously in force authorizing the wife to bind her separate property by contracts with reference thereto, or which purported to bind her only, *held*, that when the fact of coverture was set up by the wife, it constituted a complete defense until such contract was shown as to render her liable: *Rodemeyer v. Rodman*, 5-426.

147. And that a personal judgment against a married woman could not be rendered without an allegation that the debt was one for which her separate property would be liable: *McGlaughlin v. O'Rourke*, 12-459.

148. Under the same statutes, *held*, that a contract by a married woman, made in the operation of a farm, in purchasing a mower for use thereon, was a contract binding upon her: *McCormick v. Holbrook*, 22-487.

149. Also *held*, that where the wife owned a farm and most of the stock thereon, a note given by her for the purchase of a horse, made by the husband in her presence and as her agent and with her assent, the horse being intended for use on the farm, was binding: *Mitchell v. Smith*, 32-484.

150. Also *held*, that a married woman might make a valid contract for the purchase of real property, previous cases in Iowa upon the power of a married woman to contract being discussed: *Shields v. Keys*, 24-296.

151. Under the present statutory provision (Code, § 2213), by which the wife is clothed with the same property rights and charged with the same liabilities as the husband, she is completely emancipated from all the bonds recognized by the common law, save those of affection and moral obligation. Being clothed with all the natural rights enjoyed by the husband, which she may exercise free from his control, she is subject to the same rules which restrict and control the rights of the husband and enforce his obliga-

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tions assumed by contract and imposed by law for the protection of other members of society. As she has all the rights of the husband, she must assume all his obligations as well by implied as by express contract: *Spafford v. Warren*, 47-47.

152. Ratification: Therefore, *held*, that the conveyance of a homestead in which the wife joined with the husband, but which was void as being an absolute deed instead of a mortgage as contemplated when it was executed, and also for the reason that the name of the grantee and the description of the property were left blank at the time of the execution and subsequently filled in by the husband, was ratified by her subsequent action in reference thereto and thus became valid and binding upon her: *Ibid*.

153. Separation does not remove disability of coverture: Where the power of a married woman to contract is limited by the law, the disability of coverture does not cease to exist by reason of the fact that the wife lives separately from the husband, within the same jurisdiction and without divorce: *Painter v. Weatherford*, 1 G. Gr., 97.

154. But under the common law an abandonment of the wife by the husband accompanied by renunciation of marital relations and continued absence in a foreign state or country, entitles the wife to sue without joining with the husband: *Smith v. Silence*, 4-321.

155. A void marriage has no effect upon the property rights of the parties: *Carpenter v. Smith*, 24-200.

156. Recovery for tort: The provisions of the statutes with reference to rights of married woman would seem to effect their complete emancipation from the disabilities of coverture to which they were subjected by the common law with respect to the rights of property, its freedom from control of the husband or its liability for his debts and the right to sue and be sued in respect thereto. The right of action in favor of the wife, whether arising upon contract or tort, is hers in the same sense that it would be if she were unmarried, and is to be prosecuted in her own name without the joinder of her husband. So *held* in case of an action for malicious prosecution: *Musselman v. Gallagher*, 32-333.

157. So *held* also in case of libel: *Pancoast v. Burnell*, 32-394.

158. In a suit by the wife for personal injuries, it is not necessary that the husband join with her as plaintiff: *Tuttle v. Chicago, R. I. & P. R. Co.*, 42-518.

159. When the wife has a separate and independent employment, which she habitually follows and for which she receives compensation from her employers, she may be deemed to have a business or occupation independent of her husband, and may recover in an action in her own name for loss of time occasioned by personal injuries: *Fleming v. Shenandoah*, 67-505.

160. However, the husband is still entitled to the labor and assistance of the wife and may recover in his own right for any injury to her which deprives him thereof: *Mewhiter v. Hatten*, 42-288.

161. He may recover for loss of time caused by injury to her unless she is engaged in the prosecution of a separate business, which thereby suffers detriment; and therefore in an action by a married woman, not carrying on a separate business, to recover damages for personal injuries, loss of time cannot be shown as an element of damages: *Tuttle v. Chicago, R. I. & P. R. Co.*, 42-518; *Nichols v. Dubuque & D. R. Co.*, 68-732.

162. Instructions in an action by a wife against a railway company to recover damages for personal injuries, *held* to sufficiently limit the recovery to such damages as were strictly personal to the wife and for which she might recover: *Tuttle v. Chicago, R. I. & P. R. Co.*, 42-236.

163. Damages resulting from the death of the wife are damages to her estate and the right of action therefor exists only in favor of her administrator, but for loss of services, loss of society and expenses of treatment, the husband may recover: *Mowry v. Chany*, 43-609.

164. The damages accruing to the estate of a married woman because of a wrongful act which causes her death should not be assessed on the same basis as though she were unmarried, even though she may have been engaged to some extent in a separate business. Damages should not be allowed in such case for services which would have been

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wife the unlimited power to contract which she enjoys by present statutes, *held*, that a wife might execute a mortgage conveying her separate property to secure either her own or husband's debts, although she could not bind herself as surety for her husband by a contract not relating to her separate property: *Wolff v. Van Metre*, 19-184; *Simms v. Hervey*, 19-273; *Green v. Scranage*, 19-461.

188. But *held* that the execution of such mortgage upon her separate property to secure her husband's debts did not render her personally liable beyond the extent of such security: *Wolff v. Van Metre*, 19-184.

189. Where the wife gave her note, secured by mortgage on real estate standing in her own name, but of the title to which she knew nothing until about the time the note was given, and received no consideration for such note, *held* error to direct a general execution to issue against her, in case the mortgaged property failed to pay the debt: *Johns County v. Rugg*, 18-187.

140. Under the same statutory provisions, *held*, that the contracts of the wife, binding her separate property as security for the debts of others than her husband, could, in equity, be enforced against her separate property although they were not enforceable at law: *First Nat. Bank v. Huire*, 36-443; *Low v. Anderson*, 41-476.

141. And that, in such case, the wife would be estopped from setting up the invalidity of such contract as to a person who had parted with money or property on the faith of such security, and of which she had the benefit: *First Nat. Bank v. Haire*, 36-443.

142. Liability as surety: Under the Revision of 1860, which did not confer upon the wife the full power to contract which she now possesses, *held*, that she was not personally liable upon a note signed by her as surety for her husband: *Wolff v. Van Metre*, 19-184; *S. C.*, 23-397; *Van Metre v. Wolf*, 27-341.

143. But that if the wife failed to make defense to an action against her on such note, and judgment was rendered against her, it would be as binding as any other personal judgment: *Ibid.*; *Guthrie v. Howard*, 32-54.

144. Under the same statutory provisions, *held*, that the separate estate of the wife

could not be charged with the payment of a note signed as surety by her for her husband: *Sweazy v. Kammer*, 51-642.

145. At common law, a debt contracted by a married woman during coverture, either as surety for her husband or jointly with him, is generally chargeable upon her separate estate without proof of a positive intention to make it so: *Greenough v. Wiggington*, 2 G. Gr., 485.

146. Liability on other contracts: Under statutes previously in force authorizing the wife to bind her separate property by contracts with reference thereto, or which purported to bind her only, *held*, that when the fact of coverture was set up by the wife, it constituted a complete defense until such contract was shown as to render her liable: *Rodemeyer v. Rodman*, 5-426.

147. And that a personal judgment against a married woman could not be rendered without an allegation that the debt was one for which her separate property would be liable: *McGlaughlin v. O'Rourke*, 12-459.

148. Under the same statutes, *held*, that a contract by a married woman, made in the operation of a farm, in purchasing a mower for use thereon, was a contract binding upon her: *McCormick v. Holbrook*, 22-487.

149. Also *held*, that where the wife owned a farm and most of the stock thereon, a note given by her for the purchase of a horse, made by the husband in her presence and as her agent and with her assent, the horse being intended for use on the farm, was binding: *Mitchell v. Smith*, 32-484.

150. Also *held*, that a married woman might make a valid contract for the purchase of real property, previous cases in Iowa upon the power of a married woman to contract being discussed: *Shields v. Keys*, 24-298.

151. Under the present statutory provision (Code, § 2213), by which the wife is clothed with the same property rights and charged with the same liabilities as the husband, she is completely emancipated from all the bonds recognized by the common law, save those of affection and moral obligation. Being clothed with all the natural rights enjoyed by the husband, which she may exercise free from his control, she is subject to the same rules which restrict and control the rights of the husband and enforce his obliga-

Recovery by married woman for tort.

tions assumed by contract and imposed by law for the protection of other members of society. As she has all the rights of the husband, she must assume all his obligations as well by implied as by express contract: *Spafford v. Warren*, 47-47.

152. Ratification: Therefore, *held*, that the conveyance of a homestead in which the wife joined with the husband, but which was void as being an absolute deed instead of a mortgage as contemplated when it was executed, and also for the reason that the name of the grantee and the description of the property were left blank at the time of the execution and subsequently filled in by the husband, was ratified by her subsequent action in reference thereto and thus became valid and binding upon her: *Ibid*.

153. Separation does not remove disability of coverture: Where the power of a married woman to contract is limited by the law, the disability of coverture does not cease to exist by reason of the fact that the wife lives separately from the husband, within the same jurisdiction and without divorce: *Painter v. Weatherford*, 1 G. Gr., 97.

154. But under the common law an abandonment of the wife by the husband accompanied by renunciation of marital relations and continued absence in a foreign state or country, entitles the wife to sue without joining with the husband: *Smith v. Silence*, 4-321.

155. A void marriage has no effect upon the property rights of the parties: *Carpenter v. Smith*, 24-200.

156. Recovery for tort: The provisions of the statutes with reference to rights of married woman would seem to effect their complete emancipation from the disabilities of coverture to which they were subjected by the common law with respect to the rights of property, its freedom from control of the husband or its liability for his debts and the right to sue and be sued in respect thereto. The right of action in favor of the wife, whether arising upon contract or tort, is hers in the same sense that it would be if she were unmarried, and is to be prosecuted in her own name without the joinder of her husband. So *held* in case of an action for malicious prosecution: *Musselman v. Gallagher*, 32-883.

157. So *held* also in case of libel: *Pancoast v. Burnell*, 32-394.

158. In a suit by the wife for personal injuries, it is not necessary that the husband join with her as plaintiff: *Tuttle v. Chicago, R. I. & P. R. Co.*, 42-518.

159. When the wife has a separate and independent employment, which she habitually follows and for which she receives compensation from her employers, she may be deemed to have a business or occupation independent of her husband, and may recover in an action in her own name for loss of time occasioned by personal injuries: *Fleming v. Shenandoah*, 67-505.

160. However, the husband is still entitled to the labor and assistance of the wife and may recover in his own right for any injury to her which deprives him thereof: *Mewhiter v. Hatten*, 42-288.

161. He may recover for loss of time caused by injury to her unless she is engaged in the prosecution of a separate business, which thereby suffers detriment; and therefore in an action by a married woman, not carrying on a separate business, to recover damages for personal injuries, loss of time cannot be shown as an element of damages: *Tuttle v. Chicago, R. I. & P. R. Co.*, 42-518; *Nichols v. Dubuque & D. R. Co.*, 68-782.

162. Instructions in an action by a wife against a railway company to recover damages for personal injuries, *held* to sufficiently limit the recovery to such damages as were strictly personal to the wife and for which she might recover: *Tuttle v. Chicago, R. I. & P. R. Co.*, 42-236.

163. Damages resulting from the death of the wife are damages to her estate and the right of action therefor exists only in favor of her administrator, but for loss of services, loss of society and expenses of treatment, the husband may recover: *Mowry v. Chany*, 48-609.

164. The damages accruing to the estate of a married woman because of a wrongful act which causes her death should not be assessed on the same basis as though she were unmarried, even though she may have been engaged to some extent in a separate business. Damages should not be allowed in such case for services which would have been

In what cases granted.

rendered for the benefit of her husband and family: *Stulmuller v. Cloughly*, 58-738.

Further as to the right of the husband to recover in case of injury to or death of the wife, see *supra*, §§ 21-25.

As to criminal liability of married women, see CRIMINAL LAW, § 7.

Married women as parties, see PARTIES, §§ 239-241.

ILLEGITIMATE CHILDREN.

See PARENT AND CHILD.

INFANT.

See MINORS.

INJUNCTIONS.

I. IN WHAT CASES GRANTED.

II. PROCEDURE.

- a. *In general.*
- b. *Temporary injunction.*
- c. *Dissolution of temporary injunction.*
- d. *Bond; remedy upon.*
- e. *Violation.*

I. IN WHAT CASES GRANTED.

1. To restrain trespass; adequate remedy at law: An injunction ought not to be granted to restrain a mere trespasser, the party injured in such cases having an adequate remedy at law: *Wilson v. Hughell*, Mor., 461.

2. Injunction will not be allowed against a threatened trespass, where it does not appear but that plaintiff has a full, complete and adequate remedy at law for any and all trespasses which may be committed, and especially is this true where the statute offers triple damages for any injuries inflicted by such trespass and makes the same criminal: *Cowles v. Shaw*, 2-496.

3. Where, after judgment in plaintiff's favor in an action for possession of real property, in which plaintiff's right to the property is fully adjudicated, and the issuance and service of a writ of assistance, by virtue of which defendant is put out of possession, he again takes possession of the property, plaintiff may have an injunction

to prevent defendant from continuing to hold possession in disobedience of the judgment and process: *Ten Eyck v. Sjoburg*, 68-625.

4. Insolvency: To authorize the interference of a court of equity by injunction to prevent trespass upon real estate, there must be some distinct ground of equitable jurisdiction, such as the insolvency of defendant, the prevention of waste or irreparable injury or a multiplicity of suits: *Council Bluffs v. Stewart*, 51-885.

5. Where defendant in an action for trespass which is being continued is insolvent, an injunction to restrain the commission thereof may be properly issued: *Gibbs v. McFadden*, 39-871.

6. In the absence of a motion for more specific statement, an allegation in the petition that defendant is proof against execution is sufficient without more specific averment of the fact of insolvency: *Burroughs v. Saterlee*, 67-396.

7. Irreparable injury: If the injury threatened be irreparable, chancery will interfere by injunction. Therefore, *held*, that a petition which alleged that threatened illegal acts of a road supervisor in throwing down a fence to open a highway would cause irreparable injury showed ground for relief in equity: *Bolton v. McShane*, 67-207.

8. A district township may have an injunction to restrain another district township from removing a school-house from the territory of the former. It is not limited to an action at law for the trespass: *District T^p v. District T^p*, 54-115.

9. To restrain opening or obstructing highway: Where a road supervisor has served notice to have a road opened as an official act by virtue of proceedings in which it is claimed that a highway has been established, the owner of property which would be trespassed upon in opening the road may maintain an action for injunction to restrain the contemplated trespass before any actual trespass upon his land is committed: *Morgan v. Miller*, 59-481.

10. Equity will interfere by injunction to restrain road supervisors and others from removing or interfering with fences, hedges, water-courses and the like in the discharge of their official duty. Relief in such cases is not based upon the ground of the irreparable

In what cases granted.

character of the injury and the insolvency of defendant: *Bolton v. McShane*, 67-207.

11. An injunction will not lie to restrain a party from obstructing or inclosing a street or highway when it is in such condition that it cannot be used for that purpose: *Prince v. McCoy*, 40-533.

12. A party who will suffer no injury except in common with the public by reason of the obstruction of a highway will not be entitled to an injunction to restrain such obstruction: *Ibid.*

13. Obstruction of navigable stream: Where the riparian owner shows that the filling up of the banks of a navigable stream beyond high-water mark will occasion him special damages different in degree or kind from such as will be sustained by the public, he may maintain an injunction to prevent such injury: *Musser v. Hershey*, 42-356.

14. To prevent ejectment suits: The rule of the common law, on account of which it was held that an injunction might be granted in equity to restrain the prosecution of actions of ejectment, when the title had been properly determined between the parties, no longer exists, and an injunction will not be allowed for the purpose of restraining a second suit to which a previous adjudication might be pleaded as a bar: *Gray v. Coan*, 36-296.

15. A suit to enjoin the prosecution of an action to recover real property on the ground that a deed in defendant's chain of title has been lost is allowed. In such case he has no adequate remedy at law: *Butch v. Lash*, 4-215.

16. To restrain taking private property for public use: An injunction will not be allowed to restrain a party from committing an injury by an attempt to take private property under pretense of legal authority for a highway, it not appearing that any authority to do so actually exists, unless it appears that such party is insolvent and unable to respond to an action at law for damages, or that the injury would be such that it could not be adequately compensated in money: *Dinwiddie v. Roberts*, 1 G. Gr., 363.

17. After the assessment of damages for right of way of a railway has been made, the land-owner may enjoin the further use of his premises by the company until the damages

are paid: *Richards v. Des Moines Valley R. Co.*, 18-259; *Hibbs v. Chicago & S. W. R. Co.*, 39-340.

18. Where one of the purposes for which the condemnation proceedings were ostensibly had was within the provisions of the statute, and the ground of complaint was that defendant sought to defraud plaintiff by proceeding under the statute ostensibly for a proper purpose, when the real and only purpose was to procure land for a use for which property could not be condemned, held, that the proceedings might be enjoined: *Forbes v. Delashmutt*, 68-164.

19. As the right of appeal is given in proceedings for condemning right of way, the party to such proceedings cannot by injunction take advantage of irregularities therein. The remedy by appeal is conclusive: *Phillips v. Watson*, 63-28.

20. Vacation of streets; certiorari: Injunction will not be granted to restrain the vacation of streets by a city council, there being a complete remedy by certiorari: *Stubenrauch v. Neyenesch*, 54-567.

21. To restrain enforcement of illegal taxes: An injunction will lie to restrain the sale of personal property levied on to satisfy a tax illegally levied. Replevin would not be a full remedy: *Spencer v. Wheaton*, 14-88.

22. Injunction is the proper remedy to restrain the levy and collection of an illegal tax on shares of stock in a national bank: *Olmstead v. Board of Supervisors*, 24-83.

23. A resident and tax-payer of a school district may maintain a suit to enjoin the collection of a tax levied without authority of law: *Williams v. Peinny*, 25-436.

24. The jurisdiction of equity to restrain the enforcement of an illegal tax has been too long recognized and too frequently resorted to in this state to be now made a matter of serious question: *Zorger v. Township of Rapids*, 36-175; *Brandirff v. Harrison County*, 50-164.

25. An injunction is not the proper remedy against an erroneous or excessive assessment; the tax-payer should apply to the board of equalization; but *aliter*, if the law authorizing the tax is unconstitutional, or the levy is without authority or jurisdiction: *Macklot v. Davenport*, 17-879.

In what cases granted.

26. That a tax is merely irregular, for instance, by reason of property which should be included with the realty in an aggregate valuation being separately assessed as personalty, is not a ground for enjoining the collection of the tax. Such error should be corrected by application to the board of equalization: *Wilson v. Cass County*, 69-147.

27. In an action to enjoin the collection of an illegal tax, a number of persons having separate interests but equally interested in the relief may join as plaintiffs: *Brandirff v. Harrison County*, 50-164.

28. And in such case, one or more parties thus interested may maintain an action for the benefit of the others having a like interest. (Overruling *Fleming v. Mershon*, 36-413): *Ibid.* And see *Palo Alto Banking, etc., Co. v. Mahar*, 65-74.

29. Residents and tax-payers of an independent district may join in an action to declare taxes levied therein for school purposes to be void: *Wilkinson v. Van Orman*, 70—.

30. Two or more owners of distinct pieces of land cannot join in an action to restrain the levy and enforcement of a municipal tax upon their property on the ground that their land is so situated as not to be subject to the levy of such taxes: *Lewis v. Eshleman*, 57-663.

31. Where a tax in aid of a railroad was declared defeated by the judges of the election, but the township clerk improperly certified in regular form to the board of supervisors that the proposition was carried, and the board thereupon levied the tax, *held*, that as the tax was not voted, its collection might be restrained by injunction, and *certiorari* was not an available remedy: *Cattell v. Lowry*, 45-478.

32. To restrain official action: A citizen and tax-payer may maintain an action to enjoin the issuance by the county auditor of a warrant in payment of a refund of taxes illegally ordered by the board of supervisors. The determination by the board of the legality of such a refunding is not an adjudication which must be attacked only upon appeal or by *certiorari*: *Hospers v. Wyatt*, 63-264.

33. Citizens and tax-payers of a county may maintain an injunction against a county official to prevent the erection of a county

court-house at an improper place: *Rice v. Smith*, 9-570.

34. Where it appeared that the officers of a school district were about to accept a school-house which did not comply with the terms of the contract for its construction and was much less valuable than provided by such contract, *held*, that an injunction might be granted against such officers at the suit of tax-payers to prevent the acceptance of such building: *Carthan v. Lang*, 69-384.

35. A tax-payer cannot by injunction restrain officers of the county in the performance of their duties, even though irregular, where it does not appear that their action is such as to be prejudicial to him: *Sperry v. Kretchner*, 65-525.

36. A party seeking an injunction to restrain the execution of a tax deed upon property must show that he has an interest in such property entitling him to such relief: *Johnson v. Brett*, 64-162.

37. A court of equity may interfere by injunction to prevent a conveyance by a municipal corporation of lands held by it for public purposes. Although such conveyance, being inconsistent with the purposes for which it is held, might be void, yet it may be enjoined to prevent the title from passing into the hands of various grantees, by reason of which parties seeking to restrain the improper use of the land might be driven to a multiplicity of suits: *Cook v. Burlington*, 30-94.

38. An officer may be made a party to restrain him in the discharge of official duties, where the discharge of his duties will be the means of consummating or aiding fraudulent purposes or of working oppression or injustice, although the officer is guilty of no wrong or unlawful purpose. But costs will not ordinarily be adjudged against him: *Palo Alto Banking, etc., Co. v. Mahar*, 65-74.

39. So *held* in an action to which the county recorder was made a party defendant and in which it was sought to enjoin him from recording certain conveyances which it was alleged were being executed in pursuance of a fraudulent confederation to defraud plaintiff of his title: *Ibid.*

40. Legislative action of the state or of a municipal corporation within the scope of its powers cannot be restrained by injunction,

In what cases granted.

even though the threatened act, if passed, would be unconstitutional and void: *Des Moines Gas Co. v. Des Moines*, 44-505.

41. In regard to elections: A citizen of a county is authorized, as plaintiff, to prosecute an action for an injunction to restrain improper action of officers when counting votes on the question as to removing the county seat: *Collins v. Ripley*, 8-129.

42. In an injunction proceeding the validity of an election to remove a county seat may be tried: *Sweatt v. Faville*, 28-321.

43. Where an election as to change of county seat had been ordered by the board of supervisors, made upon a petition and notice therefor, and the vote was favorable to the change, *held*, that those opposing such change had no cause for equitable relief justifying an injunction, the order for the vote being conclusive until set aside by *certiorari*: *Bennett v. Hetherington*, 41-142.

44. It is doubtful whether any court has the power or jurisdiction to enjoin an election to be held by the people pursuant to public law: *Lamb v. Burlington, C. R. & M. R. Co.*, 39-333.

45. Right to public office: Action by original bill for an injunction is not the proper method for trying the right to a public office or franchise. The remedy by information in *quo warranto* should be adopted. But it would seem that a temporary injunction might be granted as an auxiliary remedy in such case: *Cochran v. McCleury*, 22-75.

46. An action in equity for an injunction is not the proper method to determine which of two persons has the right to teach a school and who is the legal sub-director in the district township: *District T'p v. Barrett*, 47-110.

47. To restrain proceedings at law: Equity will not interfere by injunction to restrain the prosecution of an action at law where it does not appear that plaintiff is insolvent or that there is any ground for a discovery, or that the facts upon which relief is sought cannot be made as fully available in an action at law as in equity: *Smith v. Short*, 11-528.

48. It is not the province of equity to interfere where there is a complete remedy at law, and especially when it is sought to restrain an action at law pending a hearing in

equity: *Central Iowa R. Co. v. Moulton & A. R. Co.*, 57-249.

49. A court of equity will enjoin proceedings in an action of forcible entry and detainer only where a certain and manifest irreparable injury will result unless its restraining power is exerted: *Crawford v. Paine*, 19-172.

50. Where parties are both residents of the state, the one may invoke the aid of a court of equity of the state to prevent the other from prosecuting an action in the courts of another state, which will result in injury and fraud. Such jurisdiction is founded upon authority vested in courts of equity over persons within their jurisdiction and amenable to process, to restrain them from doing acts which will work wrong and injury to others, and which are contrary to equity and good conscience: *Teager v. Landseley*, 69-725; *Hager v. Adams*, 70—.

51. Therefore, *held*, that a debtor resident of this state might maintain an action of injunction against his creditor, also a resident, to restrain him from procuring a judgment to be recovered in another state under which the indebtedness due to the debtor in this state, and here exempt from execution, should be seized and applied to the satisfaction of the creditor's claim, and that in the event of the creditor prosecuting the foreign action to judgment and recovering the amount of the exempt indebtedness, a judgment might be rendered against him for damages in that amount: *Ibid*.

52. Where plaintiff was under contract entitled to a conveyance of a right of way, *held*, that it was proper in an action for specific performance thereof to ask an injunction to restrain defendant from proceedings to have damages for the right of way assessed by a jury: *Chicago & S. W. R. Co. v. Swinney*, 38-182.

53. Where an injunction has been granted restraining plaintiff in an action pending in the same court from dismissing such action, the supreme court will not, on appeal in the latter action, allow the parties to dismiss the case in violation of such injunction: *Dubuque Branch of State Bank v. Rhomberg*, 37-664.

54. To restrain enforcement of judgment: A court of equity has authority to en-

In what cases granted.

join proceedings to enforce a judgment which is void for want of jurisdiction: *Connell v. Stelson*, 88-147.

55. Injunction may be granted to restrain enforcement of a judgment at law rendered without notice to the defendant therein, and upon a claim against which he had a good defense: *Givens v. Campbell*, 20-79.

56. A party seeking to enjoin the enforcement of a judgment at law must show that he has a defense to the action or make such a case as to satisfy the court that if a new trial is had a different result will be obtained: *Way v. Lamb*, 15-79.

57. The enforcement of a judgment at law will not be restrained by injunction where it is not shown that the judgment is unjust or oppressive, or in other words that there would be a good defense to the claim if the judgment should be set aside. A court of equity will not set aside a judgment and open up the litigation until it appears that the result will be other or different from that already reached: *Taggart v. Wood*, 20-286.

58. A court of equity will not interfere by injunction to restrain the enforcement of a judgment on a ground which might have been urged as a matter of defense in the action on which the judgment was recovered: *Faulkner v. Campbell*, Mor., 148.

59. To authorize a party to relief against a judgment at law, and to stay an execution thereon, it must appear that it is against conscience to execute such judgment, and also that the injured party could not have availed himself of the same facts at or before the trial, and that there was no fault or negligence on his part: *Kriechbaum v. Bridges*, 1-14; *Shricker v. Field*, 9-366.

60. Matters antecedent to the bringing of the action in which the judgment was recovered which is sought to be enjoined, which matters might have been interposed as a defense in such action, cannot be made the basis of a suit in equity to enjoin the judgment: *Lamb v. Drew*, 20-15.

61. In a motion to enjoin the enforcement of a judgment, the court cannot go behind the judgment to determine the regularity of the proceedings: *Hampson v. Weare*, 4-18.

62. In the absence of fraud, accident or mistake, equity cannot interfere to restrain

the enforcement of a judgment at law, although it be wrong, unjust, or inequitable: *Finch v. Hollinger*, 47-173.

63. Equity will not enjoin the collection of a judgment at law where the legal remedy is full, ample and complete, unless possibly there has been fraud, accident or surprise, without fault or negligence on the part of the complaining party: *Freeman v. Hart*, 61-525.

64. *Held*, that a judgment defendant could not have the enforcement of the judgment enjoined on the ground that he had a claim against the assignee of the judgment who was his attorney in the action in which the judgment was recovered, for negligence in defending such action, it not appearing that the attorney was insolvent. Under such circumstances there is no such relation of trust or confidence as to entitle the judgment debtor to relief: *Baker v. Ryan*, 67-708.

65. Where the provisions of a judgment were that it should be paid in a town order at the expiration of a certain time, and before that time execution was issued and, when the time expired, the order was not tendered, and afterwards, without any offer to perform, an injunction was asked against such execution, *held*, that plaintiff was not entitled to relief by reason of his failure to tender the order: *Anamosa v. Wurzbacher*, 87-25.

66. Where a judgment was rendered by default upon agreement that it should be satisfied only out of certain specified property, *held*, that an injunction was properly granted in an action by the debtor to restrain its enforcement against other property than that agreed upon: *Montgomery v. Gibbs*, 40-652.

67. By the English chancery rule, service in an action to enjoin the collection of a judgment might be made upon the attorney of a party who recovered the judgment, where the party himself was a non-resident, but under our procedure this course is not proper. An action to enjoin should be brought against the officer who is proceeding to enforce the judgment: *Death v. Bank of Pittsburg*, 1-882.

Further as to equitable relief against judgments, see EQUITY, II, c.

68. To restrain sale on execution: Injunction will be granted to prevent the sale

In what cases granted.

on execution of real property, when such property does not belong to the judgment debtor and the sale would cast a cloud upon the title: *Key City Gas Light Co. v. Munsell*, 19-805.

69. But a sale will not be enjoined if the judgment is a lien upon the property, although it is junior to other liens: *Wiedner v. Thompson*, 66-283.

70. Place of bringing action to enjoin civil proceedings, or the enforcement of a judgment or execution: Where it is sought to restrain the sale of property on execution under a judgment, on the ground that the judgment is void, it is required by statute (Code, § 8396) that the suit be brought in the county and court where the judgment was obtained: *Anderson v. Hall*, 48-346; *Bennett v. Hanchett*, 49-71; *Grattan v. Matteson*, 51-623.

71. This provision is applicable in case of special as well as of general execution: *Lockwood v. Kitteringham*, 42-257.

72. It seems, however, that it would not apply where it should be sought to enjoin the sale of property not belonging to defendant in execution, but belonging to a third person who seeks the injunction: *Ibid.*

73. Where the object of the action is to declare a judgment or final order of a court invalid, action must be brought in the court where the judgment or order was obtained; but where it is sought to enjoin the enforcement of a judgment because of some matter which has arisen since the judgment was rendered, and not on the ground that it should never have been entered, or that it is invalid, or that it should not be enforced, the action need not be brought in the court where the judgment was recovered, but may be brought in the county of defendant's residence: *Baker v. Ryan*, 67-708.

74. An action to set aside a sheriff's sale and deed on the ground that the property was exempt as a homestead may be brought in a different court from that in which the judgment was rendered: *Vissek v. Doolittle*, 69-602.

75. When a transcript of a judgment before a justice of the peace is filed in the office of the clerk of the circuit court, it becomes a judgment of that court, and a suit to enjoin proceedings thereon must be brought in that court: *Anderson v. Hall*, 48-346

76. If the action is brought in the wrong county, the court acquires no jurisdiction even by consent, and the action cannot be removed to the proper county: *Ibid.*

77. Where an execution issuing from the supreme court is sought to be enjoined, the action may properly be brought in the court of any county where it is sought to enforce such execution: *Davis v. Bonar*, 15-171; *Massie v. Marn*, 17-181.

78. An injunction relating to property held under attachment, where the attachment is the gist of the proceeding, must be brought in the same court where the attachment suit is pending: *Cooney v. Moroney*, 45-292.

79. To restrain enforcement of chattel mortgage: As the purchaser at foreclosure sale can acquire title only to such property as is covered by the mortgage, an action cannot be maintained by a junior mortgagee to restrain the foreclosure of a senior mortgage upon property which, it is claimed, is not covered by such senior mortgage: *Rankin v. Rankin*, 67-322.

And see CHATTEL MORTGAGES, §§ 155-157.

80. To enjoin a nuisance: An action in equity to enjoin the continuance of a nuisance may be prosecuted as before the adoption of the Code provision, found in § 8381, authorizing such relief in an action at law for damages. Different property owners, suffering damages distinct from the public, may join as plaintiffs in such action: *Bushnell v. Robeson*, 62-540.

81. In such cases the equitable remedy still exists, and may be prosecuted in a proper action, and it is error to order the transfer of such an action to the law docket: *Gribben v. Hansen*, 69-255.

82. The statutory provision as to restraining nuisances is not to be limited to cases where a nuisance is about to be located. Courts of equity before the adoption of the Code granted relief as certainly and readily where a nuisance had been located as where it was about to be, and this equitable remedy still exists: *Bushnell v. Robeson*, 62-540.

83. Courts of equity have general jurisdiction to entertain an action to abate a nuisance, and, although such jurisdiction has generally been exercised only in actions where property rights of the plaintiff are affected, yet it is competent for the legislature to extend

In what cases granted.

this jurisdiction to cases where no property rights of the plaintiff as distinct from the general public are involved, and to authorize a suit to abate a nuisance to be brought by any citizen of the county: *Littleton v. Fritz*, 65-488.

84. So held under Code, § 1543, as amended by 20 G. A., ch. 143, relating to a suit in equity by a citizen of the county to enjoin the unlawful sale of intoxicating liquors: *Ibid.*

85. The fact that the act enjoined is one which is by statute made a criminal one will not prevent a court of equity having jurisdiction to abate it by injunction: *Ibid.*

86. Where it was sought to enjoin the rebuilding of a livery stable on the ground that it would be a nuisance, held, that it appearing that the stable, as originally kept, was a nuisance by reason of the location and construction of the building and mode of using it, rather than negligence in the manner of keeping it, an injunction would be granted against any use of the premises substantially like the use theretofore made thereof, but that it would not be proper to absolutely enjoin the use of such premises for that purpose: *Shiras v. Olinger*, 50-571.

87. Where the objection to the premises arises from some cause which could not be obviated by reason of any mode or use which could be adopted, the entire use of the premises for the purpose may be enjoined: *Baker v. Bohannon*, 69-60.

88. To restrain conveyances, attachments, etc.: Where real property standing in the name of a person not a defendant is attached, as having been conveyed by defendant to defraud creditors, an action for an injunction may be maintained against the grantee in such fraudulent conveyance to prevent alienation of the property by him to an innocent purchaser, until the determination of the attachment suit: *Joseph v. McGill*, 52-127.

89. A creditor who has not yet recovered a judgment cannot have an injunction to restrain the debtor from disposing of his property: *Buchanan v. Marsh*, 17-494.

90. A mortgagee, although he has not recovered judgment, may maintain an action for injunction to prevent a judicial sale of the mortgaged premises on the ground that

it is fraudulently intended to defeat his rights, but a general creditor not yet having recovered judgment could not do so: *Brigham v. White*, 44-677.

As to who may have a FRAUDULENT CONVEYANCE set aside, see that title, II.

91. One who has conveyed property by a warranty deed has no such interest therein that he can maintain injunction against the threatened sale thereof under a subsequent judgment, under which it is sought to subject the property on the ground that the conveyance was in fraud of creditors: *Small v. Somerville*, 58-362.

92. The grantee may, under proper circumstances, maintain an action for injunction to restrain his grantor and others from prosecuting a fraudulent confederation to convey the property so as to defeat his title: *Palo Alto Banking, etc., Co. v. Mahar*, 65-74.

93. In an injunction to restrain a sale by the trustee under a mortgage containing a power of attorney, where it did not appear that there was fraud or mistake, or that plaintiff would sustain an irreparable injury by such sale, and it was shown that plaintiff was aware of the condition of the title of which he complained at the time of taking the conveyance in part payment for which the mortgage was given, held, that there was no ground for an injunction: *Crocker v. Robertson*, 8-404.

94. Equity may, at the suit of the grantee of real property by a warranty deed, restrain the transfer of notes given for the purchase money where it appears that there was a breach of warranty as to a portion of the property. But such restraint will extend only to such amount as is necessary to make good to the grantee the damage resulting from the breach of warranty: *McDunn v. Des Moines*, 34-467.

95. Where property claimed by plaintiff was seized on attachment issued against a third person, and was replevied from the officer by plaintiff and taken into possession of plaintiff, held, that he could not have an injunction to restrain the levy of other attachments by other parties against such third person upon the same property: *Patterson v. Seaton*, 64-115.

96. To restrain payment of county warrant: An injunction restraining payment of

In what cases granted.—Proceedings in general.

a county warrant cannot operate to defeat a recovery upon such warrant negotiated before the injunction suit was commenced: *McCormick v. Grundy County*, 24-882.

97. To restrain sale of partnership property: Where plaintiff as administratrix of a deceased partner showed in her petition that the defendants, the copartners of her intestate, were insolvent and were disposing of the firm property and appropriating it to their own use, and that unless defendants were restrained by injunction there was danger of the property and assets of the firm being wholly lost, *held*, that there was a proper case for an injunction restraining defendants from disposing of the partnership property: *Fletcher v. Vandusen*, 52-448.

98. In actions by ordinary proceedings: Under a statutory provision (Code, § 3386) authorizing injunctions as an independent remedy in ordinary proceedings for breach of contract or other injury, to prevent the repetition or continuance of such breach or injury, *held*, that where an injunction was asked in an action at law as thus contemplated, it was not necessary for a party to bring himself within the rules and usages of a court of equity in granting such relief: *Hall v. Crouse*, 14-487.

99. To entitle plaintiff to an injunction under such statutory provision, he need not allege that he will sustain an irreparable injury if the injunction is not granted, or that defendant is insolvent: *Mills v. Hamilton*, 49-105.

100. The fact that the action is improperly brought in equity, when it should have been brought at law, will not prevent relief being had under such provisions: *Ibid*.

101. A petition for injunction in ordinary proceedings must show a continuance or repetition of the injury: *Berger v. Armstrong*, 41-447.

102. The injunction may be granted before the determination of the case in which it is asked, the other party of course being heard: *Ewell v. Greenwood*, 26-377.

103. Where defendant had sold to plaintiff the good-will of a business, and obligated himself under a penalty not to prosecute the same business in the same place for a limited time, *held*, that the only remedy for a breach of the agreement not to prosecute the busi-

ness was an action for the penalty, and that an injunction could not be had under the statutory provision last above referred to, to restrain defendant from violating his contract: *Stafford v. Shortreed*, 62-524.

104. Such statutory provision does not confer upon a court of law in such proceedings either general or special chancery powers, nor clothe it with power to grant any other relief or remedy not before possessed, except that of an injunction: *Richmond v. Dubuque & S. C. R. Co.*, 33-422, 475.

II. PROCEEDINGS.

a. In general.

105. Jurisdiction: The authority to allow an injunction is an incident of chancery jurisdiction and can only be exercised by courts clothed with general chancery powers or by virtue of legislative enactment: *Cummings v. Des Moines, W. & S. W. R. Co.*, 36-173.

106. Parties: Where it was sought to enjoin a city from having an improvement made under an illegal ordinance, *held*, that the contractor who had entered into a contract with the city to make such improvements was a proper party defendant, but that having made no resistance to the injunction and raised no issue with plaintiff, costs should not be taxed to him: *Bush v. Dubuque*, 69-233.

That parties without interest are not entitled to relief, see *supra*, § 12.

As to who may have an injunction to restrain fraudulent conveyances, see *supra*, §§ 88-90.

That tax-payers may join as parties, when jointly interested, or one or more may sue for all, see *supra*, §§ 27-30.

As to place of bringing action to restrain civil proceedings or the enforcement of a judgment, see *supra*, §§ 70-78.

107. Petition: To entitle a party to an injunction he must allege the facts upon which his right thereto rests: *Berger v. Armstrong*, 41-447.

108. Tender: A party seeking to enjoin the sale of property under a mortgage lien, if he admits a portion of the money to be due, should pay or tender the amount due before

 Proceedings in general.—Temporary.

he will be entitled to an injunction: *Sloan v. Coolbaugh*, 10-31.

109. An injunction should not be granted to stay the sale of real estate under a trust deed, where it is admitted that a portion of the indebtedness is due, if a tender of the amount thus admitted is not shown: *Stringham v. Brown*, 7-38; *Casady v. Bosler*, 11-242.

110. Verification: An affidavit to the petition to the effect that the contents thereof are true, as the affiant believes, constitutes a sufficient verification: *Kelley v. Briggs*, 58-332.

111. Amendment: If an amended pleading in an action for injunction is not sworn to, the temporary injunction may be dissolved on that ground, but it will be error to dismiss the action and proceed to personal judgment: *Porter v. Moffett*, Mor., 108; *S. C.*, Mor., 153.

112. Although an injunction be improperly issued on account of defects in the petition, yet if these effects are corrected by amendment the injunction should not be dissolved: *Sweatt v. Faville*, 23-321; *Des Moines Nav. & R. Co. v. Carpenter*, 27-487.

113. And this is true, even though the amendment is made after the motion to dissolve is filed: *Crawford v. Paine*, 19-172.

114. The proceedings are commenced upon the filing of the petition and service of writ, and if these are within the period of the limitation, it is sufficient, although the notice is not served until the period of limitation has expired: *Sweatt v. Faville*, 23-321, 328.

115. Giving of damages not incident to the relief: Where a party sought to enjoin the opening of a highway on the ground that he had not been given due notice thereof, held, that he could not, in such action, recover damages for failure to give such notice: *Tharp v. Witham*, 65-566.

b. Temporary injunction.

116. When allowed: A temporary injunction will not be issued where the facts stated in the petition, if proved, would not entitle the party to relief: *Zorger v. Township of Rapids*, 36-175.

117. In a suit brought under Code, § 1543,

as amended by 20 G. A., ch. 143, to enjoin illegal sale of intoxicating liquors, a temporary injunction may be granted as in any other case: *Littleton v. Fritz*, 65-488.

118. The statutory provision (Code, § 3394) that the order for a temporary injunction shall be indorsed upon the petition is not mandatory, and the fact that it is made upon a separate piece of paper will not render subsequent proceedings thereunder void: *Jordan v. Circuit Court*, 89-177.

119. Code, § 3391, providing that an injunction to stop the general and ordinary business of a municipal corporation shall only be granted after reasonable notice, held not applicable where one district township sought to restrain another from removing school-houses from the territory of the former: *District T'p. v. District T'p.*, 54-115.

120. A temporary injunction issued in vacation is not dissolved by failure to procure an additional order therefor at the next term of court: *Curtis v. Crane*, 38-459.

121. Under the statutory provisions (Code, §§ 3389, 3394) by which a judge may grant a temporary injunction in vacation, held, that the judge might act during term time, but while the court was not actually in session, as well as in vacation between terms: *Thompson v. Benepe*, 67-79.

122. Although the granting as well as the refusal of a temporary injunction rests much in the discretion of the court, and such discretion will not be controlled except where there is a manifest abuse or mistake of the law, yet where an appeal was taken from an order granting a preliminary injunction involving a simple question of law upon undisputed facts, held, that the question would be determined on appeal and not postponed to final hearing: *Fuson v. Connecticut General L. Ins. Co.*, 53-609.

123. A party cannot, by appealing from an order denying a temporary injunction and executing a *supersedeas* bond, have the benefit of such temporary injunction: *Troupe v. Eade*, 42-552.

124. Affidavits in resistance of an application for a temporary injunction are merely evidence which do not become a part of the record, unless preserved by bill of exceptions: *Hart v. Foley*, 67-407.

Dissolution of temporary.

c. *Dissolution of temporary injunction.*

125. When grounds denied in answer: Where the facts alleged in the petition as a ground for the injunction are plainly, directly and fully denied by the answer, the injunction may be dissolved upon the answer alone: *Shricker v. Field*, 9-366; *Anderson v. Reed*, 11-177; *Stevens v. Myers*, 11-183; *Taylor v. Dickinson*, 15-483; *Des Moines Nav. & R. Co. v. Carpenter*, 27-487; *Ingraham v. Chicago, D. & M. R. Co.*, 34-249; *Russell v. Wilson*, 37-377.

126. In a particular case, *held*, that the equities of the petition were sufficiently denied in the answer to warrant a dissolution: *Carrothers v. Newton Mineral Spring Co.*, 61-681.

127. Where defendant bases his motion to dissolve the temporary injunction on his answer alone, the plaintiff may resist the dissolution by affidavits in support of his petition although no affidavits are offered by defendant: *Palo Alto Banking, etc., Co. v. Mahar*, 65-74.

128. An answer which does not fully meet the equities set up in the petition will not justify the dissolution of a temporary injunction, although it may be sufficient to support a judgment for defendant on the final trial: *Trotter v. Paunley*, 39-203.

129. Where one material allegation of a petition for injunction to restrain the collection of a judgment was not denied by the answer, *held*, that the temporary injunction should not have been dissolved, but should have been continued to the final hearing: *Gates v. Ballou*, 54-485.

130. Where plaintiff sought to enjoin the enforcement of a judgment, alleging that large payments had been made thereon which had not been credited, and that fact was not denied in the answer, *held*, that the temporary injunction should have been dissolved only as to that part of the injunction not alleged to have been paid, and as to the other part it should have been continued to the hearing: *Marsh v. Mead*, 57-535.

131. To warrant the dissolution upon answer alone, the answer must be upon personal knowledge, and of such character as to entitle it to as much credit as the averments

of the bill. If its statements are such as to leave the mind of the court in reasonable doubt as to whether the equities are sufficiently answered, the injunction ought not to be dissolved: *Sinnett v. Moles*, 38-25; *Fargo v. Ames*, 45-494.

132. Even where all the equities of the bill are denied by the answer, it does not follow as a matter of course that the injunction will be dissolved. Its dissolution or continuance rests very much in the sound discretion of the court to be governed by the nature of the case: *Shricker v. Field*, 9-366.

133. An injunction should not be dissolved without proof, on an answer which admits the allegations of the petition and seeks to avoid their effect by pleading affirmative matter: *Ibid.*; *Judd v. Hatch*, 31-491; *Fargo v. Ames*, 45-494; *Mills v. Hamilton*, 49-105; *Huskins v. McElroy*, 62-508; *Hayes v. Billings*, 69-387.

134. Upon the hearing of a motion to dissolve an injunction, the plaintiff may file an amended petition, and if it states a good cause for an injunction, not overborne by the adverse showing, the injunction should be continued: *Crawford v. Paine*, 19-172.

135. Where the final relief sought will be ineffectual, if the temporary injunction is dissolved, it will be continued to the final hearing, even though the equities of the bill are fully denied in the answer: *Joseph v. McGill*, 52-127.

136. Where fraud is the gravamen of a petition, or it is apparent that by dissolution a party will lose all benefit to accrue from final success, the court may refuse to dissolve the injunction until final hearing: *Sinnett v. Moles*, 38-25; *Stewart v. Johnston*, 44-435; *Brigham v. White*, 44-677; *Fargo v. Ames*, 45-494; *Johnston v. Chicago, M. & St. P. R. Co.*, 58-537.

137. The general rule is, that where all the material allegations of the petition for an injunction are fully and satisfactorily denied in the answer, upon the personal knowledge of the defendant, the preliminary injunction, if one has been allowed, will be dissolved. There are some exceptions to this rule, and one of them is where the gravamen of the petition is fraud: *Walker v. Stone*, 70—.

138. The ruling of the court continuing a preliminary injunction to the hearing is

Dissolution of temporary.—Bond; remedy upon.

largely a matter of discretion, and not to be reversed unless such discretion has been abused: *Ibid.*

139. Where there was no showing that the continuance of the injunction to the hearing would result in any substantial injury to defendant, and it appeared that the dissolution might materially injure plaintiff, *held*, that a refusal of the court to dissolve the injunction would not be reversed on appeal: *Kelley v. Briggs*, 58-333.

140. An injunction restraining the taking of private property for public use until compensation is made should not be dissolved while the question as to the right to compensation is pending and undetermined: *Trustees of Iowa College v. Davenport*, 7-213; *Conolly v. Griswold*, 7-416.

141. It being provided by statute that an injunction to restrain a nuisance can only be granted upon reasonable notice of the time and place of application, to the party to be enjoined, *held*, that an injunction for that purpose, having been granted without notice, should be set aside on motion, and that an appearance to move to dissolve, accompanied by answer to the petition in the case, was not a waiver of the right to have such dissolution: *Hughes v. Eckerson*, 55-641.

142. While an injunction should not be dissolved until after answer by defendant, this rule has no application where the party failing to answer is a merely nominal party: *Shricker, v. Field*, 9-366.

143. Where it appeared that there had been no unreasonable delay in the service of the notice after the granting of the writ, *held*, that a motion to dissolve for want of notice was properly overruled, when made after service; also, that appearance waived any objection to the form or sufficiency of such notice: *Sweatt v. Faville*, 23-321.

As to curing defects by amendment and thus preventing dissolution, see *supra*, §§ 111, 112, 134.

144. An injunction cannot be dissolved on the ground that the service of the writ precedes the acquisition of jurisdiction of the person by appearance when the original notice is defective: *District T'p v. District T'p*, 54-115.

145. Where the writ of temporary injunction is broader than the petition, the remedy

is not by motion for dissolution, but for modification of the writ: *Ford v. Loomis*, 62-586.

146. Upon motion to dissolve, the opposite party is not entitled as a matter of course to a continuance: *Taylor v. Dickinson*, 15-483.

147. The renewal of a motion already filed in another court to dissolve the injunction is not a second motion within the prohibition of the statute: *Carrothers v. Newton Mineral Spring Co.*, 61-681.

148. It may be that, upon a dissolution, damages which are the immediate and necessary result of the allowance of the writ, and which depend simply upon computation for their determination, may be recovered by a summary proceeding; but damages consequential in their nature, as expenses, attorney's fees, etc., can only be recovered in an independent action: *Taylor v. Brownfield*, 41-264.

Further as to recovery of damages, see *infra*, §§ 156-167.

149. Sustaining a motion to dissolve a temporary injunction which has been granted *ex parte* upon a showing then made does not bar the right to a perpetual injunction upon full proof at the final hearing: *Fisher v. Beard*, 40-625.

150. The dissolution of the injunction does not necessarily operate to dismiss the bill: *Russell v. Wilson*, 37-377; *Massie v. Mann*, 17-181; *Walters v. Fredericks*, 11-181.

151. While the continuance or dissolution of an injunction rests in the sound discretion of the court originally passing upon the question, yet this is a legal discretion, and if based upon sufficient grounds will be reversed on appeal: *Sinnett v. Moles*, 38-25; *Stewart v. Johnston*, 44-435.

152. Appeal from order of dissolution: After the dissolution of a temporary injunction it cannot be restored on appeal, although another might be granted if the case has not proceeded to a hearing, and if the granting of another such injunction would be of any use: *Ellwood Mfg. Co. v. Rankin*, 70—.

d. Bond; remedy upon.

153. Where the action is to enjoin the sale of a particular piece of property under a judgment, the bond need not be for twice

Bond; remedy upon.

the amount of the judgment as required by Code, §§ 3396, 3397: *Hardin v. White*, 63-633.

154. Under previous statutory provisions differing from the section just referred to, *held*, that an action for an injunction to restrain the collection of a judgment was not a suit to enjoin proceedings in a civil action within the meaning of such statute, and the bond required need not be conditioned to pay the judgment finally to be recovered: *Way v. Lamb*, 15-79.

155. Under statute, as well as by rules of equity practice, it is competent for the court, in case the litigation wherein the injunction has been granted shall be protracted, to require an additional bond or further security to meet such contingency: *Crawford v. Paine*, 19-172.

156. Action on the bond for damages: The bond contemplated by statute in case of a temporary injunction is to cover such damages as may be adjudged against the obligors in an action brought thereon. The amount of damages cannot be adjudged in the original action. No such issue can be joined therein: *Fountain v. West*, 68-380.

157. Attorneys' fees: In an action on the bond, reasonable compensation for legal services in securing a dissolution of the injunction may be recovered; but not attorneys' fees for services in defending the entire suit: *Behrens v. McKenzie*, 28-333; *Langworthy v. McKelvey*, 25-48.

158. Where an action was brought to have certain taxes declared illegal and void and a temporary injunction was granted restraining their collection, but no steps were taken to have such injunction dissolved before final hearing, when it was dissolved, *held*, that the injunction being merely auxiliary, defendant was not entitled in an action on the injunction bond to recover attorneys' fees: *Carroll County v. Iowa R. Land Co.*, 53-635.

159. If the injunction is dissolved after hearing on the merits and this is all there is in the case, counsel fees might be recovered. Such recovery is not confined to cases where the injunction is dissolved on motion: *Langworthy v. McKelvey*, 25-48.

160. Where the motion to dissolve is made in good faith and affidavits filed in support thereof, but the court declines to pass upon it until final hearing, when the injunction is

dissolved after hearing upon the merits, counsel fees for preparation of motion, etc., may be recovered in suit upon the bond: *Wallace v. York*, 45-81; *Fountain v. West*, 68-380.

161. An allowance of attorneys' fees for time spent in drawing useless affidavits would be improper: *Ellwood Mfg. Co. v. Rankin*, 70—.

162. Fees for the services of an attorney in a case in the supreme court after the dissolution of the injunction should not be allowed: *Ibid*.

163. Where an injunction is the only relief sought, and dissolution is procured only upon final hearing, attorneys' fees should, in an action on the bond, be allowed for defending in the entire action: *Reece v. Northway*, 58-187.

164. An attorney's fee may be recovered where the injunction is dissolved on motion, and also where it is dissolved on final hearing, if it is the only relief sought. It may also be allowed in case of partial dissolution or modification, where such is the relief sought in the motion, but not where the motion is to dissolve as an entirety and is only partially sustained or a modification is granted: *Ford v. Loomis*, 62-586.

165. Dismissal of action: In an action on an injunction bond given to stay execution on a judgment, where it was alleged that an action for injunction had been dismissed, *held*, that the entry on the judgment calendar, "dismissed as per stipulation," was not sufficient evidence as to that fact in the absence of a showing as to what that stipulation was: *Towle v. Leacox*, 59-42.

166. Other damages: Where real estate depreciates in value during the time that sale thereof is prevented by injunction proceedings, there is no presumption that the owner, if not prevented, would have sold before depreciation and saved himself from loss, and damages are not recoverable for loss of sale unless it is made to appear that there was a *bona fide* application on the part of some person to buy, and that the sale was lost by reason of the injunction: *Reece v. Northway*, 58-187.

167. Defendant having a lot of unburned brick which were damaged by rain while an injunction was in force, restraining him from carrying on the manufacture of such brick

Violation.—Who deemed innkeeper; guest; boarder.

on the premises, *held*, that the writ of injunction as issued did not prevent him from taking steps to protect the brick from the rain, and if he was negligent in that respect, he could not recover for damages sustained thereby: *Behrens v. McKenzie*, 23-383.

168. **Defense; insanity:** A bond given in an injunction proceeding is in the nature of an executed rather than an executory contract, and the fact that the one signing the bond and enjoying the benefit of the writ was insane at the time of signing it will constitute no defense to an action on the bond, if it appears that his insanity was not known to the opposite party: *Ibid*.

169. **Summary damages** should not be allowed on dissolution of an injunction unless they are such as are the immediate and necessary result of the allowance of the writ and depend simply upon computation for their determination, as the allowance of interest when the payment of money is restrained. In other cases, the party should be left to his remedy by an action: *Taylor v. Brownfield*, 41-264.

170. **Bond construed:** In a particular case, *held*, that the bond rendered the obligor liable only for costs of the proceeding and not for other damages which accrued: *Gifford v. Mohr*, 47-279.

171. **Right of action accrues on the bond** at the final determination of the injunction suit, and not at the previous dissolution of the temporary injunction: *Bank of Monroe v. Gifford*, 65-648.

e. Violation.

172. Where a party is in court and hears an order for the injunction pronounced, he is as much bound thereby as if he had actually been served with the writ: *Milne v. Van Buskirk*, 9-558.

173. So long as an injunction remains in force, the party bound thereby must obey it: *Langworthy v. McKelvey*, 25-48.

174. In seeking to punish a party for the violation of an injunction it must be taken in the form in which it was looked at by the court rendering it: *Lamb v. Burlington, C. R. & M. R. Co.*, 39-383.

175. **Proof of a violation of the injunction** should usually be made by affidavit: *State v. Myers*, 44-580.

176. **Contempt of court** in violating an injunction should be dealt with as other contempts. The proceedings are merely incidental to the original proceeding and there is no appeal: *First Cong. Church v. Muscatine*, 2-69.

177. Any error in the injunction proceeding in granting an injunction without proper evidence cannot be raised by way of defense to a proceeding for contempt in violating such injunction: *Jordan v. Circuit Court*, 69-177.

178. The fact that the order allowing an injunction is not indorsed on the petition but is entered on a separate piece of paper will not prevent a violation of such injunction being a contempt: *Ibid*.

179. **Damages:** A party is liable for all damages resulting from a refusal on his part to obey the mandate of an injunction granted against him: *Benson v. Connors*, 63-670.

INNKEEPERS.

1. **Who deemed:** To render a person liable as a common innkeeper it is not sufficient to show that he occasionally entertains travelers for a compensation; it must appear that he makes tavern-keeping to some extent a business and means of livelihood and holds himself out to the world as an innkeeper. It is not necessary, however, that he should have a sign and a license, provided that he has in any other manner authorized a general understanding that his is a public house where strangers have a right to require accommodation: *Lyon v. Smith*, Mor., 184.

2. **Who deemed guest:** The guest comes without any bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment received; and the rule is not changed by the fact that the person remains a long time in the inn in this way: *Shoecraft v. Bailey*, 25-553.

3. **Boarder:** An allegation that a party boarded with the innkeeper is not sufficient to show that he was a mere boarder and not a guest: *Pollock v. Landis*, 36-651.

4. **Liability; notice to guest:** Before the enactment of a statutory provision on the subject (see 18 G. A., ch. 181), *held*, that the mere fact that a notice was posted on

Liability; public calling.— Insanity defined.

the door of a guest's room, limiting the innkeeper's liability unless certain requirements were observed, would not raise a presumption of knowledge thereof on the part of the guest, and that the guest would not be chargeable with notice unless it appeared that he had actual notice, or that he wilfully or negligently failed to read the notice posted: *Bodwell v. Bragg*, 29-232.

5. Negligence of guest: The fact that the guest, when giving his pocket-book into the innkeeper's care for safe keeping, did not state that there was money therein, *held* not sufficient to show negligence on the guest's part: *Shoecraft v. Bailey*, 25-553.

6. Termination of liability: Where a person stopped at an inn for several days and then paid his bill and departed, leaving his trunk with the landlord and stating that he would return in three or four days, *held*, that the relation of guest and innkeeper terminated at the time of such departure, and the innkeeper could not be held liable as such for delivering the trunk to the wrong person during the absence of the owner: *Hays v. Turner*, 23-214.

7. An innkeeper's lien exists by common law and may be enforced against property exempt from execution, as, for instance, a coat: *Swan v. Bournes*, 47-501.

8. No lien as against boarder: An innkeeper has a lien upon the goods of a guest but not upon those of the boarder: *Pollock v. Landis*, 36-651.

9. Public calling: The business of an innkeeper is such that, although conducted by private parties for their own emolument, the public has such interest therein that it is properly the subject of regulation by law, and those engaged in it are subject to restrictions and limitations which do not apply to persons engaged in other kinds of business: *Bowlin v. Lyon*, 67-536

INSANITY.

See, also, CONTRACTS, VI, b; CONVEYANCES, §§ 9-12; CRIMINAL LAW, §§ 8-24; EVIDENCE, §§ 81-83, 384-393, 859, 860; GUARDIANSHIP, §§ 95-101; JURISDICTION, § 198; LIMITATION OF ACTIONS, § 148; WILLS, §§ 20-30.

As a defense in slander, see SLANDER AND LIBEL, § 93.

1. *Defined*: A person who, of sound mind until nine years of age, then became affected with epilepsy and gradually lost her mind until she was unable to take the slightest care of herself, *held* insane within the meaning of the statutory provision (Code, § 1434) defining insanity: *Speedling v. Worth County*, 68-152.

2. *Finding as to insanity*: The interrogatories and answers appended to the certificate of the physician appointed by the commissioners to make personal examination, touching the condition of the person claimed to be insane, are not competent evidence as to whether the party was insane previous to the time of the examination: *Butler v. St. Louis L. Ins. Co.*, 41-93.

3. The provision of Code, § 1401, allowing an appeal from the findings of the commissioners of insanity, and the further provisions of the Code, §§ 1442 and 1444, allowing subsequent investigation of the question of sanity, prevent the provisions as to the findings of the commissioners of insanity from being in conflict with the constitutional guaranties against deprivation of personal liberty without due jury trial: *Black Hawk County v. Springer*, 58-417.

4. An appeal from the findings of the commissioners not being taken within the time allowed, such appeal cannot be secured by moving for a rehearing and then appealing from the refusal to grant it. The commissioners are not authorized to grant a rehearing in such case: *Wilson v. State*, 66-487.

5. *Support and treatment of insane persons*: Notice to the county in which the person has a legal settlement is a condition precedent to the right of recovery against such county, by another county, for the support of such person: *Poweshiek County v. Cass County*, 63-244.

6. Where the county furnishing the relief gives notice to the supposed county of settlement that the relief is being furnished, without making an order for removal, and afterwards sues to recover for the relief thus furnished, the circuit court does not have exclusive jurisdiction of the action: *Winneshek County v. Allamakee County*, 62-558.

Insane tax.—Form and method of giving instructions.

7. Where an adult is adjudged insane and a fit subject to be treated in the hospital, but cannot be admitted there and is otherwise maintained and treated, his father is not liable for the expense of his maintenance, although he is appointed custodian: *Speedling v. Worth County*, 68-152.

Further as to support of poor persons, see POOR.

8. Insane tax: By the provisions of 18 G. A., ch. 109, § 41, corresponding to Code, § 1428, but not identical with it, no authority was given to the board of supervisors to levy an independent or special tax for paying the expenses of insane persons from the county in the hospital for the insane: *Iowa R. Land Co. v. Carroll County*, 39-151.

9. Liability of relatives to county: The "relatives" contemplated in Code, § 1433, as it stood before its amendment, were only such as were legally bound for the support of the insane person. A father is not legally bound to support his adult children, and therefore was not liable for the expenses of his adult children in the insane hospital: *Monroe County v. Teller*, 51-670.

10. Under this section as amended, a husband is not liable for the expense of treating an insane wife sent to the hospital by the commissioners of insanity. Such expense is not a family expense: *Delaware County v. McDonald*, 46-170.

11. The claim of the county against the estate of an insane person for expenses of his treatment becomes a lien from the commencement of the suit by the county to recover for the expenses of support, and collection is to be made, as in the case of any other claim, by action, judgment and execution. There is no lien until it is allowed by the court: *Thode v. Spofford*, 65-294.

12. Visiting committee to hospital: The visiting committee has no authority to punish witnesses for contempt in refusing to testify before it: *Brown v. Davidson* 59-461.

III. SUBJECT-MATTER OF INSTRUCTIONS.

a. *In general; misleading and erroneous; effect of error.*

b. *Stating the issues.*

IV. PERTINENCY TO ISSUES AND EVIDENCE.

a. *In general.*

b. *As to questions of fact.*

c. *As to the effect of written instruments, records, etc.*

d. *Construction; conflicting instructions.*

e. *Duty of jury to follow.*

f. *What objections may be raised or errors cured by instructions.*

In criminal cases, see CRIMINAL LAW, III, 10, e.

As to directing the verdict of the jury, see PRACTICE, III, f.

I. FORM OF AND METHOD OF GIVING.

1. **In writing:** Under the statutory provision (Code, § 2784) requiring instructions to be in writing, it is error to orally explain an instruction given, or to charge the jury verbally: *Head v. Langworthy*, 15-235.

2. Where the jury sent questions to the judge, in response to which he told them orally that their questions had nothing to do with the case, and that it was their duty to determine the case under the evidence and instructions given, *held*, that such action was not erroneous, it not being an instruction to the jury, but a refusal to instruct: *Sullivan v. Collins*, 18-228.

3. It is not error in the court, after reading to the jury instructions asked by one of the parties, to state orally that such instructions are given at the request of such party: *Scott v. Chicago, M. & St. P. R. Co.*, 68-360.

4. A direction to the jury to find a verdict for one party, when such direction is proper, need not be in writing: *Milne v. Walker*, 59-186.

5. Instructions asked, written in pencil, cannot be refused as not being in writing, as required by the statute: *Harvey v. Tama County*, 53-228.

6. The rule requiring instructions to be in writing is sufficiently complied with by presenting them in print: *State v. Fooks*, 65-196.

7. Where instructions were given orally

INSTRUCTIONS.

I. FORM OF AND METHOD OF GIVING.

II. DUTY TO INSTRUCT; REFUSAL OF INSTRUCTIONS; MODIFICATION.

Form of and method of giving.

and afterwards reduced to writing, with the acquiescence of defendant, *held*, that it was not ground for reversal on defendant's appeal: *State v. Sipult*, 17-575.

8. If a party sits by with the knowledge that the statute requiring instructions to be in writing is not being complied with, and without excepting to the oral charge, he cannot afterwards be allowed to complain: *Head v. Langworthy*, 15-235.

9. Modification of instructions asked may be made by cutting off a part of the sheet on which the instruction is written, notwithstanding the particular provisions of Code, § 2785, as to the method of making modifications: *Ham v. Wisconsin, I. & N. R. Co.*, 61-716.

Further as to modifications, see *infra*, §§ 70-76.

10. Giving instructions to jury without reading: A party who, without objection, permits instructions to be handed to the jury as given, without being read, cannot after verdict object to the action of the court in so doing: *Langworthy v. Meyers*, 4-18; *Talty v. Lusk*, 4-469.

11. When to be asked: Instructions which are submitted during the opening and only argument made at the trial cannot be refused as being presented too late: *McCaleb v. Smith*, 22-242.

12. Marking as "given" or as "refused:" Where several instructions were asked, written on sheets of paper fastened at the top, and on the margin of the first sheet the court wrote, "instructions one to seven, all refused," *held*, that this was a substantial compliance with the statute (Code, §, 2786) requiring the court to write "given" or "refused" in the margin of each instruction, and was a refusal such that exception might be taken thereto: *Harvey v. Tama County*, 53-228.

13. Unless it is stated on the margin or elsewhere that an instruction complained of was "given," it will not be regarded as properly before the court on appeal. The recital in the clerk's transcript that an instruction was given is not sufficient: *Cadwallader v. Blair*, 18-420.

14. Noting exceptions: Where the fact of giving or refusing to give instructions and exceptions thereto is entered in the margin

in the handwriting of the judge, and the giving of such instructions is afterwards made a ground for sustaining a motion for new trial, it will be presumed that such entry was made at the time the instructions were passed upon: *Kellow v. Central Iowa R. Co.*, 68-470.

15. If the ruling of the court upon an instruction with a proper exception thereto is noted on the margin of the instruction, it is sufficient, and a formal bill of exceptions is not necessary, although proper: *Cadwallader v. Blair*, 18-420; *Phillips v. Starr*, 26-349.

16. Instructions in a criminal case, not made part of the record by being signed as required in such cases or embodied in a bill of exceptions, are not to be considered on appeal: *State v. Gebhardt*, 18-473; *State v. Watrous*, 18-489.

17. Error in the giving of instructions may be made the ground of a motion for a new trial, whether exceptions were taken to the instructions at the time they were given or not. (So *held* under the provisions of Code of '51, different from those of the present Code): *Farr v. Fuller*, 8-347.

Further, see EXCEPTIONS, §§ 28-57.

18. How made part of the record: Before the enactment of the statutory provision that the instructions shall become a part of the record, it was *held* that they were not so by law, and unless embodied in the record by bill of exceptions could not be considered on appeal: *Pierce v. Locke*, 11-454.

Further, see EXCEPTIONS, §§ 86-91.

Appeal: As to what must appear to enable the supreme court to review alleged errors in giving or refusing instructions, see APPEALS, §§ 259-271.

As to the presumptions entertained in behalf of the lower court with regard to instructions, see APPEALS, §§ 323-331.

As to error without prejudice in giving instructions, see APPEALS, §§ 431-453.

19. Additional instructions: If further instructions are to be given to the jury after they have retired, they must be given in open court, that an opportunity may be offered to know what they are and except to them, if desired, and to ask others if deemed necessary: *O'Connor v. Guthrie*, 11-80.

20. Additional instructions should not be

Duty to instruct; refusal; modification.

given without notice to counsel of the parties: *Davis v. Fish*, 1 G. Gr., 406.

As to additional instructions in criminal cases, see CRIMINAL LAW, §§ 1219-1221.

Directing verdict: See PRACTICE, III, f.

21. **Special interrogatories:** It is proper and not uncommon, in the submission of special interrogatories, to instruct the jury as to the mode and manner of answering each one, according as they find the facts to exist: *State v. Geddis*, 42-264.

Further as to special interrogatories, see PRACTICE, III, d.

II. DUTY TO INSTRUCT; REFUSAL; MODIFICATION.

22. A justice of the peace has no authority to give instructions to a jury in his court: *St. Joseph Mfg. Co. v. Harrington*, 53-380.

23. **Duty to instruct:** It is the duty of the judge to see that every case is so presented to the jury that they have clear and intelligent notions of what they are to decide, and necessary instructions should therefore be given, although not requested by counsel, and a failure to give such instructions may be ground for new trial, when the verdict does not effectuate justice between the parties: *Owen v. Owen*, 23-270.

24. If the instructions asked by counsel are defective and insufficient, and the case is complicated, or the law applicable to it not supposed to be within the knowledge of jurymen, and, particularly, if the charge is of a high criminal offense, it is the duty of the court to point out to the jury controverted questions of fact, and state the law applicable to them, and a failure to do so will be error: *State v. Brainard*, 25-372.

25. Where, in a criminal prosecution, the court gave full instructions as to the theory of the case relied on by the prosecution, but omitted to give instructions upon an essential part of the case upon the theory upon which defendant relied, *held*, that the judgment should be reversed: *State v. O'Hagan*, 38-504.

26. Where instructions, although correct as far as they go, do not announce such rule as is necessary for the guidance of the jury, the giving of them will amount to error: *Durant v. Fish*, 40-559.

27. The fact that an instruction directs the attention of the jury to certain things proper to be considered, as well as to the facts and circumstances surrounding the case, will not constitute error merely because it omits to direct their attention to other facts which might be proper for them to consider: *Allender v. Chicago, R. I. & P. R. Co.*, 43-276.

28. The reasons for the rules of law contained in instructions to the jury need not be stated: *State v. Turner*, 19-144; *State v. Rorabacher*, 19-154.

29. **Instructions should be asked:** It is not incumbent on the court, on its own motion, to instruct as to a matter upon which an instruction is not requested by the party desiring it: *Smith v. Chicago, M. & St. P. R. Co.*, 60-512.

30. Where it does not appear but that substantial justice has been effected, and further instructions have not been asked, the case should not be reversed for failure of the court to more fully instruct the jury: *Hubbell v. Ream*, 31-239.

31. If instructions given do not embrace the law applicable to the case, it is the duty of the party desiring a fuller or broader instruction to ask it, and if he fails to do so, he cannot object to an instruction which is given and is correct as far as it goes: *Gwinn v. Crawford*, 42-63.

32. Mere failure to instruct may be reversible error if it appears that defendant has not had a fair trial. But where instructions are correct as far as they go, defendant cannot be heard to complain of failure to instruct as to matters as to which no instructions have been asked: *State v. Helvin*, 65-289.

33. Failure to state the law upon a particular point will not avail defendant if he has not asked instructions on such point: *State v. Tweedy*, 11-350; *State ex rel. v. O'Day*, 69-368.

34. A party cannot object on the ground of failure of the court to fully instruct the jury unless he has asked proper instructions on the point on which he claims the charge to be defective: *Ault v. Sloan*, 4-506.

35. Failure of the court to instruct as to other points upon which no instructions were asked will not be error where the instructions given are correct as far as they go: *Mackie*

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v. *Central R. of Iowa*, 54-540; *Hall v. Stewart*, 58-681.

36. Where an instruction is correct as far as it goes, it will not generally be considered erroneous for not stating additional rules applicable to the same point, unless the opposite party asks an instruction for the purpose of supplementing it: *Gwynn v. Duffield*, 66-708.

37. Objection that instructions are not more specific cannot be urged by a party who failed to ask more specific instructions: *Dixon v. Stewart*, 38-125; *Harrison v. Iowa Midland R. Co.*, 36-823; *Koehler v. Wilson*, 40-183.

38. If a party desires to have a question specifically presented to the attention of the jury, he should ask an instruction upon it: *State v. Hazen*, 39-648; *McCausland v. Cresap*, 3 G. Gr., 161.

39. Where an instruction contains affirmative error, appellant will not be debarred from complaining thereof, because he fails to ask an instruction which would have contravened the one given and expressed the correct rule: *State v. Pennell*, 56-29.

40. Refusal of irrelevant instructions: It is not error to refuse instructions which are irrelevant to the issue: *Ford v. Jefferson County*, 4 G. Gr., 273.

41. Instructions may be refused which, while correct, are not essential to enable the jury to understand the questions involved: *Hale v. Philbrick*, 47-217.

42. Refusal to modify: Although the court may in its discretion modify instructions asked and give them as modified, yet it is not under obligation to so correct or limit them. It may refuse them entirely and leave the party proposing them to assume the hazard of their entire correctness: *Tifield v. Adams*, 2-487; *Keenan v. Missouri State Mut. Ins. Co.*, 12-126.

43. It is not error to refuse an instruction which could not be properly given without modification: *Grimes v. Martin*, 10-347; *Morrison v. Myers*, 11-538.

44. Refusal as to facts in detail: The court may properly refuse instructions which merely call the attention of the jury to particular facts and circumstances testified to by the witnesses in the case which are proper for their consideration. It might be impractical to instruct as to all the facts in detail:

Kline v. Kansas City, St. J. & C. P. R. Co., 50-656; *State v. Miller*, 65-60.

45. The jury having been instructed that plaintiff could not recover, unless they found the existence of the contract relied on by him, *held*, that it was unnecessary to further instruct that plaintiff could recover upon proof of other matters: *Poole v. Hintrager*, 60-180.

46. Refusal of proper instructions error: The court shall give instructions asked, if they are correct and there is any basis for them in the testimony: *State v. Gibbons*, 10-117.

47. Where letters were put in evidence to prove an admission and also to be used by way of comparison to prove the genuineness of a signature, *held*, that it was error to refuse to instruct the jury that they might make such comparison: *Saunders v. Howard*, 51-517.

48. The refusal of the court to give instructions correct in law and supported by the evidence and not covered by instructions given constitutes reversible error: *Prichard v. Hopkins*, 52-120; *Spaulding v. Adams*, 63-437.

49. It is not sufficient that the jury might have considered evidence referred to without an instruction. If it is proper for the jury to consider matters referred to in the instruction, it is proper for the court to so instruct them: *Spaulding v. Adams*, 63-437.

50. An instruction simply calling the attention of the jury to certain matters which the evidence tends to establish, informing them that they should consider such circumstances, should be given if requested and correct in law: *Ibid*.

51. Instructions cannot be refused on the ground of being unnecessarily lengthy and numerous: *McCaleb v. Smith*, 22-242.

52. The refusal of an instruction calling attention to the effect of impeaching evidence upon the credibility of any particular witness, *held* not error where a general instruction on that question was given: *State v. Curran*, 51-112.

53. Also *held* not error to refuse an instruction cautioning the jury not to put a strained construction upon the testimony of the prosecuting witness: *Ibid*.

54. Refusal of instructions otherwise given: It is not error to refuse instructions

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asked where the subject is properly covered by instructions given by the court: *Rusch v. Davenport*, 6-448; *State v. Castello*, 62-404.

55. The court is not bound to repeat the instructions previously given: *Trustees of Iowa College v. Hill*, 12-462.

56. It will not constitute error to refuse instructions when others given by the court cover precisely and fully the same ground: *Harper v. Madren*, 21-407.

57. It is not error to refuse instructions which are correct if others to the same effect have been given: *Clinton Nat. Bank v. Torry*, 30-85; *Todd v. Branner*, 30-439; *Hopper v. Moore*, 42-563.

58. It is not error to refuse instructions which though correct are substantially covered by instructions given by the court: *Price v. Alexander*, 2 G. Gr., 427; *Raver v. Webster*, 3-502; *Rusch v. Davenport*, 6-448; *Mills v. Mabon*, 9-484; *Payne v. Billingham*, 10-360; *State v. Hookenberry*, 11-269; *Rindskoff v. Barrett*, 14-101; *Russ v. Steamboat War Eagle*, 14-868; *State v. Rorabacher*, 19-154; *State v. Schlagel*, 19-169; *Harper v. Madren*, 21-407; *Robinson v. Illinois Cent. R. Co.*, 30-401; *Wilhelm v. Fimple*, 31-181; *Maxwell v. Gibbs*, 32-32; *State v. Morphy*, 33-270; *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50-636; *Thomas v. Brooklyn*, 58-438; *Thompson v. Keokuk*, 61-187; *Votaw v. Diehl*, 62-676; *Gee v. Moss*, 68-318.

59. When the law of the case has once been stated to the jury, all further instructions should be refused: *Wilson Sewing Machine Co. v. Bull*, 52-554.

60. It is not error to refuse an instruction substantially given in another form which is as beneficial to the party as if given in the form asked by his counsel: *State v. Stanley*, 39-526.

61. Where by agreement of the parties instructions given by the court were to be decisive of the case, *held*, that the refusal to give every instruction asked by one of the parties could not be construed as error: *Parsons v. Hedges*, 15-119.

62. It is not error to refuse one instruction and give another in its place which differs from the former merely in words and not in essential meaning: *Galpin v. Wilson*, 40-90.

63. It is not error to refuse instructions embodying propositions which are all forcibly

and favorably presented in instructions given: *State v. Donneker*, 40-340.

64. It is not error to refuse an instruction which presents a doctrine that has been fairly stated in another instruction: *Allen v. Burlington, C. R. & N. R. Co.*, 57-623.

65. Where the instructions given fairly submit the merits of the controversy to the jury, the refusal to give others substantially covered by those given will not constitute error: *Van Winter v. Henry County*, 61-684.

66. Where one instruction states to the jury the rule as to an element of the case, it is not necessary to repeat the same rule in connection with other instructions: *State v. Heatherton*, 60-175.

67. **Particular instructions:** Each party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no ground for error or mistake, and it is error to refuse an instruction correct in law and applicable to the evidence which instructs as to a particular state of facts, although the general proposition is covered by other instructions: *Muldouney v. Illinois Cent. R. Co.*, 32-176; *Perry v. Dubuque Southwestern R. Co.*, 36-102; *Manuel v. Chicago, R. I. & P. R. Co.*, 56-655; *Parkhill v. Brighton*, 61-103.

68. It is error to refuse an instruction directly applicable to facts of which there is evidence before the jury, although the principles of law to which such facts relate are properly stated in the instructions given: *Muldouney v. Illinois Cent. R. Co.*, 39-615.

69. It is error to refuse correct instructions which are relevant, even though the same instructions are given in a different form: *Webster v. Raver*, 4 G. Gr., 426.

70. **Modifications of instructions** asked should not be by interlineation or erasure: *Phillips v. Starr*, 26-349.

71. In giving instructions the court is not limited to the language adopted by the party requesting them, but may modify them to meet its views; but if, as so modified, they do not express the law, they are subject to objection: *State v. Gibbons*, 10-117; *Abbott v. Striblen*, 6-191.

72. It will not constitute error to add to an instruction a modification which does not change its meaning: *Moore v. Chicago, B. & Q. R. Co.*, 65-505.

Subject-matter of.— In general.

73. Held not error to modify an instruction so as to make it as broad as the issues between the parties: *Large v. Moore*, 17-258.

74. Modifications will not be erroneous which are merely words of explanation expressing that which must have been understood had they not been added: *Paukett v. Livermore*, 5-277.

75. Where an instruction asked by a party is modified by the court with matter not pertinent thereto, or erroneous if pertinent, it will constitute error: *State v. Green*, 20-424.

76. A modification of an instruction by cutting out a portion of it, held not to constitute error where the change was a proper one: *Ham v. Wisconsin, I. & N. R. Co.*, 61-716.

III. SUBJECT-MATTER OF INSTRUCTIONS.

a. In general; misleading and erroneous; effect of error.

77. The charge in general: It is better as a general rule for the judge to put aside the instructions asked and cover the whole ground in a methodical charge of his own: *State v. Collins*, 20-85.

78. Where numerous and conflicting instructions are asked by the opposite parties they should be subjected to the mental alembic of the judge and materially reduced and purified and moulded to the facts of the case: *Murphy v. Chicago, R. I. & P. R. Co.*, 88-589.

79. It is not good practice for the court to charge the jury in chief and then give all the instructions asked by either party. A clear and distinct enunciation of the law should be given: *Wilson Sewing Machine Co. v. Bull*, 52-554.

80. Ordinarily where the whole law of the case is given to the jury, although at the instance of the different parties, the supreme court will not interfere, but the instructions must be consistent as a whole, and not misleading: *Hoben v. Burlington & M. R. R. Co.*, 20-562.

81. Instructions to the jury which partake of the nature of an argument are to be discouraged, and courts should labor to give such only as present the issues in a clear,

single, plain and unincumbered manner: *State v. Turner*, 19-144.

82. While it is not good practice to ask instructions which are simply intended to constitute a reply to the argument of counsel on the other side, and such instructions can usually be properly refused, yet where the argument of counsel contained statements not warranted by the evidence, held, that it was error to refuse an instruction which was intended to correct any misapprehension growing out of such improper argument: *State v. McCartney*, 65-522.

83. Foreign terms: The use of the word *onus* in an instruction held not objectionable; for, though a Latin word, it is incorporated into our language: *In re Will of Convey*, 52-197.

84. Should be clear and consistent: Instructions should be brief and perspicuous; and where they are confused or in conflict, to the probable prejudice of the complaining party, a new trial should be granted: *Eyser v. Weissgerber*, 2-463; *Hoben v. Burlington, & M. R. R. Co.*, 20-562.

85. The whole charge, as given, should be consistent, and so framed as not only to state the law correctly, but in such manner as not to confuse the jury: *Hoben v. Burlington & M. R. R. Co.*, 20-562.

86. Abstract propositions: Instructions should clearly present the rules applicable to the peculiar facts of the case rather than general and abstract propositions of law, the bearing and force of which will not be fully understood and correctly applied by the jury: *State v. Glynden*, 51-463.

87. The giving or refusal of an instruction upon a mere abstract proposition of law, not referring in any way to the evidence, is not sufficient to warrant a reversal, unless it may be fairly inferred that the jury was thereby misled to the prejudice of the party complaining: *McGregor v. Armill*, 2-30.

88. While the giving of instructions containing abstract propositions of law not applicable to the evidence will not in itself constitute prejudicial error, yet, if the jury are thereby left without any other guide in applying the evidence to the case, that fact may in itself constitute error warranting a reversal: *State v. Thompson*, 45-414.

89. It may also be error to give instructions

Misleading and erroneous.

embodying abstract propositions of law which are correct in themselves, but are not applicable to the evidence, where such instructions have a tendency to make an erroneous impression upon the jury and mislead them: *Moffitt v. Cressler*, 8-122; *Van Tuyl v. Quinton*, 45-459; *Williamson v. Reddish*, 45-550.

90. **Contradictory:** It is error sufficient to warrant a reversal that instructions lay down two contradictory rules for the guidance of the jury, if it appears that they may have adopted the erroneous instead of the correct one: *State v. Hartzell*, 58-520.

91. Conflict in the instructions is a ground for reversal on appeal: *Moore v. Des Moines & Ft. D. R. Co.*, 69-491.

92. **Misleading:** An instruction embracing a correct legal principle may be misleading as applied to the particular facts of the case, and therefore erroneous: *State v. Benham*, 28-154.

93. An instruction embracing a correct legal principle, but couched in such language as to be likely to mislead the jury, may properly be refused: *Perry v. Dubuque Southwestern R. Co.*, 36-102.

94. Where the instructions are such that the jury have been probably misled and confused by the language used, a new trial should be granted, even though the law may have been correctly stated in some of the instructions: *Preston v. Dubuque & P. R. Co.*, 11-15.

95. In a particular case, *held*, that an instruction referring to a matter which, owing to the circumstances of the case, was not proper for the jury to consider, was misleading; and therefore erroneous: *Dolan v. Jean*, 35-413.

96. Where an instruction is misleading by reason of being susceptible of an erroneous construction, although technically correct, it may be a ground for reversal: *McCracken v. Webb*, 86-551.

97. An instruction which is inapplicable to the testimony, and has a tendency to mislead the jury, will constitute error: *Aultman v. Lee*, 43-404.

98. Giving an instruction so framed that it might have misled the jury as to the amount of proof necessary on the part of defendant, *held* sufficient error to war-

rant a reversal: *Williamson v. Reddish*, 45-550.

99. An instruction collecting together various things which, if true, would exonerate defendant from liability, *held* to be misleading in that it tended to lead the jury to believe that all such circumstances must concur to exonerate defendant, whereas a portion of them only were sufficient, as a matter of law, for that purpose: *Van Tuyl v. Quinton*, 45-459.

100. An instruction directing the jury that if they find a certain fact to be true to return a verdict for plaintiff, when the right of recovery depends upon other facts in connection with the fact thus mentioned, is misleading: *McKern v. Albia*, 69-447.

101. An instruction directing the jury as to the effect of a particular fact, which fact is in itself not essential as to the rights of either party, is misleading: *Campbell v. Wheeler*, 69-588.

102. An instruction to the effect that a bill of sale was invalid unless possession of the property passed thereunder, *held* misleading, as no explanation was made as to the effect of notice to other persons of the transaction: *Tiffany v. Anderson*, 55-405.

103. Where an instruction was such that it authorized the jury, if they found a certain fact, to consider it only in mitigation and allow some damage, when the fact itself was such as to entirely preclude plaintiff's recovery, *held* error sufficient to require a reversal: *Guptill v. Verbach*, 58-98.

104. A particular instruction excluding from the jury any statements of counsel as to the issues on a former trial, *held* not erroneous as tending to exclude the pleadings on the former trial: *Wormley v. Hamburg*, 46-144.

105. An instruction to the jury that if they believed plaintiff had testified falsely to any material fact, they would be authorized to reject all his testimony unless corroborated by other credible evidence, *held* not misleading: *Brown v. Chicago, R. I. & P. R. Co.*, 51-235.

106. A mere mistake of the court in directing the jury that, if their verdict was for plaintiff, the form should be "that the jury find for the defendants," etc., *held* not such error as likely to mislead the jury: *Eldredge v. Bell*, 64-125.

Effect of error.—Stating the issues.

107. The fact that the court in stating the issues to the jury confounds the action of trespass with trespass on the case, is not such an error as can be made a ground for reversal: *Brown v. Hendrickson*, 89-749.

108. Not prejudicial: An instruction which as to an abstract proposition may not be correct may yet be, as applied to the facts of the case, without prejudice: *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 56-440.

109. An instruction which might be erroneous as a general proposition, but is not misleading under the evidence, will not be ground for a reversal: *Ross v. Davenport*, 66-548.

Further as to error without prejudice in the giving of instructions, see APPEALS, §§ 481-453.

110. Error of which party cannot complain: A party cannot complain of the giving of instructions which are of the same purport, though not identical with those asked by himself: *Smith v. Sioux City & P. R. Co.*, 88-173.

111. Where an instruction given is erroneous on a particular point, but as to that point the instructions asked by the party complaining contain the same error, the party cannot take advantage of such error in the instruction given: *Weller v. Hawes*, 49-45; *Campbell v. Ormsby*, 65-518.

112. Where instructions follow the theory of the case as set forth in the petition, plaintiff cannot complain of error in the instructions as to the basis of recovery: *Briscoe v. Reynolds*, 51-873.

113. General directions to jury: A statement by the judge to the jury, that a case having been twice tried, it was important that they should agree if they could satisfy their minds as to the right of the case, held not improper: *Niles v. Sprague*, 13-198.

114. It is not error to caution the jury, after they have been out for some time without agreement, that each juror should lay aside pride of opinion and examine their differences in a spirit of fairness and candor, and state to them that a new trial would involve large expense: *Frandsen v. Chicago, R. I. & P. R. Co.*, 86-872.

115. The court may properly instruct upon a point not suggested by counsel for either party, and intimate to counsel his intention

of instructing on such point, and his desire to have the point discussed, even though thereby he discloses to the counsel of one party an error which such counsel might have overlooked, and which would have been fatal to his case: *Hinkle v. Davenport*, 88-855.

b. Stating the issues.

116. By the court: It is the province of the court, and not that of the jury, to determine the nature of the action, or what issues are made by the pleadings: *McKinney v. Hartman*, 4-154; *Beebe v. Stutsman*, 5-271; *Potter v. Wooster*, 10-384; *Reid v. Mason*, 14-541; *Pharo v. Johnson*, 15-560; *Hempstead v. Des Moines*, 52-303.

117. Duty to state the issues: In a proper and necessary case the court is to inform the jury specifically as to the issues involved and not leave it to them to determine such issues; but when the necessity for such a case does not exist, no such direction can be asked as a matter of right: *Fannon v. Robinson*, 10-272.

118. It is the province and duty of the court to determine what are the issues in the pleadings, and this cannot be left to the jury: *West v. Moody*, 33-137.

119. It is the duty of the court to instruct as to the issues, and state directly and plainly the claims made by the parties: *Little v. McGuire*, 43-447.

120. The court should make a full statement of the issues to the jury: *Hollis v. State Ins. Co.*, 65-454.

121. Failure of the court to state fully to the jury the material issues made by the pleadings will constitute error: *Potter v. Chicago, R. I. & P. R. Co.*, 46-399.

122. The fact that an issue is ignored in the instructions given to the jury will constitute reversible error: *Hill v. Aultmann*, 68-630.

123. In a particular case, held, that there was no prejudicial error in referring in an instruction to the matter charged in the petition, without specifying also an amendment to the petition: *Fuhs v. Osweller*, 59-431.

124. Instructions in a particular case, held sufficiently to present to the jury the issues before them, although the fact that defend-

Stating the issues.—Pertinency to issues and evidence.

ant denied the averment of plaintiff's petition was not stated in express terms: *Gunsel v. McDonnell*, 67-521.

125. Error in stating: When the court, in stating the issues to the jury, stated that the amount claimed by plaintiff was a certain amount, basing the statement upon the petition and the amended petition, whereas the amount stated in the amended petition was inclusive and not additional to that stated in the original petition, *held*, that such statement constituted error, but whether, under the particular circumstances, it was error without prejudice was not determined: *Staford v. Oskaloosa*, 57-748.

126. Where the petition charged negligence on the part of an engineer in backing up his train too fast, and an instruction stating such cause of complaint referred to this allegation as being that "the party in charge of the engine moved the train at an unusually fast rate of speed," *held*, that the instruction was not erroneous in not properly stating the plaintiff's cause of action: *Beems v. Chicago, R. I. & P. R. Co.*, 58-150.

127. Matters not in issue: It is not error in the court to fail to state to the jury the effect of impeaching evidence as to the credibility of a witness where no instruction on that question is asked. The impeachment of a witness does not constitute a defense, but merely relates to the credibility to be given to the testimony, and the failure to instruct as to the effect of an effort to impeach does not constitute a failure to state the issues in the case: *State v. Kirkpatrick*, 63-554.

128. Matters of dispute arising upon the law or the evidence are not issues which the court ought specifically to present to the jury: *State v. Nadal*, 69-478.

129. Failure to give an instruction with reference to immaterial questions on matters which, though pleaded by way of defense, do not constitute a defense in law, will not be deemed prejudicial to the party seeking to raise the immaterial question or plead the incompetent matter: *Tuck v. Singer Mfg. Co.*, 67-576.

130. An instruction suggesting an issue not raised by the pleadings is erroneous: *Benton v. Chicago, R. I. & P. R. Co.*, 55-496.

131. Issues not supported by evidence: Failure to state to the jury an issue raised by

the pleadings will not constitute error where there was no evidence for the party introduced upon such issue: *Van Vechten v. Smith*, 59-173.

132. It is not necessary for the court to state to the jury an issue involving matters as to which there is no conflict in the evidence: *Kimball v. Monarch Ins. Co.*, 70—.

133. Not sufficiently specific: If the issues are stated in the instructions, a failure to state them more specifically will not be reversible error where more specific instructions are not asked by the opposite party: *Dixon v. Stewart*, 88-125.

134. Issues withdrawn: Where the court declines to submit an issue to the jury upon which evidence has been introduced, the evidence bearing on that issue should be taken from the jury, and it is error in such case to instruct them that the facts concerning that matter may properly be considered in determining the issues that are submitted: *Hammer v. Chicago, R. I. & P. R. Co.*, 70—.

135. Reference to pleadings: It is improper to direct the jury to the pleadings for the purpose of ascertaining what the issues are: *Fitzgerald v. McCarty*, 55-702; *Porter v. Knight*, 63-365; *Bryan v. Chicago, R. I. & P. R. Co.*, 63-484; *Hollis v. State Ins. Co.*, 65-454; *Lindsay v. Des Moines*, 68-368.

136. It is not error to refer the jury to the pleading to ascertain the narrative of the facts therein contained: *Marion v. Chicago, R. I. & P. R. Co.*, 64-568.

137. It is not improper to refer the jury to the petition and the amendment thereto for a fuller statement of the several items of the plaintiff's claim for damages: *Lanning v. Chicago, B. & Q. R. Co.*, 68-502.

IV. PERTINENCY TO ISSUES AND EVIDENCE.

a. In general.

138. Must be pertinent to issues in pleadings: It is error to submit to the jury a question not presented by the pleadings: *Stein v. Seaton*, 51-18; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67-150.

139. An instruction to the jury as to liability for a cause of injury not alleged in the petition is ground for a reversal: *Cressy v. Postville*, 59-63.

Pertinency to issues and evidence.— In general.

140. Instructions should not be given upon a matter which is not in issue: *Troughear v. Lower Vein Coal Co.*, 62-576.

141. It is error to give an instruction containing a correct legal proposition which is not applicable to any issue involved in the case: *Deppe v. Chicago, R. I. & P. R. Co.*, 36-52; *Roberts v. Richardson*, 39-290; *Sioux City & P. R. Co. v. Walker*, 49-273; *Wood v. Chicago, M. & St. P. R. Co.*, 68-491.

142. Where evidence is admitted without objection upon an issue not raised by the pleadings, the court may properly instruct the jury as to the effect of such evidence. The objection that no such issue is raised in the pleadings comes too late: *Collins v. Collins*, 46-60.

143. The objection that instructions given pertain to an issue not in the case cannot be considered, if the party objecting has asked instructions upon that issue: *Eahn v. Miller*, 60-96.

144. Refusal of instructions not pertinent: An instruction not pertinent to the pleadings or evidence should be refused although containing correct propositions of law: *Cutter v. Fanning*, 2-580; *Gover v. Dill*, 3-337; *Conger v. Dean*, 8-463; *Oliver v. Depew*, 14-490; *Packer v. Cockayne*, 3 G. Gr., 111; *State v. Gibbons*, 10-117.

145. Instructions not supported by evidence: It is error to give an instruction on a state of facts not proven, even though the instruction is correct as an abstract proposition of law, if the giving of such instructions may tend to mislead the jury: *Moffitt v. Cressler*, 8-122; *Farr v. Fuller*, 8-347.

146. Where an instruction is based upon a theory wholly unsupported by the evidence and calculated to mislead the jury, the giving thereof will constitute error: *Mundhenk v. Central Iowa R. Co.*, 57-718; *Murphy v. Chicago, R. I. & P. R. Co.*, 38-539.

147. An instruction which though correct is not adapted to the facts of the case upon any hypothesis which the evidence tends to establish should not be given, especially when the jury is properly instructed otherwise: *Tisdale v. Connecticut Mut. L. Ins. Co.*, 28-12.

148. Refusal of an instruction as to a state of facts finding no support in the evidence will not constitute error, though the instruc-

tion be abstractly correct: *Messer v. Reginitter*, 32-312; *Cross v. Garrett*, 35-480.

149. An instruction should be refused where there is no evidence to which it is applicable: *State v. Corrette*, 12-358; *Cobb v. Illinois Cent. R. Co.*, 38-601.

150. A court cannot be required to give an instruction containing an abstract proposition which is correct in itself, but which is not legitimately connected with the evidence in the case: *Tryon v. Oxley*, 3 G. Gr., 289; *Hall v. Hunter*, 4 G. Gr., 539; *Trustees of Iowa College v. Hill*, 12-482.

151. An instruction correct in law, but based upon a state of facts as to which there is no evidence, should not be given: *McCraimer v. Thompson*, 21-244; *First Nat. Bank v. Hurford*, 29-579; *Byington v. McCadden*, 34-216; *Case v. Illinois Cent. R. Co.*, 38-581; *Murphy v. Chicago, R. I. & P. R. Co.*, 38-539; *Leffingwell v. Gilchrist*, 40-416; *Howell v. Price*, 40-548; *State v. Fraunburg*, 40-555; *O'Laughlin v. Dubuque*, 42-539; *Henderson v. Chicago, R. I. & P. R. Co.*, 43-620; *State v. Osborne*, 45-425; *Clark v. Ralls*, 58-201; *Hess v. Wilcox*, 58-380; *Hall v. Wolff*, 61-559; *Snyder v. Kurtz*, 61-593; *Johnson v. Miller*, 63-529; *State v. Archer*, 69-420.

152. It is error to submit a material question of fact to the jury upon which there is no evidence, even though the rule of law as to such question of fact be properly stated: *Bank of Monroe v. Anderson Bros. Mining & R. Co.*, 65-692; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67-150; *White v. Spangler*, 68-222; *State v. Myer*, 69-148; *Johnson v. Miller*, 69-562.

153. Error in giving an instruction which states a correct proposition of law, but is not founded upon anything appearing in the evidence, will not be considered to be without prejudice, where all of the instructions given are of that character, and fail to show their applicability to the case or the evidence before the jury: *State v. Thompson*, 45-414.

154. An instruction cannot be held erroneously refused when there is nothing in the record to indicate what testimony was before the jury, as the refusal may have been justified on the ground of inapplicability: *Little v. Martin*, 28-558.

155. It is error to direct the attention of the jury to matters as to which there is no

Pertinency in general.—As to questions of fact.

evidence before them: *Allender v. Chicago, R. I. & P. R. Co.*, 37-264.

156. The jury cannot be required to pass upon the effect of a fact as to which there is no evidence: *Stier v. Oskaloosa*, 41-353.

157. It is error to give an instruction based upon facts as to which there is no evidence, assuming to the jury thereby that there is such evidence, the sufficiency of which is left for them to pass upon: *Moorehead v. Hyde*, 88-882.

158. An instruction assuming that the jury may find a fact as to which there is no evidence whatever is erroneous: *Hand v. Langland*, 67-185.

159. An instruction directing the jury that they may allow damages as to which there is no evidence is erroneous: *Reed v. Chicago, R. I. & P. R. Co.*, 57-23.

160. Where there is no evidence whatever tending to show the amount of a particular item of damage, it is error to authorize the jury to allow damages for such item. So held as to expenses incurred for medical treatment in case of personal injury: *Staford v. Oskaloosa*, 57-748.

161. Held, that it was error to instruct the jury that they might allow for loss of time and expenses of medicine and nursing in an action for personal injuries, where there was no allegation in the pleadings as to loss of time and no evidence of expense: *Gardner v. Burlington, C. R. & N. R. Co.*, 68-588.

162. It is improper to leave to the jury the determination of damages, based upon the employment of counsel, where there is no evidence as to the amount of counsel fees: *Parkhurst v. Masteller*, 57-474.

163. When there is some evidence upon the point, an instruction which is applicable to that point and correct in law should be given without regard to the weight of such evidence: *De Camp v. Mississippi & M. R. Co.*, 12-348.

164. The statement of an abstract proposition not inherently erroneous and not purporting to relate to the evidence will not require a reversal merely on the ground that there is no evidence to which it is applicable: *Kearney v. Fitzgerald*, 43-580.

165. An instruction embodying a correct presentation of the law, which may have been given to meet positions taken in argu-

ment, will not be ground for reversal, although not applicable to the evidence, if not of such nature as to mislead the jury: *Hall v. Stewart*, 58-681.

166. Where there is evidence introduced relating to a particular matter, the court will be justified in instructing the jury in regard to the law pertaining to such matter, even though the evidence is not such that the party introducing it could properly claim anything therefrom, if there appears to be any danger that the jury may be misled by such evidence: *Walker v. Camp*, 69-741.

167. A party who has asked instructions upon a particular point cannot afterwards complain of instructions given by the court upon that point, on the ground that there is no evidence whatever to support the instructions: *Spears v. Mt. Ayr*, 66-721.

b. As to questions of fact.

168. Matters of law and not of fact: The instructions must state rules of law only, leaving to the jury the decision of the facts and the application of the rules of law given them by the court: *Muldowney v. Illinois Cent. R. Co.*, 82-176.

169. The court cannot instruct the jury upon questions of fact: *Frederick v. Gaston*, 1 G. Gr., 401.

170. The sufficiency or insufficiency of testimony to establish a given fact or determine an issue cannot be passed upon by the court, but must be left to the jury: *Franks v. State*, 1 G. Gr., 541.

171. It is error to give an instruction which, though stating a correct proposition of law, assumes facts to be true which are in issue: *Luman v. Kerr's Adm'r*, 4 G. Gr., 159.

172. It is error to charge the jury as to the weight and sufficiency of the testimony: *Houston v. State*, 4 G. Gr., 437.

173. The court may explain to the jury the legal effect of facts, but the facts themselves must be determined exclusively by the jury: *Ibid*.

174. An instruction which assumes as true the very fact in controversy, and bases thereon the relative duties and liabilities of the parties, should be refused: *Russ v. Steamboat War Eagle*, 14-363.

175. It is error to assume a fact as proven

As to questions of fact.

which is properly for the determination of the jury: *State v. Jones*, 38-9.

176. An instruction based upon an assumption of fact is erroneous: *Walters v. Chicago, R. I. & P. R. Co.*, 41-71.

177. The court would not be justified in giving an instruction which assumes facts as true which are for the jury to determine: *Ruter v. Foy*, 46-132.

178. An instruction should not assume facts as not proven of which there is some evidence: *Napper v. Young*, 12-450.

179. It is error to assume as true in an instruction a fact which is in issue, and upon which the evidence is conflicting: *Case v. Burrows*, 52-146; *Bryan v. Brazil*, 52-350; *Bowersock v. Winers*, 60-84.

180. It is error to give an instruction based upon an assumption as to a fact which is in issue and upon which there is a conflict in the evidence, and such an instruction will be considered prejudicial: *Roach v. Parcell*, 61-98.

181. A fact should not be assumed to be true of which there is no proof: *Howes v. Carver*, 3-257.

182. However slight the effect of testimony, and however little the consideration to which it is entitled from a jury, still its weight is to be determined by them, and should not be determined beforehand by the court in an instruction: *Miller v. Mutual Benefit L. Ins. Co.*, 31-216.

183. Remarks made in the presence of the jury, based upon an assumption of the facts upon which it is the province of the jury to pass, and which would be erroneous if contained in an instruction, will entitle defendant to a new trial: *State v. Stowell*, 60-535.

184. An instruction that if the jury find the testimony of plaintiff to be the only positive evidence in support of material allegations, and that it is contradicted in all material points by an unimpeached witness, they must find for defendant, *held* error, as taking from the jury the province of weighing the entire evidence: *Delvee v. Boardman*, 20-446.

185. In an action for injuries from defendant's negligence in operating its railroad, where it appeared that the injured person was first seen at a point beyond the coal platform where it was claimed that he was

injured, but it did not appear whether he had been struck by the platform or not, *held*, that it was error to refer to such platform as that "by which deceased was injured:" *Perigo v. Chicago, R. I. & P. R. Co.*, 55-326.

186. In an action to recover for services rendered under implied contract, the court instructed that the acceptance of the services by defendant would render him liable, and directed the jury to apply this rule to the case; *held*, that the instruction was misleading in authorizing the jury to infer that the court regarded the defendant as liable under the rule, and that the jury should have been instructed that, if they found that defendant had accepted the services, he was liable: *Richardson v. Hoyt*, 60-68.

187. An instruction which contained the words "the other ingredients being proven," *held*, under a fair construction, not to be an assumption of the fact that the other ingredients had been established: *State v. Tarr*, 28-397.

188. The assumption in an instruction that a certain fact is conceded will not be presumed to be erroneous, it not appearing by the record but that such concession or admission was made in some proper manner: *Walsh v. Aetna L. Ins. Co.*, 30-133.

189. It is not error to base the charge on facts as to which all the witnesses agree, and there is no room for controversy: *Russ v. Steamboat War Eagle*, 14-363.

190. Where a fact is fully proven without conflict of evidence, it is not error to assume its existence in an instruction: *Hughes v. Monty*, 24-499; *State v. Meshek*, 61-316.

191. If a material fact is admitted or proved without conflict in the evidence, no prejudice can result from the court stating the fact as established, or that it should be regarded as established: *Wood v. Porter*, 56-161.

192. Where there is no controversy as to the facts, especially where the evidence is documentary, the court may direct the jury as to the application of such evidence to the law that must govern the case: *Thorp v. Craig*, 10-461.

193. Stating to the jury the law as applicable to a particular state of facts will not necessarily be erroneous, as an assumption

As to effect of written instruments, records, etc.

that such facts are proven: *State v. Zeibart*, 40-169.

194. Instructions with reference to certain facts which the evidence tends to prove, stating what the legal effect of such facts will be if found by the jury, may be proper: *Pritchett v. Overman*, 3 G. Gr., 581.

195. The grouping together in one instruction of legitimate facts which the evidence tends to prove, and charging that such facts constitute circumstantial evidence, is not necessarily erroneous: *State v. Carnahan*, 17-256.

196. It is proper for the court to announce to the jury rules sanctioned by reason and experience to enable them rightly to weigh the evidence submitted in the case. Thus the jury may be told that a writing is entitled to more weight than statements founded merely on memory; and that expert testimony is of the lowest order and most unsatisfactory character: *Whitaker v. Parker*, 42-585.

197. It is not improper for the court to advise the jury as to the character of the evidence introduced on the trial and the relative weight of different kinds of evidence: *Buford v. McGetchie*, 60-298.

As to instructions on questions of fact in criminal cases, see, further, CRIMINAL LAW, §§ 1196-1200.

c. *As to effect of written instruments, records, etc.*

198. The construction of a written instrument is for the court: *Lucas v. Snyder*, 2 G. Gr., 499; *Durham v. Daniels*, 2 G. Gr., 518; *Hendrick v. Kellogg*, 3 G. Gr., 215.

199. The court may charge the jury as to whether or not a writing introduced in evidence is a contract: *Eyser v. Weissgerber*, 2-463.

200. The question whether certain letters introduced in evidence constituted a contract is to be determined by the court: *Lea v. Henry*, 56-662.

201. Effect of written instrument: The legal effect of an instrument is to be determined by the court and not by the jury, and if such instrument is conclusive evidence of a fact, it is error to leave that fact to the jury for determination: *Chandler v. Keiler*, 44-871.

202. It is the duty of the court to construe a contract, and it is error to leave its construction to the jury: *Kilbourne v. Jennings*, 40-473; *Vaughn v. Smith*, 58-553.

203. Where the evidence is undisputed it is for the court to determine whether a written instrument has been duly executed or not so as to effect the purposes for which it was intended: *Snyder v. Kurtz*, 61-593.

204. Where a contract is in writing the court should interpret it and not submit to the jury the question of its meaning as dependent upon parol evidence which is not admissible for the purpose of varying it: *Daly v. W. W. Kimball Co.*, 67-132.

205. Where a question arises as to the construction of a written contract, it is for the court and not for the jury to construe it; but where the question in controversy is as to whether the contract has been lawfully performed, and that question depends upon extrinsic evidence, the weight and effect of the evidence is for the jury: *Fairbanks v. Jacobs*, 69-265.

206. Where the court is unable to determine the date of an instrument owing to the manner in which the figures are written, it may submit the question to the jury: *Partridge v. Patterson*, 6-514.

207. Where letters are plain in their language and require no interpretation, it is not necessary for the court to put a construction upon them, but they may be left to the jury as other evidence: *Avery v. Chapman*, 62-144.

208. Where the objects of an association were to be determined from the constitution and by-laws, held, that it was for the court to construe such instruments, and the question as to the purposes of the association should not have been submitted to the jury: *Johnson v. Miller*, 63-529.

209. Ordinances: The construction of an ordinance of a city should be made by the court and not left to the jury: *Ingram v. Chicago, D. & M. R. Co.*, 38-669.

210. Record of road: It is the province of the court to determine the sufficiency of the records to sustain a road, and an instruction may properly be given that the records and papers offered in evidence are sufficient proof of the establishment of a public highway: *State v. Prine*, 25-231.

Construction; conflicting instructions.

211. Title to real estate: The court may instruct the jury as to who holds title to real estate as shown by deeds introduced, or when the question of title is one of law upon the testimony: *State v. Delong*, 12-453.

212. Issues in former judgment: It is the province of the court and not the jury to determine what issues were involved in a case which is pleaded as a former adjudication: *Neumeister v. Dubuque*, 47-465.

213. Or where it is claimed that the issues in another case were identical with those in the pending action: *Hempstead v. Des Moines*, 52-303.

d. *Construction; conflicting instructions.*

214. All the instructions given should be read and construed together for the purpose of determining the correctness of any part of the charge: *Burrows v. Lehndorff*, 8-86, 104; *Brown v. Bridges*, 31-138; *State v. Maloy*, 44-104; *Locke v. Sioux City & P. R. Co.*, 46-109, 114; *State v. Stanley*, 48-221; *Albertson v. Keokuk & D. M. R. Co.*, 48-292; *State v. Golden*, 49-48; *Beazan v. Mason City*, 58-233; *Gronan v. Kukuck*, 59-18.

215. All instructions bearing upon the same branch of the case should be read and construed together: *Albertson v. Keokuk & D. M. R. Co.*, 48-292.

216. Where the court, in an instruction consisting of more than one paragraph, states the law applicable to a state of facts which the evidence tends to prove, the whole instruction must be considered together in determining its meaning: *Carter v. Monticello*, 68-178.

217. Circumstances of the case: Instructions must always be considered with reference to the circumstances of the case in which they are given: *State v. Johnson*, 8-525.

218. Not erroneous as qualified: Even though the instruction be abstractly erroneous or capable of misconception, yet if, when taken with the other instructions and in the connection in which it was given, it could not have been misunderstood, the giving of it will not constitute ground for reversal: *Ferguson v. Beadle*, 30-477.

219. Even though one clause of an instruc-

tion be apparently erroneous, yet if it is so clearly qualified by what follows that from the entire instruction the jury cannot have failed to receive a correct impression, the instruction will not be erroneous: *Dixon v. Stewart*, 33-125.

220. If, as a whole, the instructions contain a correct exposition of the law, the supreme court will not ordinarily interfere, even though, if separately considered, they might be objectionable. Where, however, they are so framed as to present a conflict or tend to mislead the jury, that fact will constitute error: *Brown v. Bridges*, 31-138.

221. Although an instruction, if standing alone, might be susceptible of an interpretation which would make it erroneous, yet if, when construed with other instructions, it cannot be reasonably understood in such erroneous sense, the giving of it will not be ground for reversal: *Parker v. Dubuque Southwestern R. Co.*, 34-399.

222. The charge of the court must be taken together, and if, when so considered, it fairly presents the law, and is not liable to misapprehension nor calculated to mislead, the judgment should not be reversed simply because some one of the instructions may lay down the law without sufficient qualification: *Rice v. Des Moines*, 40-638.

223. If, as a whole, the instructions contain a correct exposition of the law, the case will not be reversed, although, separately considered, they may be objectionable: *Green v. Cochran*, 43-544.

224. It is not proper to select out single sentences or phrases from the instructions as a subject for criticism as distinct from the entire instructions: *State v. Pierce*, 65-85.

225. Instructions must be regarded as a whole, and a defect in one may be cured by other portions of the charge: *Hamilton v. State Bank*, 22-306.

226. Though one of the instructions is too broad in its statements, if it is properly limited by a subsequent one the charge will not be considered erroneous: *Ruble v. McDonald*, 18-493.

227. An instruction cannot be complained of for not containing limitations or qualifications given in another instruction: *Stier v. Oskaloosa*, 41-353.

228. Where an instruction presents a cor-

Conflicting.—Duty of jury to follow.

rect proposition of law, but one which needs to be explained, modified and corrected by some other proposition, it cannot ordinarily be presumed that the jury is misled if the other proposition is expressed in a different instruction: *Lombard v. Chicago, R. I. & P. R. Co.*, 47-494.

229. The omission in one instruction of a proper qualification which is given in another may be sufficient to prevent the instructions from being erroneous: *Allen v. Burlington, C. R. & N. R. Co.*, 57-628.

230. It is not usual, and in ordinary cases not possible, to state in a single instruction all the propositions to which the attention of the jury should be directed, and if the instructions taken together present a correct statement of the law applicable to the case, there will be no ground of reversal: *Funston v. Chicago, R. I. & P. R. Co.*, 61-452.

231. **Conflicting instructions:** It is error to give instructions which are conflicting: *Hart v. Chicago, R. I. & P. R. Co.*, 56-166; *Brown v. Bridges*, 31-138.

232. Where instructions are inharmonious and misleading and directly in conflict, the judgment will be reversed on appeal: *Vanslyck v. Mills*, 34-375.

233. Where instructions are contradictory it cannot be said that the error of one is cured by the giving of the other. It cannot be determined in such case which one of the instructions the jury followed, and it cannot be said that no prejudice resulted from the error: *Conway v. Illinois Cent. R. Co.*, 50-465.

234. Where the instructions are contradictory and it is impossible to tell which the jury followed, such conflict will constitute error and warrant a reversal: *Hawes v. Burlington, C. R. & N. R. Co.*, 64-315.

235. **Common understanding:** Where an instruction, taken in connection with others given, states the law in such a manner as to enable a person of common understanding to know what is intended, it is sufficient: *Smothers v. Hanks*, 34-286.

236. A verbal inaccuracy in an instruction will not be ground for reversal if it is not such as to tend to mislead or confuse the jury, and the meaning is plain to the common understanding: *Harger v. Spofford*, 46-11.

237. It is not necessary, in an instruction,

for the court to define words that may be understood by men of ordinary intelligence: *Rogers v. Millard*, 44-466.

238. **Sense intended:** Where a word is used in an instruction which might be taken in different senses, and the jury follows the instruction in the sense in which it was intended, a judgment on the verdict will not be reversed because the jury might have followed it in the sense in which it was not intended: *Parkhurst v. Masteller*, 57-474.

239. **Ordinary meaning:** It is not proper to seek after some far-fetched and unusual signification of the language of an instruction and base a reversal thereon. The language should be given its usual and ordinary meaning: *State v. Hurford*, 47-16.

240. The language of an instruction should receive a reasonable construction in view of all the circumstances, and not a strange or forced one: *Davenport v. Cummings*, 15-219.

e. *Duty of jury to follow.*

241. **Law of the case:** The instructions of the court to the jury constitute the law of the case, and must be followed by the jury whether right or wrong: *Taylor v. Cook*, 14-501; *Baird v. Chicago, R. I. & P. R. Co.*, 55-121; *Stewart v. Smith*, 60-275; *Roberts v. Leon Loan, etc., Co.*, 63-76.

242. The instructions constitute the law of the case for the jury, and a verdict contrary to the instructions will be set aside or the judgment reversed without regard to whether the instructions are correct or not: *Caffrey v. Groome*, 10-548; *Savery v. Busick*, 11-487; *Jercett v. Smart*, 11-505; *Farley v. Budd*, 14-289; *Porter v. Thomson*, 22-891; *Beal v. Stone*, 22-447; *Morss v. Johnson*, 38-430; *Cobb v. Illinois Cent. R. Co.*, 38-601; *Sullivan v. Otis*, 39-328; *Howell v. Snyder*, 39-610; *Peterson v. Ochs*, 40-530; *Baird v. Chicago, R. I. & P. R. Co.*, 55-121; *Furman v. Chicago, R. I. & P. R. Co.*, 57-42; *Musser v. Maynard*, 59-11; *Griffith v. Parton*, 59-31; *Graham v. McGeoch*, 61-51; *Browne v. Hickie*, 63-330.

243. The instructions to the jury must be regarded as the law of the case, and if the verdict of the jury is without support in the evidence under the instructions, a new trial should be granted: *Dutton v. Wabash, St. L. & P. R. Co.*, 66-352.

What objections may be raised or errors cured by.

244. A refusal of the lower court to grant a new trial on that ground will require a reversal: *Nichols v. Chicago, R. I. & P. R. Co.*, 69-154.

245. Where an instruction states that to entitle a party to recover the jury must find a certain fact, and there is no evidence establishing such fact, the case will be reversed although the instruction itself is erroneous, and the fact referred to is not essential to support the verdict: *Bowman v. Brown*, 52-437.

246. It is the duty of the jury to regard the law as laid down by the court, even if it is incorrect; and where a verdict has been returned which is contrary to the instructions given, and a new trial has been granted upon that ground, the supreme court will affirm the order without reviewing the instructions: *Boyer v. Riley*, 41-13.

247. It cannot be presumed in favor of the verdict on appeal, that it was rendered upon a theory of the case correct in law, but in conflict with the instructions given: *Mast v. Pearce*, 58-579.

248. While an instruction given is binding on the jury without regard to its correctness, yet it is not binding upon the court, and the court may, in ruling upon a motion for judgment upon a special finding or upon the pleadings, disregard instructions which would have been binding upon the jury, and which it considers erroneous: *Baird v. Chicago, R. I. & P. R. Co.*, 61-359; *Haldane v. Arcadia*, 70—.

249. Where a general verdict is set aside because in conflict with an instruction given, it does not follow that the court should render judgment on a special verdict in accordance with the law in such instruction. If the instruction is incorrect the court may refuse to render judgment in accordance therewith, and award a new trial: *Evans v. St. Paul Harvester Works*, 63-204.

f. What objections may be raised or errors cured by instructions.

250. Defects in pleading: The question as to the sufficiency of a pleading cannot be raised by an instruction: *Nollen v. Wisner*, 11-190; *McIntire v. McIntire*, 48-511; *Bushnell v. Robeson*, 62-540.

And see PLEADINGS, §§ 905-910.

251. Objections to evidence cannot be first taken by an instruction to the jury. Such evidence should be disregarded: *State v. Pratt*, 20-267.

252. It is error to exclude from the jury, by an instruction, evidence which has been admitted without objection: *Becker v. Becker*, 45-239.

253. An objection to evidence, made at the time the evidence is introduced, cannot be raised by objecting to the giving of instructions based on such evidence: *Le Grand Quarry Co. v. Reichard*, 40-161.

254. Where a defense in a criminal prosecution for obstructing a highway rested upon the insufficiency of the record of the establishment of the highway, held, that such objection could be raised by instructions although it might have been interposed to the admission of the record in evidence: *State v. Anderson*, 39-274.

And further, see EVIDENCE, §§ 1372-1377.

255. Withdrawing improper evidence from jury: If the court, by an instruction excludes from the consideration of the jury evidence which has been improperly received, such exclusion of the evidence will be considered as preventing any prejudice which would otherwise result from the admission thereof. It is not to be presumed that the minds of the jurors would become poisoned or prejudiced by the introduction of evidence which the court afterward directs them not to take into consideration: *State v. Postlewait*, 14-446.

256. Where the court in its charge to the jury plainly directs them to disregard evidence improperly admitted, error in admitting the evidence is thereby cured: *Cook v. Robinson*, 42-474.

257. Error in admitting evidence as to a matter not in issue by the pleadings is cured by an instruction plainly taking such evidence from the jury: *Bardwell v. Clare*, 47-297.

258. The prompt exclusion of evidence erroneously admitted will correct the error: *State v. Davis*, 56-202.

259. By an instruction withdrawing from the jury the consideration of evidence which has been improperly admitted, the error in such admission may be cured: *Davis v. Danforth*, 65-601.

Fire; lightning; tornado.—Insurable interest.—The contract.

260. Error in refusing, on motion, to strike out improper evidence cannot be cured by an instruction to the jury which correctly states the law of the case: *Wicks v. DeWitt*, 54-190.

261. Instructions of the court to the jury to disregard matters which it has improperly allowed to be read to the jury, *held*, not sufficient in a particular case to cure the error: *Martin v. Orndorff*, 22-504.

INSURANCE.

I. FIRE; LIGHTNING; TORNADO.

- a. *Insurable interest.*
- b. *The contract; application and policy.*
- c. *Payment of premiums; cancellation for non-payment; recovery of unearned premiums.*
- d. *Assignment and subrogation.*
- e. *Warranties and representations.*
- f. *Waiver of breach of warranty or forfeiture.*
- g. *Loss; what covered.*
- h. *Conditions precedent to recovery; notice; proof of loss.*
- i. *Limitation of action.*
- j. *Authority of agents.*
- k. *Statutory provisions as to companies.*

II. LIFE.

III. ACCIDENT.

I. FIRE; LIGHTNING; TORNADO.

a. *Insurable interest.*

1. **Necessary:** It is not that wager policies are without consideration or unequal between the parties that they are held void, but because they are contrary to public policy. Therefore if the insured has no interest in the property insured, the policy must be held void: *Warren v. Davenport F. Ins. Co.*, 31-464.

2. **What constitutes:** But any interest which would be recognized by a court of law or equity is an insurable interest. The term interest as thus used does not necessarily imply property: *Ibid.*

3. Therefore, *held*, that a stockholder has such interest in the corporate property as to authorize him to insure the same against any

loss in so far as the value of his stock might be depressed in consequence thereof, or his dividends cut off: *Ibid.*

4. To constitute an insurable interest it is not necessary that the party should have either a legal or an equitable interest in the property insured. Any interest may be insured if the peril against which the insurance is made would bring loss upon the insured by its immediate and direct effect: *Carter v. Humboldt F. Ins. Co.*, 12-287.

5. Therefore, *held*, that the holder of a mechanic's lien has an insurable interest in the property covered thereby: *Ibid.*; *Stout v. City F. Ins. Co.*, 12-371.

6. Possession of property under a subsisting executory contract which may result in title or ownership constitutes an insurable interest, whether the purchase money is paid or not: *Ayres v. Hartford F. Ins. Co.*, 17-176.

7. An insurable interest may exist without title to or ownership of the property. It may be a special or limited interest, disconnected from title, lien or possession. If the holder of an interest in property will suffer loss by its destruction, he may indemnify himself therefrom by insurance. Therefore, *held*, that the husband's interest in the homestead, the title of which is in the wife, is an insurable interest: *Merrett v. Farmers' Ins. Co.*, 42-11.

8. A vendor who has executed a contract to convey but has not yet made a conveyance retains an insurable interest: *Kempton v. State Ins. Co.*, 62-83.

9. **Question for jury:** The question whether insured has an insurable interest in the property should be left to be determined as a fact by the jury under proper instructions: *Mitchell v. Home Ins. Co.*, 32-421.

10. **Evidence:** In a particular case, *held*, that it was not sufficiently shown that insured had an insurable interest in the property to entitle him to recover: *Hansen v. American Ins. Co.*, 57-741.

b. *The contract; application and policy.*

11. **Parol:** Insurance may be effected by a parol contract: *Revere F. Ins. Co. v. Chamberlin*, 56-508.

The contract; application and policy.

12. Where a contract of insurance is made with an agent who has no power to vary or change the terms fixed by the company in its policies, an oral contract will be considered as a contract for insurance on the terms and conditions contained in such policies: *Hubbard v. Hartford F. Ins. Co.*, 83-825.

13. The terms of the form of policy in use at the time of the oral contract will by implication be deemed to be embraced in the oral agreement as a part thereof: *Smith v. State Ins. Co.*, 64-716.

14. What constitutes contract; charter and by-laws of mutual company: A member of a mutual company is bound to take notice of its articles of incorporation and by-laws: *Simeral v. Dubuque Mut. F. Ins. Co.*, 18-319; *Coles v. Iowa State Mut. Ins. Co.*, 18-425.

15. The charter and rules of the company referred to in the policy and attached thereto become a part of it: *Simeral v. Dubuque Mut. F. Ins. Co.*, 18-319.

16. Where the by-laws of a mutual company are incorporated into the policy, they become binding on the insured, even though as by-laws they are beyond the authority of the board of directors to adopt: *Hygum v. Aetna Ins. Co.*, 11-21.

17. In an action by a mutual company against one of its members on his premium note, the defendant is an adversary party, and, as such, is not conclusively bound by the action of the board of directors in relation to such note; nor is he required to take notice of their proceedings: *American Ins. Co. v. Schmidt*, 19-502.

18. A member of a mutual company is not presumed to have knowledge of the rules in relation to the instruction of officers or agents in reference to the discharge of their duties: *Walsh v. Aetna L. Ins. Co.*, 30-133.

19. Terms of premium note: Where a premium note, containing conditions, etc., is given in connection with the issuance of a policy, the policy and the note together form the contract between the parties: *Shultz v. Hawkeye Ins. Co.*, 42-239.

20. Policy subsequently issued: Where the application, payment of premium and issuance and delivery of policy are all consummated at the same time or are parts of the same transaction, the assured should be

bound by whatever statements and obligations are contained in the policy; but where the application and premium note were taken by a soliciting agent and forwarded by mail to the company, and the policy was afterwards returned to assured, *held*, that, as the policy was in force from the time of the application, the assured was not bound by the terms contained in the policy and might recover for a loss, notwithstanding the breach of a condition in the policy against incumbrances, it appearing that assured had correctly stated to the agent the fact of incumbrance upon the premises: *Boetcher v. Hawkeye Ins. Co.*, 47-253.

21. Apportionment to distinct items: The fact that a policy issued on a single consideration apportions the amount of insurance among distinct items will not render it a severable policy: *Garver v. Hawkeye Ins. Co.*, 60-202.

22. Acceptance of risk is essential to constitute a contract of insurance. The application and premium note alone do not make a contract: *Walker v. Farmers' Ins. Co.*, 51-679.

23. Where it is intended between the parties that the application does not complete the contract, but that such contract is to be perfected by the issuance of a policy by the company, if the application shall be accepted, the company is not bound until such acceptance, and if the application is rejected before notice of loss and for a good reason, the company will not be liable: *Armstrong v. State Ins. Co.*, 61-212.

24. Where the insured and the agent of the company deposited the policy with a third party, while the agent should correspond with the company and ascertain whether it would accept the risk, and afterwards, the risk having been refused and the property having been burned by fire, the agent obtained possession of the policy from such third party, *held*, that there had been no such delivery as that the policy would take effect: *Brown v. American Cent. Ins. Co.*, 70—.

25. In an action on a contract of insurance, plaintiff cannot show and recover for negligence of the agent of the company in not securing the completion of such contract. If that ground of recovery is relied on, it must

Policy.—Payment of premium.

be pleaded: *Walker v. Farmers' Ins. Co.*, 51-679.

26. Date of contract; relation back: The contract or agreement to insure is the principal act and whether the premium is paid or waived is immaterial. If the formal execution of the policy, though a subsequent act, is made as of the date of the principal act, it will have relation back to the time of such act: *Davenport v. Peoria M. & F. Ins. Co.*, 17-276.

27. Thus where an agreement for insurance was made between the parties by their agents on one day and the policy was delivered and received in accordance with that agreement on the morning of the next day, in ignorance of the fact that the property had been destroyed by fire during the night, *held*, that the agreement for insurance was binding on the company from the time agreed upon: *Ibid*.

28. Where a policy is issued, dated on a previous day in accordance with the contract made on that day, it takes effect from the time of the date, not from the time of delivery: *Hubbard v. Hartford F. Ins. Co.*, 33-325.

29. Alteration: The question of the materiality of an alteration is one for the court, and where a party who held a contract of insurance had altered an indorsement on the back thereof, which was in fact a contract with another party, *held*, that plaintiff's contract would not be avoided by such alteration even if material. But if there was such alteration of the contract as to affect and enlarge it, the alteration would avoid it: *Robinson v. Phoenix Ins. Co.*, 25-480.

30. Parol evidence to contradict the terms of the contract of insurance is not admissible: *Mills v. Farmers' Ins. Co.*, 37-400.

31. It is not competent by parol evidence to establish a waiver of the terms of a written policy of insurance, so as to make it cover property not described therein and for the benefit of a person not mentioned: *Fuller v. Phoenix Ins. Co.*, 61-350.

32. Reformation: Where a policy upon property of one person was procured in the name of another for the reason that the owner was financially embarrassed, *held*, that there was no ground for reformation of the contract by inserting the name of the real

owner instead of that of the person named as beneficiary: *Baldwin v. State Ins. Co.*, 60-497.

33. Where the policy covers entirely different property from that intended, there can be no recovery thereon in an action at law until there has been a reformation of the contract: *Eggleston v. Council Bluffs Ins. Co.*, 65-308.

34. Latent ambiguity in description: Where the property was sufficiently described by other description than the lot and block, the description by lot and block being incorrect in that it did not specify the addition of the city in which it was located, *held*, that the error in the description was a latent ambiguity subject to explanation by parol evidence: *Ibid*.

35. Construction: In construing a policy of insurance covering grain, *held*, that that word under the circumstances properly included flax seed yet unthreshed in the stack: *Hewitt v. Watertown F. Ins. Co.*, 55-323.

36. Parol condition: Where the validity of a policy is established, it is upon defendant to assume the burden of proof in showing that a parol condition affecting its validity has not been complied with: *Williams v. Niagara F. Ins. Co.*, 50-561.

c. Payment of premium; cancellation for non-payment; recovery of unearned premium.

37. Assessment of premium note: Where a premium note given in consideration of a policy of insurance in a mutual company stipulated that the amount named should be paid as required by the directors of the company agreeable to their charter and by-laws, and by the charter such premium notes constituted the capital stock of the company, which was declared liable for losses and expenses, *held*, that in an action on such note the burden of proof was on the company to show the necessity of assessment for losses and expenses: *American Ins. Co. v. Schmidt*, 19-502.

38. Where the payment of the premium note is to be made at such time as the directors may require, it does not become due until an order for its payment is made: *Warner v. Beem*, 36-385.

 Payment of premium ; cancellation for non-payment.

39. Under the facts of a particular case, *held*, that the company was authorized by its charter to insure on either the mutual or the cash plan, and that where the policy, notes, etc., indicated that the insurance was on the cash plan, instalments of premium notes became due without proof of assessment or losses: *Davenport F. Ins. Co. v. Moore*, 50-619.

40. Annulment of policy for non-payment of premium notes: Where the company had the option, upon failure of insured to pay an assessment on his premium note, to annul the policy, *held*, that in order to authorize the termination of the contract, notice of the rescission of the policy must be given the insured: *Supple v. Iowa State Ins. Co.*, 58-29.

41. Where the company does not require payment of the premium at the time of the issuance of the policy, but notifies insured that it will be collected in the future, the company cannot, upon a mere demand at the place of business of insured in his absence, annul the policy for non-payment without notice to him: *Carson v. German Ins. Co.*, 62-433.

42. Where the directors of an insurance company were authorized by its articles to fix the assessment to be paid by the persons assured and to annul the policy upon failure of the assured, for thirty days after being notified thereof, to pay his assessment, and the by-laws provided that such notice might be given by mail, which was done, *held*, that the policy might be suspended upon failure to pay after such notice was sent, although it was not received by insured: *Greeley v. Iowa State Ins. Co.*, 50-86.

43. Forfeiture or suspension for non-payment: Where the policy provides that the company shall not be liable for any loss occurring after the note given for the premium is due and unpaid, such provision shall exempt it from liability although the note which was unpaid was given and taken in payment for a cash premium: *Watrous v. Mississippi Valley Ins. Co.*, 85-582.

44. A condition in a policy that in case of loss while the note given for the cash premium or any part thereof remains unpaid and past due, the policy shall be void, is valid and will be upheld: *Nedrow v. Farmers' Ins. Co.*, 43-24.

45. Provisions in the policy that upon failure to pay the premium note at maturity such failure will avoid the policy, and that the collection of the note after such default shall not revive the policy, are valid: *Shakey v. Hawkeye Ins. Co.*, 44-540.

46. Under the provisions of the policy, *held*, that owing to default in payment of premium note the policy was suspended at the time of loss: *Garlick v. Mississippi Valley Ins. Co.*, 44-553.

47. In such case, *held*, that acceptance of part payment of the note, or offer by the company to extend the time of payment, or representations by the secretary of the company that the policy was in force, would not constitute a waiver of the suspension: *Ibid*.

48. Under the power to annul a policy of a mutual company for default in paying assessments, the company may provide for its annulment through the period of such default, with the stipulation for reinstatement upon payment of the delinquent assessments: *Coles v. Iowa State Mut. Ins. Co.*, 18-425.

49. The company may provide in the policy that failure to pay a premium note shall annul the contract, but that it may be revived upon payment of the note unless suit to collect such premium note shall have been commenced before such payment is made: *Shultz v. Hawkeye Ins. Co.*, 42-239.

50. The fact that a policy in a mutual company becomes forfeited by reason of default in payment of assessments on premium notes does not avoid such notes or release insured from liability for assessments made before the forfeiture: *Iowa State Ins. Co. v. Prosser*, 11-115.

51. Under 18 G. A., ch. 210 (McClain's Ann. Stat., 299), an insurance company seeking to declare a forfeiture of a policy by reason of the non-payment of the premium note must not only give the maker notice of the proposed suspension of his policy on account of such non-payment, but must also notify him of the amount necessary to pay the customary short rates, including the expense of taking the risk, up to the time the policy will be suspended, in order to cancel the policy: *Boyd v. Cedar Rapids Ins. Co.*, 70—.

52. In a particular case, *held*, that an application by insured for extension of time and the fact that it was not granted did not waive

Policy.—Payment of premium.

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41. Where the company does not require payment of the premium at the time of the issuance of the policy, but notifies insured that it will be collected in the future, the company cannot, upon a mere demand at the place of business of insured in his absence, annul the policy for non-payment without notice to him: *Carson v. German Ins. Co.*, 62-493.

42. Where the directors of an insurance company were authorized by its articles to fix the assessment to be paid by the persons assured and to annul the policy upon failure of the assured, for thirty days after being notified thereof, to pay his assessment, and the by-laws provided that such notice might be given by mail, which was done, *held*, that the policy might be suspended upon failure to pay after such notice was sent, although it was not received by insured: *Greeley v. Iowa State Ins. Co.*, 50-86.

43. Forfeiture or suspension for non-payment: Where the policy provides that the company shall not be liable for any loss occurring after the note given for the premium is due and unpaid, such provision shall exempt it from liability although the note which was unpaid was given and taken in payment for a cash premium: *Watrous v. Mississippi Valley Ins. Co.*, 35-582.

44. A condition in a policy that in case of loss while the note given for the cash premium or any part thereof remains unpaid and past due, the policy shall be void, is valid and will be upheld: *Nedrow v. Farmers' Ins. Co.*, 43-24.

45. Provisions in the policy that upon failure to pay the premium note at maturity such failure will avoid the policy, and that the collection of the note after such default shall not revive the policy, are valid: *Shakey v. Hawkeye Ins. Co.*, 44-540.

46. Under the provisions of the policy, *held*, that owing to default in payment of premium note the policy was suspended at the time of loss: *Garlick v. Mississippi Valley Ins. Co.*, 44-553.

47. In such case, *held*, that acceptance of part payment of the note, or offer by the company to extend the time of payment, or representations by the secretary of the company that the policy was in force, would not constitute a waiver of the suspension: *Ibid*.

48. Under the power to annul a policy of a mutual company for default in paying assessments, the company may provide for its annulment through the period of such default, with the stipulation for reinstatement upon payment of the delinquent assessments: *Coles v. Iowa State Mut. Ins. Co.*, 18-425.

49. The company may provide in the policy that failure to pay a premium note shall annul the contract, but that it may be revived upon payment of the note unless suit to collect such premium note shall have been commenced before such payment is made: *Shultz v. Hawkeye Ins. Co.*, 42-239.

50. The fact that a policy in a mutual company becomes forfeited by reason of default in payment of assessments on premium notes does not avoid such notes or release insured from liability for assessments made before the forfeiture: *Iowa State Ins. Co. v. Prosser*, 11-115.

51. Under 18 G. A., ch. 210 (McClain's Ann. Stat., 299), an insurance company seeking to declare a forfeiture of a policy by reason of the non-payment of the premium note must not only give the maker notice of the proposed suspension of his policy on account of such non-payment, but must also notify him of the amount necessary to pay the customary short rates, including the expense of taking the risk, up to the time the policy will be suspended, in order to cancel the policy: *Boyd v. Cedar Rapids Ins. Co.*, 70—.

52. In a particular case, *held*, that an application by insured for extension of time and the fact that it was not granted did not waive

Unearned premiums.—Assignment; subrogation.

the provision as to notice just referred to: *Ibid.*

Further as to forfeiture for non-payment, see life insurance cases, *infra*, §§ 243-245.

53. Unearned premiums: If assured conveys the property, the insurer may declare the policy void without liability to refund unearned premiums: *Victor v. Hartford F. Ins. Co.*, 33-210.

54. Money paid as premiums on policies where the risk does not attach, or the contract is void *ab initio*, as, for instance, on account of failure of assured to state the nature of his interest in the property, may be recovered by the assured, and such right of recovery is not dependent on the loss of the property intended to be insured. Where successive premiums have been paid for the continuance of the insurance on the same property, all such premiums may be recovered back: *Waller v. Northern Assurance Co.*, 64-101.

55. The action to recover back the premiums paid will not be barred by the limitation contained in the policy upon an action brought thereunder, the action to recover such premiums not being an action under the policy: *Ibid.*

56. The right of assured to cancel the policy and recover back premiums paid in excess of customary short rates (18 G. A., ch. 210; McClain's Ann. Stat., 299) cannot be exercised by assigning to another the right to cancel such policy and collect the unearned premium. The assignment would avoid the policy and terminate the right to recover. Nor can such unearned premium be recovered after the policy has been rendered void by taking other insurance: *Colby v. Cedar Rapids Ins. Co.*, 66-577.

d. Assignment; subrogation.

57. Consent to assignment necessary: An insurance against fire is a personal contract with the assured, and the liability of the insurer does not continue to an assignee or purchaser of the property unless by insurer's consent: *Simeral v. Dubuque Mut. F. Ins. Co.*, 18-319.

58. Collateral security: With the consent of the company a policy of insurance may be assigned as collateral security with-

out the transfer of the property insured therein: *Stout v. City F. Ins. Co.*, 12-371.

59. Terms binding on assignee: Where the articles of incorporation and by-laws of a mutual company were attached to the policy, by the terms of which insurer undertook the risk according to the provisions of such articles and by-laws, *held*, that an assignee of the policy and property was bound by the regulations as to alienation contained in the articles and by-laws: *Simeral v. Dubuque Mut. F. Ins. Co.*, 18-319.

60. Where a policy of insurance is assigned with the consent of the company, all its terms and conditions are imported into the new contract. Therefore, *held*, that under a policy containing the condition that, if the title of the property is incumbered, the policy shall be void, such policy was void in the hands of the assignee by reason of the existence of an incumbrance on the property, remaining after the assignment, it not appearing that the company had knowledge of such incumbrance at the time of the assignment: *Ellis v. State Ins. Co.*, 68-578.

61. Assignee not affected by false representations of assignor: Where the company has assented to the assignment of the policy by the assured to the purchaser of the property from him, it cannot afterwards set up as against the assignee false representations made by the assignor in procuring the policy. By consenting to the assignment, the policy becomes a new contract between the company and the assignee which is not to be affected by the acts of the assignor: *Ellis v. Council Bluffs Ins. Co.*, 64-507.

62. Unearned premiums do not pass by assignment: An assignment of a policy of insurance without the consent of the company, where it is stipulated that such assignment shall avoid the policy, cannot confer upon assignee a right to recover unearned premiums which may be due the assignor upon the cancellation of the policy: *Colby v. Cedar Rapids Ins. Co.*, 66-577.

63. Assignment after loss: A policy containing a stipulation against assignment becomes assignable after loss, notwithstanding such stipulation: *Walters v. Washington Ins. Co.*, 1-404; *Carter v. Humboldt F. Ins. Co.*, 12-287; *Mershon v. National Ins. Co.*, 34-87.

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64. Subrogation: A mortgagee has no interest in a policy of insurance issued to the mortgagor for his own benefit: *Ryan v. Adamson*, 57-80.

65. Assignment of claim against common carrier: An insurance company has, by virtue of its usual powers, authority to acquire by assignment the claim of the shipper of goods insured by it, against a common carrier in whose hands they are destroyed, and such assignment is valid without regard to the binding force of the policy, if accepted in pursuance of a settlement of the claims of the insured against the company; and upon such assignment the company may recover the full amount of the loss, although it exceeds the amount of the policy: *Home Ins. Co. v. Northwestern Packet Co.*, 32-223.

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66. Warranties strictly enforced: Where a stipulation in the policy is made a warranty, it must be strictly complied with or the policy will be void: *Hygum v. Aetna F. Ins. Co.*, 11-21; *Stout v. City F. Ins. Co.*, 12-871.

67. Where a policy in a mill-owners' mutual fire insurance company provided that stoppage of the mill for any cause whatever for more than twenty days without notice should suspend the policy, held, that there could be no recovery for a loss occurring after twenty days' stoppage without notice, no matter what the occasion for such stoppage might be: *Day v. Mill Owners' Mut. F. Ins. Co.*, 70—.

68. Substantial compliance: The intention and purpose of the parties in entering into the covenants in the policy must be regarded, and the language must be interpreted in harmony therewith if it can be done without disregarding its proper signification. A covenant is not to be regarded as requiring assured to comply with its literal provisions, but a substantial compliance whereby the hazard is not increased is sufficient: *Bankhead v. Des Moines Ins. Co.*, 70—.

69. Continuing warranty: An express warranty as to the present use of the property will not, without provision to that effect, constitute a continuing or executory warranty as to the future use in the same manner: *Stout v. City F. Ins. Co.*, 12-871.

70. Condition of property: Where property insured was described as a certain specified building "occupied as stores on the first floor," etc., *held*, that if any of the rooms on the first floor were occupied as stores the policy was valid, whether they were all so occupied or not: *Carter v. Humboldt F. Ins. Co.*, 17-456.

71. Where the agent taking the insurance directed an iron door to be put in, the continuation of the insurance being conditioned upon that being done, but no time was fixed when it should be completed, and it appeared that the insured was making proper effort to have it done, held, that the agreement to put in the door was not a condition precedent, and the insured could recover: *Viele v. Germania Ins. Co.*, 26-9.

72. Breach of warranty: Where, in an application for a policy of insurance, the building was described as a two-story building, when in fact the main part was two stories and there was a small addition of only one story, *held*, that such misdescription was not sufficient to constitute a breach of the warranty as to the truth of the matter as stated in the application. Any description as to the height pertains rather to the identification of the property than to the character of the risk, and the same accuracy is not required in the former case as in the latter: *Wilkins v. Germania F. Ins. Co.*, 57-529.

73. Where assured, in his application, in answer to a question whether his chimneys, stoves, pipes, etc., were well secured, and whether he would engage to keep them so, answered yes, and such application was made a part of the policy, but the property was destroyed by reason of a portion of the pipe in an upstairs room having been taken down with the intention of taking down the stove, situated below, for the summer, and afterwards, in forgetfulness of the removal of the pipe, a fire having been lighted in the stove, causing a conflagration, held, that there was not a breach of warranty such as to defeat a recovery for the loss: *Mickey v. Burlington Ins. Co.*, 85-174.

74. Warranties not severable: A policy issued on a single consideration upon different items of property is not severable, although the amount of insurance is appor-

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tioned to the several items, and a breach of warranty as to part of the property will avoid the policy as to all: *Garver v. Hawkeye Ins. Co.*, 69-202.

75. **Statement as to knowledge:** Where the warranty of assured as to statements in his application was that the application was a just, full and true exposition of all the facts and circumstances in regard to the condition, etc., of the property, so far as the same were known to the applicant, *held*, that the truth of the matters stated could not be deemed as absolutely warranted, and that the burden of proof was upon the company to establish knowledge on the part of applicant that the facts stated in his application were not true: *Wilkins v. Germania F. Ins. Co.*, 57-529.

76. **Representations in application:** By statute (18 G. A., ch. 211, § 2; McClain's Ann. Stat., 300) it is incompetent, in defense to an action upon a policy, to plead or prove statements made in the application, where such statements are not reduced to writing and a copy thereof is not attached to or indorsed upon the policy: *Ellis v. Council Bluffs Ins. Co.*, 64-507. And see *Wallace v. Council Bluffs Ins. Co.*, 66-139.

77. Where answers in the application are filled up by the agent taking such application from his own knowledge, the fact that a copy of the application is attached to the policy which is delivered to insured will not bind him to statements thus made, although he fails to notify the company of their falsity. The assured is not required to prove the statements made in the application to be true, and he is therefore not required nor has he occasion to examine the copy of the application indorsed on the policy: *Donnelly v. Cedar Rapids Ins. Co.*, 70—.

78. Where the insured fills the application in blank and leaves it with the soliciting agent of insurer, who fills up the application and writes out answers to questions contained therein, basing such answers upon his own investigation and knowledge, the insurer will be estopped by such act of its agent from setting up misstatements in such answers as a breach of warranty: *Ibid.*

79. **Age of building:** A false statement in an application as to the date when a building insured was erected will not defeat the

policy unless it is material to the hazard of the risk: *Eddy v. Hawkeye Ins. Co.*, 70 —.

80. It is not competent to show that the phrase "when built," in reference to the age of the building, refers in insurance parlance to a building constructed entirely of new material: *Lamb v. Council Bluffs Ins. Co.*, 70—.

81. **Oral representations:** In an action on a policy, the company cannot prove false representations made orally to its agent at the time of applying for the insurance for the purpose of defeating the policy: *Ellis v. Council Bluffs Ins. Co.*, 64-507.

82. **Location of property:** The expression, "stored therein," in reference to certain goods in connection with the building described, must be construed as defining the location of the property, and not as sufficient to cover property belonging to another owner stored in such building. Where the terms of the policy require that goods held by any other right than that of absolute ownership shall be specifically mentioned, if intended to be covered, and there is in the building some property belonging to the insured, and therefore answering the description of the policy, property of others stored in the same building will not be considered as covered: *Fuller v. Phoenix Ins. Co.*, 61-350.

83. **Removal of property:** Where the policy of insurance contained a requirement that in making proof of loss the insured should state on oath that all the merchandise and personal property for which claim was made was at the time of the fire contained in the building or premises described in the policy, and the description in the policy was of a stock of pumps, etc., contained in the "one-story frame building situated on the north side of the public square and west of Fourth street," etc., and it appeared that subsequently the property had been removed to another building of the same general description of structure and location, where it was burned, *held*, that plaintiff could not recover for the loss, the description in the policy being of a particular building and the language used amounting to a warranty that the property was in such building and would continue to remain there: *Harris v. Royal Canadian Ins. Co.*, 53-236.

84. **Removal for use:** Policies of insurance are to be reasonably construed, and a

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restriction placed upon the use of the property insured by implication only will not be sustained if unreasonable. In a particular case, where a team of horses, for the loss of which recovery was sought, were, with other property, described as situated upon a certain section, township, and range, *held*, that plaintiff could recover for a loss sustained while the team was temporarily removed from said premises: *Peterson v. Mississippi Valley Ins. Co.*, 24-494.

85. So *held*, also, where a loss by lightning occurred off the premises where live-stock insured was described as situated: *Mills v. Farmers' Ins. Co.*, 87-400.

86. Where property such as a horse, harness, or buggy is described in the policy as contained in a certain barn, the presumption must be that it is in use and that the policy is issued with reference to such use; and while the statement will constitute a warranty that the property will continue to be contained in such place as a place of deposit when not absent therefrom for temporary purposes incident to its use and enjoyment, yet if it is removed in pursuance of such use, as, for instance, where a buggy is taken to a carriage shop for repairs and left there a reasonable length of time, such fact will not constitute a breach of warranty such as to defeat recovery although the risk is increased by reason of such removal: *McCluer v. Girard F. & M. Ins. Co.*, 48-849.

87. Where wearing apparel was described as contained in a certain dwelling-house, *held*, that a destruction thereof by fire in another place while in ordinary use was within the policy and the insurer would be liable: *Longueville v. Western Assurance Co.*, 51-553.

88. Overvaluation by the insured in his application will not defeat recovery on a policy which regulates the damages by the actual cash value of the property at the time of the loss. Such valuation is not material to the risk, and if considered as a warranty, being neither an inducement to the contract nor the foundation of fraud by the plaintiff, a misstatement with reference thereto will not defeat recovery: *Bonham v. Iowa Central Ins. Co.*, 25-328.

89. Overvaluation is usually honestly made, and it is doubtful whether anything short of

fraudulent intent should render a policy void on that ground: *Behrens v. Germania F. Ins. Co.*, 64-19.

90. In a particular case, *held*, that an overvaluation was not so great as to justify a court in holding, as a matter of law, that there could be no recovery on the policy: *Ibid.*

91. Ownership: One who has purchased and partly paid for property, and is in possession with no lien for purchase money or incumbrance of any other character against it, holds the absolute and sole ownership of the property, although it has not been deeded to him: *Bonham v. Iowa Central Ins. Co.*, 25-328.

92. The existence of a chattel mortgage upon goods covered by the policy will not cause a forfeiture by reason of a condition in the policy providing that it shall be void if insured is not the sole and unconditional owner of the property: *Hubbard v. Hartford F. Ins. Co.*, 83-325.

93. A policy providing that if the interest of the insured in the property is other than the entire, unconditional and sole ownership thereof for his own use and benefit, it must be so stated in the written part of the policy, is void *ab initio* if the interest of the insured is that of mortgagee only, and in the absence of fraud or deception the insured may in such case recover back the premium paid, on the ground that the risk never attached: *Waller v. Northern Assurance Co.*, 64-101.

94. Under a warranty that the interest of assured in the property is absolute, and not a leasehold on other interest not absolute, or that he is the sole and unconditional owner, the fact that insured has only a life estate will constitute a breach of the warranty and render the policy void: *Davis v. Iowa State Ins. Co.*, 67-494; *Garver v. Hawkeye Ins. Co.*, 69-202.

95. Under an insurance policy providing that property held in trust must be insured as such, *held*, that the fact that the title was held in secret trust to defraud the creditors of another would not be such a holding in trust as contemplated by the terms of the policy: *Ayres v. Hartford F. Ins. Co.*, 17-176.

96. Incumbrances: A mortgage executed upon the property, but not delivered, is not

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an incumbrance such as to defeat recovery under a condition as to incumbrances: *Olmstead v. Iowa Mut. Ins. Co.*, 24-503.

97. Material misrepresentations as to the amount of an incumbrance upon the property will avoid the policy, and it will be immaterial whether it is the result of bad faith or of mere ignorance. Where the answer given is qualified it will still be the declaration that the information of the party making it is such as to justify him in giving the qualified answer which he does give: *Glade v. Germania F. Ins. Co.*, 56-400.

98. Where it was provided in a policy that it should become void upon the execution of any incumbrance on the property until the consent of the company was obtained thereto and indorsed thereon by the secretary, and a mortgage was afterward executed and the policy was forwarded to the company for such indorsement of consent, but was returned without indorsement with the statement that the policy would be transferred to mortgagee when certain assessments then due had been paid, *held*, that such policy had then become void and was not revived by the action of the company: *Supple v. Iowa State Ins. Co.*, 58-29.

99. Where the application in a policy described the property insured as situated upon a certain tract of land, *held*, that incumbrances upon a portion of such tract, which portion did not include the buildings insured, would not render the policy void, although not properly described in the application: *Eddy v. Hawkeye Ins. Co.*, 70—.

100. Where the property insured was a homestead, *held*, that the existence of a judgment against the insured, which was not a lien upon the homestead, did not render the policy void: *Ibid*.

101. In a particular case *held* that a policy became void by reason of certain incumbrances executed by insured without consent of insurer, and in violation of its terms: *Mallory v. Farmers' Ins. Co.*, 65-450.

102. In the absence of a warranty that there is no incumbrance upon the property, it is not incumbent upon plaintiff to prove that there was no incumbrance: *Edgerly v. Farmers' Ins. Co.*, 48-644.

103. Alienation; change of title, etc.: A complete alienation of the property ends

the insurance, but if it is for the purpose of collateral security, and the insured still retains an interest in the property, the policy will protect that interest in the absence of stipulations to the contrary: *Ayres v. Hartford F. Ins. Co.*, 17-176.

104. Where a policy contained a stipulation that, in case of any "sale, transfer or change of title in the property insured," the insurance should cease and be void, *held*, that in the absence of express provision against mortgages, a mortgage was not a sale within the terms of the policy, and that a change or transfer of title must be more than nominal, and such a change in the interest of the assured as would create a greater temptation or motive to burn the property or less interest in preserving it from destruction by fire, in order to render the policy void: *Ibid*.

105. Nothing less than a transfer of the property insured whereby the insured parts with all insurable interest therein will operate to defeat the policy under the condition against alienation. Therefore, *held*, that a transfer of the property by the insured to the firm in which he was a member was not such alienation as to render the policy void: *Cowan v. Iowa State Ins. Co.*, 40-551.

106. Under a policy of insurance providing that in case of any sale, transfer, or change of title in the property insured, it should be void, *held*, that the assignment by the insured of the title bond under which he held the property as collateral security to a judgment creditor to secure his judgment lien, which was older than the interest of assured in the property, and also to secure such creditor for the advance of the balance of the purchase money if he should make it, did not constitute such a change in the title as to defeat the policy, if it did not increase the creditor's rights nor decrease the interest of assured: *Ayres v. Home Ins. Co.*, 21-185; *Ayres v. Hartford Ins. Co.*, 21-193.

107. Where the policy contained the provision that if the title to the property was transferred, incumbered or changed the policy should be void, *held*, that an execution of a mortgage on the property which was still in force at the time of loss rendered the policy void. An incumbrance affects and renders less valuable the right to the prop-

erty, and a mortgage amounts to an incumbrance within such provision in the policy: *Ellis v. State Ins. Co.*, 61-577.

108. Under the same provision in a policy issued to a firm, *held*, that a transfer by one partner to the other of all his interest in the firm property was a sufficient change in the title to render the policy void: *Hathaway v. State Ins. Co.*, 64-229.

109. If the stipulation in the policy relates only to alienation, it seems that such a change in the title would not avoid the policy: *Ibid.*

110. To defeat recovery under a policy containing a provision against sale or conveyance, such sale or conveyance must be full and complete to work a forfeiture, and the right to the property and the possession thereof must pass from the vendor to the vendee. A mere contract for a sale or conveyance, not divesting the title of the vendor and vesting the same in the vendee, is not a breach of the provision. Therefore, *held*, that a contract to convey at a future day upon payment of the purchase money, which was to be paid at a certain time and upon delivery of the deed, did not amount to a sale or conveyance within the terms of the policy: *Kempton v. State Ins. Co.*, 62-83.

111. As a provision against sale or conveyance of the property imposes a restriction upon the right of disposing of the property, it should be construed with strictness: *Ibid.*

112. Alienation by operation of law: Certain proceedings of foreclosure and sale and to correct the description of property covered by the mortgage and sale, *held* sufficient to amount to alienation by operation of law and to avoid the policy containing a provision against such alienation: *McKissick v. Mill Owners' Mut. F. Ins. Co.*, 50-116.

113. Foreclosure: A provision in the policy that commencement of foreclosure or other proceedings upon any mortgage shall render the policy null and void are valid: *Meadows v. Hawkeye Ins. Co.*, 62-387.

114. Other insurance: Where insurance was affected with a condition of forfeiture in case of other insurance without notification and indorsement by the insurer, and other insurance was effected without such notice, by policies which were themselves *prima facie* void by reason of failure to state certain facts, but which were treated as valid and paid,

after loss, by the respective companies, *held*, in an action on the first policy, that while it might have been true that the latter policies could have been avoided by the insurers, yet as far as plaintiff was concerned, they were valid, and it was the duty of the plaintiff to have notified defendant that he had effected what he supposed at the time was valid insurance, and he could not recover on his first policy: *David v. Hartford Ins. Co.*, 13-69.

115. Where a policy of insurance is issued containing the stipulation that it shall be void in case of the taking of other insurance without the consent of the company, the subsequent taking of a policy of insurance which is void on account of a like stipulation as to prior insurance, and which is actually avoided by the company on that account, will not render the prior policy void or voidable: *Hubbard v. Hartford F. Ins. Co.*, 33-325; *Behrens v. Germania F. Ins. Co.*, 64-19.

116. But the breach of condition in the second policy renders it voidable only, and if the company issuing such policy does not avoid it, it is valid and renders the prior policy void: *Hubbard v. Hartford F. Ins. Co.*, 33-325.

117. Statements by insured in his proof of loss as to another policy of insurance subsequently issued on the same property by another company does not estop him from claiming that such policy was void, and therefore did not defeat the policy under which the proofs were made: *Ibid.*

118. Indorsement upon a policy of a permit for "additional insurance," *held* under the facts of the case to refer to prior as well as subsequent insurance, and as prior and subsequent insurance to a larger amount than was permitted in the policy was made, it was held that the policy was thereby rendered void: *Behrens v. Germania Ins. Co.*, 58-26.

119. Where a policy of insurance contained a provision which was made a warranty, that any further insurance, valid or invalid, would render the policy void, *held*, that proof as to what the insured thought as to whether there was prior insurance was immaterial: *Zinck v. Phoenix Ins. Co.*, 60-266.

120. Where the provision of the policy was that it should be void in case there was

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any other insurance on the property whether valid or not, *held*, that a prior policy of insurance which had become void by reason of removal of the property in violation of the terms thereof did not defeat the subsequent policy: *Stevens v. Citizens' Ins. Co.*, 69-658.

121. Oral permission given to the agent of the owner of the property to obtain additional insurance will not authorize additional insurance to be taken by such agent in his own name after he has become the purchaser of the property and taken an assignment of the policy: *Hower v. State Ins. Co.*, 58-51.

122. In the absence of a warranty against other insurance, it is not incumbent upon the plaintiff seeking to recover upon a policy to show that there was no other insurance: *Edgerly v. Farmers' Ins. Co.*, 48-644.

123. Where it was provided in a policy of insurance that insured should furnish to the companies copies of other policies of insurance upon the property, *held*, that a substantial compliance with this provision was all that was required, and that a mistake in a copy thus furnished, not material, would not defeat the right of recovery: *Miller v. Hartford F. Ins. Co.*, 70—.

124. Vacancy of building: Where a policy provided that if the building became vacant and unoccupied, and so remained without notice to and consent of the company, it should become void, and the building was burned, after having been vacant seventeen days without notice to the company, *held*, that the insured could not recover for the loss: *Dennison v. Phoenix Ins. Co.*, 52-457.

125. Provisions in a policy against loss by fire or tornado, rendering the policy void in case of vacancy, *held* applicable to the case of loss by tornado equally with a loss by fire: *Sexton v. Hawkeye Ins. Co.*, 69-99.

126. Where a building was described and insured as a dwelling-house, *held*, that occupancy thereof for the purpose of storing tools, etc., was not such as to prevent a breach of warranty against vacancy: *Ibid.*

127. A house is not to be deemed vacant and unoccupied by the mere fact of the physical absence of the occupants for a day or a night. And where it appeared that the house covered by a policy had been vacated by the tenant and that the owner was pre-

paring to move into it from an adjoining house, and had placed his furniture therein with the intention to personally occupy it the next day, and a loss occurred in the meantime, and before the family had actually lodged or taken their meals in the house, it would not be deemed vacant at the time of such loss so as to defeat recovery under the policy: *Eddy v. Hawkeye Ins. Co.*, 70—.

128. The provision of the policy against vacancy does not bind the insured to personal occupancy of the building where it is not of a character permitting personal occupancy. Such a stipulation in the policy covering a hog-house *held* to be intended to secure the watchfulness of the occupant to protect it from fire, and that the fact that the building had ceased to be used for any purpose, the owner of the premises continuing to reside thereon, would not constitute vacancy such as to make void the policy: *Kimball v. Monarch Ins. Co.*, 70—.

129. Fraud: An attempt of insured to recover from the company an amount due to the mortgagee of the property by assignment of the policy constitutes such fraud on the part of the insured as to defeat his right of recovery for any loss under the terms of the policy stipulating that it shall be void in case of fraud: *Lewis v. Council Bluffs Ins. Co.*, 68-198.

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130. What deemed waiver: To constitute a waiver, it is not necessary that the acts relied upon be attended with such equitable circumstances as would create an estoppel, as, for instance, that the opposite party shall have been induced by the acts in question to in any manner change his condition with reference to the subject: *Hollis v. State Ins. Co.*, 65-454.

131. If, with knowledge of the circumstances constituting a forfeiture, the company continues to treat the contract as of binding force, and induces the plaintiff to act in that belief, it will be held thereby to have waived the forfeiture: *Ibid.*

132. Where an insurance company has notice of a transfer of the property and approves of it, it cannot afterwards set up the fact of such transfer to defeat recovery upon the

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policy, having retained the premium: *Kimball v. Monarch Ins. Co.*, 70—.

133. Waiver of prepayment of premium: Prepayment of premium may be waived by a general agent, even where the policy recites that it shall not be binding until the cash portion of the premium is actually paid, and there is a condition in the policy forbidding the waiver of such prepayment except in writing on the policy. Such condition of the policy may itself be waived by a general agent. At least this is true where the policy does not contain any limitation on the power of the agent to waive its conditions, and the person doing business has no notice of such a limitation. Where an agent with large discretionary powers writes up and delivers a policy which contains the condition referred to, and at the same time extends a short credit for the payment of the premium, the assured has a right to suppose that all conditions precedent to the taking effect of the policy have been waived: *Young v. Hartford F. Ins. Co.*, 45-377.

134. Where, by the terms of the policy, the company ceases to carry the risk after thirty days from the time an instalment of the premium becomes due, the agreement of an agent of the company having authority to collect the premium, but not the right to contract for insurance or extend the time for the payment of the premium, will not constitute a waiver of the condition so as to continue the policy in force: *Critchett v. American Ins. Co.*, 53-404.

135. Subsequent acceptance of premiums: Under a policy of a mutual company providing that use of the premises for hazardous or extra-hazardous purposes during the continuance of the policy should annul it so long as the premises were so used, *held*, that the act of the company subsequently to the breach of such condition, and with full knowledge thereof, in collecting assessments on premium notes, would constitute a waiver of such forfeiture: *Keenan v. Missouri State Mut. Ins. Co.*, 12-126.

136. Receiving the premium on the policy with full knowledge of, and after the occurrence of facts which would be ground for declaring it forfeited, amounts to a waiver of the right to declare a forfeiture: *Mershon v. National Ins. Co.*, 34-87.

137. Acceptance of risk with knowledge of the breach of conditions: Where a policy provided that it should be void if the premises were vacant and unoccupied, and also that any waiver of conditions, etc., must be indorsed on the policy, and it appeared that the property insured was vacant at the time that the policy was executed, and that there was a verbal agreement with the agent that it might remain vacant for thirty days, during which time it burned, *held*, that the company having, through their agent, issued the policy and received the premium with full knowledge that the property was unoccupied, thereby waived the conditions of the policy: *Williams v. Niagara F. Ins. Co.*, 50-561.

138. Where a policy is issued with knowledge of false statements contained therein, and the application is made a part of the policy, the company cannot afterwards object to the policy on the ground of such statements: *Lamb v. Council Bluffs Ins. Co.*, 70—.

139. An insurance company, issuing a policy and receiving the premium thereon with knowledge of facts which were breaches of warranties contained in the policy, will be estopped to deny the validity of the instrument and will be regarded as having waived the violation of its conditions: *Jordan v. State Ins. Co.*, 64-216; *Stone v. Hawk-eye Ins. Co.*, 68-737.

140. In such a case, knowledge of an agent taking the application who is authorized to solicit and forward applications for insurance, and to deliver policies and collect and transmit premiums, will bind the company: *Ibid*.

141. Where an agent, having authority to receive applications and take risks, had knowledge that the person described as the owner of the property was dead, and that the intention was to insure the interest of the heirs in such property, and suggested that the policy should be taken out in that form, *held*, that the misstatement as to the ownership of the property would not render the policy void: *Anson v. Winnesheik Ins. Co.*, 28-84.

142. Waiver by not annulling policy: A breach of a condition in a policy of insurance which provides that upon such breach it shall become void, does not make it *ipso facto*

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void, and the forfeiture may be waived by the insurance company, expressly, or by acts amounting to estoppel, and the policy will then continue with its original force and effect: *Viele v. Germania Ins. Co.*, 26-9.

143. Where the risk is increased by the insured, and the insurer has notice thereof, and the right to cancel is not exercised, this amounts to a waiver of the forfeiture arising from breach of the condition against increase of risk: *Ibid.*

144. After such forfeiture, the policy is still the only competent evidence of the contract, and the insurer will not be discharged unless he pleads the fact that the insured failed to perform his covenants. His silence in this respect will be a waiver of the default of the insured: *Ibid.*

145. Permitting the policy to stand without objection or claim that its terms are violated by the failure of the insured to communicate information of the existence of an incumbrance on the property, after knowledge of such incumbrance has been acquired by the company, will constitute a waiver of the breach of the condition. So *held* where there was a chattel mortgage upon the property at the date of the policy and subsequently the company made an indorsement thereon, making the loss payable to the mortgagee, as his interest might appear, no objection to the policy on the ground of the existence of such incumbrance being interposed: *Lewis v. Council Bluffs Ins. Co.*, 63-193.

146. Demanding proofs of loss: Where a policy provided that the company should not be liable for any loss during the time that the building should be vacant and unoccupied, also that after the loss the party claiming under the policy should give immediate notice thereof and render a particular account, etc., stating the occupancy of the building insured, etc., duly verified, etc., and that the loss should not become payable until such proofs had been rendered, *held*, that as plaintiff had no right of action until these proofs were made, the company did not waive its right to object to paying the loss on account of the vacancy of the building by requiring plaintiff to furnish his proofs of loss, without a refusal to pay on that ac-

count after knowledge of the fact: *Fitchpatrick v. Hawkeye Ins. Co.*, 53-335.

147. Waiver as to use: Where a policy of insurance was surrendered to the company with the information that a use was being made of the premises inconsistent with the terms of the policy and thereupon the company returned the policy uncanceled, *held*, that the policy thereafter remained in force as before, the condition being thereby waived: *Nedrow v. Farmers' Ins. Co.*, 43-24.

148. The waiver of the breach of condition against increased risk by permitting a certain article to be manufactured in the building applies not only to breaches prior to the waiver, but also contemplates a dispensation of the condition and a continuation of the prohibited use: *Viele v. Germania Ins. Co.*, 26-9.

149. Consent to the prohibited use of the building as a manufactory implies consent to the use of such articles as are necessary in connection with the use thus consented to, though the use of such articles may be expressly prohibited in the policy: *Ibid.*

150. Parol evidence of waiver: The rule that parol evidence is not admissible to contradict or alter a written instrument does not exclude such evidence when offered to show discharge or waiver. The same character of evidence will establish a waiver or dispensation of conditions that is sufficient to prove the existence of a contract, such as an express agreement, or acts and declarations inducing the other party to believe the condition or forfeiture waived and a treatment of the contract as not forfeited: *Ibid.*

151. Consideration for waiver: A condition in a policy is not dependent upon nor supported by the consideration and may be waived or dispensed with by an agreement without consideration: *Ibid.*

152. Return of premium not necessary: Failure of the company to repay to the assured the *pro rata* premium unearned on the policy after loss, upon learning that the policy has been rendered void by reason of its conditions, will not constitute a waiver: *Jewett v. Home Ins. Co.*, 29-562.

153. The appointment of an appraiser to determine the value of the goods not destroyed will not constitute a waiver of the

Loss; what covered.—Conditions precedent to recovery.

breach of a condition coming to the knowledge of the insurer after loss: *Ibid*.

154. Waiver by agent: A general agent is presumed to have authority to waive forfeitures and dispense with conditions and the company will be bound by his acts in this respect within the general scope of his authority though he violates limitations that are not brought home to the knowledge of the party with whom he deals: *Viele v. Germania Ins. Co.*, 26-9.

And further as to authority of agents, see *infra*, I, j.

g. Loss; what covered.

155. Negligence: Insurance against fire covers losses occasioned by the mere faults and negligence of assured and his servants, not affected with any fraud or design: *Mickey v. Burlington Ins. Co.*, 35-174.

156. Recovery not limited to interest: The value of the property and the sum insured determine the amount of recovery and not the value of the interest of the assured in the property. So *held* where the interest of assured was merely the right of homestead in the property of his wife. Whether the rule would be different in case of a mortgagee or lienholder, *quære*: *Merrett v. Farmers' Ins. Co.*, 42-11.

157. After-acquired property: Where the policy covers live-stock of a certain value, situated upon certain described premises, but not otherwise specifically described, the company will be liable for an animal acquired after the date of the policy in exchange for one covered by the policy: *Mills v. Farmers' Ins. Co.*, 37-400.

As to effect of removal, etc., see *supra*, §§ 83-87.

158. What damage covered: Under a policy which excluded store furniture and fixtures, *held*, that damages to the foundation, also that to an ice box built into and constituting part of one of the walls of the building, and also to an awning, were properly included in the damages covered by the policy: *Wilkins v. Germania F. Ins. Co.*, 57-529.

159. Evidence: Where the question is whether a destruction of property insured is due to what is described in the policy as a

tornado, or to weakness of the building, by reason of which it is blown over by a wind less violent than one thus contemplated, evidence as to damage done in the neighborhood at the same time is admissible as tending to prove the nature of the storm: *Pogensee v. Mutual F. L. & T. Ins. Co.*, 69-157.

160. In a particular case *held* that the evidence was not sufficient to show that animals covered by a policy of insurance against lightning, etc., had been injured in such a manner as to render the company liable: *Wilson v. Hawkeye Ins. Co.*, 70—.

161. Custom: It is not proper, in an action under an insurance policy, to allow defendant to prove by experts the manner of adjusting losses: *Williams v. Niagara F. Ins. Co.*, 50-561.

162. Apportionment: The fact that the whole amount of insurance is apportioned in several amounts among distinct items of property limits the liability of insurer to the sums specified as to each item, but does not render the policy severable if the consideration is single. There cannot, in such case, be a recovery as to one part of the property if by reason of misstatements the policy is void as to other parts: *Garver v. Hawkeye Ins. Co.*, 69-202.

h. Conditions precedent to recovery; notice; proof of loss.

163. Condition precedent; arbitration: Where the policy contained a condition that at the request of either party, any difference which might arise as to the amount of loss damage should be referred to arbitrators whose award should be binding upon parties as to such loss or damage, *held* although there was a written request company for such appointment of arbitrators, arbitration was not a condition to the right to sue: *Gere v. Bluffs Ins. Co.*, 67-272.

164. Waiver of notice: The policy requiring notice of loss by the insurer: *Stevens v. City*, 69-658.

165. Where an agent, while investigation of a loss, informs that written notice need not be given, waiver is binding on the

Notice; proof of loss.

the policy provides that the company shall not be bound by the acts and declarations of its agents not contained in the policy: *Ibid.*

166. Proofs of loss: Compliance with the conditions of the policy as to furnishing proofs of loss as a condition precedent must be alleged and proved: *Keenan v. Missouri State Mut. Ins. Co.*, 12-126.

167. Where the policy contains the stipulation that the loss shall be paid after sixty days from due notice and proof thereof, the insured cannot recover without such proof: *Mitchell v. Home Ins. Co.*, 32-421.

168. Where the policy provides that the loss shall not be payable until proofs of loss are furnished, the production of such proofs of loss is a condition precedent to plaintiff's right to sue, and the performance of such condition or its waiver must be averred: *Edgerly v. Farmers' Ins. Co.*, 43-587.

169. Proofs of loss submitted to an insurance company in accordance with the requirements of its policy cannot be used in evidence against the company in an action under the policy: *Neese v. Farmers' Ins. Co.*, 55-604.

170. A statement in the proofs of the aggregate value of the property is sufficient, unless objected to and a more particular amount expressly or impliedly demanded: *Miller v. Hartford F. Ins. Co.*, 70—.

171. The fact that the assured in making proofs of loss fails to state the fact that he has made an assignment of the amount due under the policy for the loss, held not to constitute false statements in the proofs, where the only statement therein relating to such matter was as to the amount claimed and that the property insured belonged exclusively to applicant: *Lamb v. Council Bluffs Ins. Co.*, 70—.

172. Where the policy prescribes that immediate notice of the loss shall be given, and that a particular account thereof shall also be furnished, but the time for furnishing such account or proofs is not prescribed, the account must be furnished within a reasonable time, but the question as to what is a reasonable time will depend upon the circumstances of each particular case: *Miller v. Hartford F. Ins. Co.*, 70—.

173. Provisions of this kind in the policy

should be construed strictly against the company: *Ibid.*

174. Parol evidence of the making of a proof of loss may be received for the purpose of establishing that fact, although not to show the contents of such proof of loss until the absence of the original is accounted for: *Bish v. Hawkeye Ins. Co.*, 69-184.

175. Waiver: The provision requiring proofs of loss being solely for the benefit of the company may be waived: *Eggleston v. Council Bluffs Ins. Co.*, 65-308; *Boyd v. Cedar Rapids Ins. Co.*, 70—.

176. Mere silence on the part of the insurer with reference to proofs of loss will not amount to a waiver: *Keenan v. Missouri State Mut. Ins. Co.*, 12-126.

177. If there is an attempt to perform the condition requiring the filing of proofs of loss, which does not amount to a performance, the failure to request other proofs or to object to the sufficiency of those furnished will not constitute a waiver: *Ibid.*

178. Where something purporting to be proofs of loss is received by the company and retained without specific objection, any objection which may have existed to such proofs will be deemed waived: *Bach v. State Ins. Co.*, 64-595.

179. If the insurer or his authorized agent makes no objection to the proofs upon one ground, but refuses to pay upon other specified and distinct grounds, the objection upon the ground not raised cannot be brought forward at the trial in order to defeat recovery: *Ayres v. Hartford F. Ins. Co.*, 17-176; *Ayres v. Home Ins. Co.*, 21-185.

180. Where a specific objection is made to the proofs of loss which is afterwards cured, all other objections thereto will be deemed waived: *Williams v. Niagara F. Ins. Co.*, 50-561.

181. A positive and unqualified refusal to pay, based upon facts within the company's knowledge, and made under such circumstances as to justify the insured in believing that the rendition of proofs would be a vain act, and that they would not be examined, is equivalent to an express waiver: *Boyd v. Cedar Rapids Ins. Co.*, 70—.

182. So held as to refusal, on account of non-payment of premium, to recognize any liability whatever; and held, that the com-

Proof of loss.—Limitation of actions.

pany could not afterward object that proofs were not furnished within proper time: *Carson v. German Ins. Co.*, 62-433.

183. If proofs are submitted after the time within which proofs are required to be furnished, which the company promises to consider, agreeing to notify assured of the result of its examination, it will be estopped from pleading the delay: *Mickey v. Burlington Ins. Co.*, 35-174.

184. Acquiescence of the agent of the company in the sufficiency of notice of loss will not operate as a waiver of preliminary proof; but under the facts in a particular case, *held*, that something in addition to notice, and intended as preliminary proof, having been given the agent, and he having been asked if anything further was required, his answer in the negative constituted a waiver of further proof, so far as he had power to bind the company by such waiver: *Edgerly v. Farmers' Ins. Co.*, 48-644.

185. Where waiver of preliminary proof was relied on, *held*, that an averment of the acceptance of a paper purporting to be such proof was sufficient to raise the question of waiver: *Ibid.*

186. Preliminary proofs *held* properly admitted in evidence in connection with proof of waiver by the company of any further proof, but not as evidence as to extent of plaintiff's damages: *Ibid.*

187. Statements by the agent of the company, in a particular case, refusing to pay the loss for the reason that it was not from a cause for which the company was liable, *held* not sufficient to constitute a waiver of proof of loss as to a cause of loss for which the company was liable: *Cornett v. Phenix Ins. Co.*, 67-388.

188. Where a waiver of proof of loss is alleged, plaintiff may be required on motion to state whether such waiver was oral or in writing, and what officer or agent undertook to make such waiver: *Webster v. Continental Ins. Co.*, 67-393.

189. Objections on account of defects in proof of loss are technical and without substantial merit, and insurer should make them known with reasonable promptitude, to the end that they may be perfected, if possible: *Young v. Hartford F. Ins. Co.*, 45-377.

190. Objections to the proofs not made

when they are furnished cannot be raised afterward: *Miller v. Hartford F. Ins. Co.*, 70—.

191. Fraud: In a particular case, *held*, that the evidence showed a false statement in the proofs of loss sufficient to defeat recovery under the policy: *Hansen v. American Ins. Co.*, 57-741.

192. Overvaluation: An overestimate in the proofs of loss of the value of the property destroyed, if made honestly and in good faith, will not constitute fraud precluding the recovery on the policy: *Stone v. Hawk-eye Ins. Co.*, 68-737.

193. Proofs by agent: Where the policy required all persons insured to deliver an account of loss signed by their own hands, and the preliminary proof was made by a person not the insured, who stated that the insured was a non-resident, was ignorant of the fire, and that the proofs were therefore made for him, *held*, that this might be sufficient, if the person making the proof was in fact the agent of the assured in charge of the premises, but not, unless the objection was waived, if he was not such agent: *Ayres v. Hartford F. Ins. Co.*, 17-176.

194. Nearest magistrate: Under the provisions of a policy that certificate of loss thereunder should be made by the nearest magistrate or notary public, *held*, in the absence of bad faith of insured in selecting the officer, nice distinctions as to the distance should not be indulged in: *Williams v. Niagara F. Ins. Co.*, 50-561.

195. Impossibility: Where the policy required production by assured, in case of loss by fire, of duplicate bills and invoices of goods destroyed, *held*, that literal compliance with such provision could not be required where it was impossible: *Eggleston v. Council Bluffs Ins. Co.*, 65-308.

i. Limitation of actions.

196. Valid: Provisions in the contract of insurance limiting the time within which suit may be brought under the policy are valid in the absence of controlling circumstances: *Stout v. City F. Ins. Co.*, 12-371; *Carter v. Humboldt F. Ins. Co.*, 12-287.

197. Controlling circumstances: Where the insured is required to prove the amount

Limitation of actions.

of loss before being entitled to bring action on the policy, and under the circumstances it is not practical to make such proof within the time limited, the limitation will not be enforced. Therefore where the interest of the insured was a mechanic's lien which it was impossible to reduce to judgment within the time specified for bringing suit, the condition requiring it to be brought within the time specified was held to be inoperative: *Stout v. City F. Ins. Co.*, 12-371.

198. Where the interest of the assured is such that with reasonable diligence the value thereof cannot be legally ascertained in time to bring an action on the policy within the time fixed, the law will presume that in granting such policy the company intended to waive such condition limiting the time for bringing action: *Longhurst v. Star Ins. Co.*, 19-364.

199. When period commences: Where the policy provided that no action should be brought thereon, unless commenced within six months after loss, and contained a further provision that the company should have sixty days after due notice and proof of loss within which to make payment, *held*, that the six months during which action might be brought must be construed to commence with the expiration of the sixty days allowed the company for making payment: *Ellis v. Council Bluffs Ins. Co.*, 64-507.

200. Where the policy provides that action shall be commenced within one year after the loss, and that the company will pay the loss in sixty days after the proofs of loss are furnished, but the time for furnishing proofs of loss is not stipulated, the action is not barred at the expiration of one year from the time of loss: *Miller v. Hartford F. Ins. Co.*, 70—.

201. The statutory provision (18 G. A., ch. 211, § 3; McClain's Ann. Stat., 300, 301) that no action shall be brought until ninety days after giving notice of the loss and furnishing proofs, does not operate to extend the period of limitation fixed in the policy where proof of loss is neither made nor waived: *Cornett v. Phenix Ins. Co.*, 67-388.

202. Where an action upon a policy was brought within the time limited therein, *held*, that the subsequent intervention of a party who was entitled to a portion of the

recovery would not constitute the bringing an action after the limitation in such sense as to defeat such action: *Stevens v. Citizens' Ins. Co.*, 69-658.

203. Waiver: The conditions of the policy as to the time within which action may be brought, being for the benefit of the company, may be waived by it: *Bish v. Hawkeye Ins. Co.*, 69-184.

204. The company may, by promises and representations tending to induce claimant to refrain from bringing suit, estop itself from afterwards setting up the fact that the time for bringing suit has expired: *Eggleston v. Council Bluffs Ins. Co.*, 65-308.

205. And in a particular case, *held*, that if delay in bringing suit until after the expiration of the time was in consequence of inducements held out to insured by the officers of the company, making him believe that the loss would be paid without suit, this fact would operate to remove the bar created by the terms of the policy: *Ibid*.

206. An agreement by the company as to the amount of the loss and that it will be paid by a particular time on the return of the policy and receipt will not estop it from afterwards insisting on the limitation as to the time of bringing action, where, previous to the expiration of the period of limitation, it has notified insured that the claim will not be paid: *Garretson v. Hawkeye Ins. Co.*, 65-468.

207. An instruction that if insured was induced, by the statements and representations of the agent of the company to the effect that the terms of the policy had been complied with and that the settlement of the loss would be made, to abstain from bringing action until the expiration of the term fixed by the policy, the defendant would be presumed to have waived the conditions of the policy and would be estopped from setting up any defense based thereon, *held* proper: *Bish v. Hawkeye Ins. Co.*, 69-184.

208. Not applicable to recovery of unearned premiums: The provision limiting the time within which action may be brought for a claim under the policy is not applicable to an action by the assured to recover back premiums paid on a policy which is void *ab initio*: *Waller v. Northern Assurance Co.*, 64-101.

 Authority of agents.

209. Demurrer: Advantage of the fact that the action is not brought within the time limited in the policy cannot be taken by demurrer, but the objection must be raised by plea. (Decided under former rules of procedure): *Carter v. Humboldt F. Ins. Co.*, 12-287.

j. *Authority of agents.*

210. General agents: Agents of insurance companies, who are empowered generally to make policies, transfers, etc., are to be considered as general agents, and the corporations represented by them are bound by their acts so far as they are in the scope of the general authority they possess, though in violation of limitation upon that authority not brought home to the party dealing with them: *Miller v. Phoenix Ins. Co.*, 27-203.

211. Authority: Under general authority to conduct the business of insurance for his principal at a certain place, an agent possesses implied authority to do all things proper and necessary in the prosecution of that business, subject to limitations imposed by his principal and known to those with whom he deals. He has also all the powers which by the usages of the business are properly and ordinarily exercised by agents engaged therein, and may therefore dispense with the conditions and waive the effect of breach of warranty in contract of insurance made by him: *Viele v. Germania Ins. Co.*, 26-9.

Further as to authority to waive forfeitures, etc., see *supra*, I, f.

212. Notice to agent taking the insurance and who is authorized to issue or countersign policies, accept risks and receive premiums, is notice to the company: *Williams v. Niagara F. Ins. Co.*, 50-561.

213. Agreement without authority: An insurance company is not bound by an agreement of an agent who takes the application but has no authority to make such agreement; for instance, an agreement varying the terms of the policy as to the party to whom the loss shall be payable: *Baldwin v. State Ins. Co.*, 60-497.

214. Authority to take one kind of risk does not necessarily include authority to take all kinds: *Smith v. State Ins. Co.*, 58-487.

215. An agent who is authorized to take applications, receive and receipt for premiums, and forward applications and premiums, receive policies when issued and deliver them to assured, but nothing further, has no such authority as to bind the company for a contract of insurance not assented to by it: *Armstrong v. State Ins. Co.*, 61-212.

216. The fact that the agent is required to countersign policies issued by the company will not confer upon him any power to bind the company for a contract of insurance before the issuance of any policy: *Ibid.*

217. The appointment of a person to solicit insurance will not give him power to pass upon risks or bind the company by his written consent to the assignment of the policy: *Strickland v. Council Bluffs Ins. Co.*, 66-466.

218. Acts and declarations of an agent whose business it is to take applications, where such acts and declarations are subsequent to the taking of the application and at the time of the destruction of the property, are not competent to establish a contract of insurance: *Walker v. Farmers' Ins. Co.*, 51-679.

219. An insurance company may reject applications made through an agent, and a failure of the agent to return a premium paid with the application will not operate to render the risk binding where the fact of rejection is known to the applicant and the premium is left in the hands of the agent while a reconsideration of the application is asked: *Otterbein v. Iowa State Ins. Co.*, 57-274.

220. Ratification: Where an agent agreed to insure property, but it was not specified what company insurance should be taken in, held, that a subsequent issuance of a policy in the defendant company, and the acceptance of the benefit therefrom in its behalf, amounted to a ratification binding it to the contract: *Young v. Hartford F. Ins. Co.*, 45-377.

221. Filling out applications: Where the local agent of an insurance company has authority only to receive and forward applications, parol evidence is not admissible to show that in a particular case he failed to take down the statements or changed them. By signing the application the applicant

 Authority of agents.

makes it his own. But if the agent has power to pass upon the risk without submitting it to his principal, and fails to take down the facts as stated by the applicant, in ignorance of which such application is signed, and there is no statement in the policy that the insurer will not be bound by the acts or knowledge of the agent or by statements to or by him, the insurer will be estopped from objecting that he has been misled by the statements in the application: *Ayres v. Hartford F. Ins. Co.*, 17-176; *Ayres v. Home Ins. Co.*, 21-185.

222. Where insured stated in his application that there was no incumbrance on the property, and shortly afterwards met the agent, who took the application and corrected his statement, and the agent wrote the company on the date of such correction, and two or three days afterwards the policy was received by insured, *held*, that if the company received the information before it sent the policy, it became an amendment of the application and made it true, and if it did not receive such application until the policy was sent, it should have returned the premium note and demanded the surrender of the policy; and it is questionable if it could avail itself of the mistake, after loss, upon failure to do so. But, at any rate, the agent being the agent of the insurer in respect to the application, notice to the agent will be notice to the company and the policy will be valid: *Anson v. Winnesheik Ins. Co.*, 23-84.

223. But if the agent taking the application in such case had no power except to take and forward applications, then the company would not be bound: *Ibid*.

224. One who receives and forwards applications will be regarded as an agent of the insurer, and if the applicant knows or has reason to know that such agent has simply power to take and forward applications, and that such application is to be forwarded and submitted to the company as the sole basis of its accepting the risk, he must see that its representations are not untrue. But if the agent furnishes and undertakes to fill up the application, and being correctly informed respecting an incumbrance the insured is led to suppose that his answers have been truly taken down, and by the fault of the agent he does not know to the contrary, then

the company having received the premium cannot avoid liability because of the existence of the incumbrance: *Bartholomew v. Merchants' Ins. Co.*, 25-507.

225. Where the application is signed in blank and filled up by the agent of the company on his own motion without the knowledge of the assured, the latter will not be bound by the answers, and the signing of the application in blank will not be considered as giving the agent authority to fill such blanks for the applicant, but it will rather be considered that the applicant supposes answer to the questions are waived: *Hington v. Aetna Ins. Co.*, 42-46.

226. A false statement in the application for insurance, if written in the application by the company's soliciting agent without the knowledge of insured, the insured having made truthful answers to such questions as were asked him by the agent, will not defeat recovery under the policy. The agent is deemed to have written the application in the performance of his duties as agent, and if the company is deceived or misled by such statements, the loss should not fall upon the insured who is without fault. The insured is not charged in such case with the duty of seeing that the statements are correctly written by the agent: *Stone v. Hawkeye Ins. Co.*, 68-737.

227. If an agent having authority to solicit insurance and forward applications fills up answers in an application from his own knowledge, the company will not be allowed to rely upon misstatements made in such answers as a breach of warranty avoiding the policy: *Donnelly v. Cedar Rapids Ins. Co.*, 70—.

228. Parol evidence is admissible to show that assured correctly stated the fact of incumbrance on the property to the solicitor taking the application, and the company is bound by knowledge of or notice to a soliciting agent having power to fill up applications and receive and forward premiums: *Boetcher v. Hawkeye Ins. Co.*, 47-253. And see *Miller v. Mutual Benefit L. Ins. Co.*, 31-216.

229. Personal knowledge of an agent having authority to take risks and fill out applications will be imputed to the company, and it will be estopped from claiming that representations in the application as to

which the agent has knowledge render the policy void: *Eggleston v. Council Bluffs Ins. Co.*, 65-308.

230. Where an agent was also a notary public, *held*, that knowledge acquired by him while acting as notary in reference to other business prior to the issuance of the policy, and not sufficiently near to the issuance of the policy to justify the inference that at that time he had in mind the facts coming to his knowledge as notary, would not be imputed to the company: *Stennett v. Pennsylvania F. Ins. Co.*, 68-674.

231. Authority to waive notice or proofs of loss: Where a policy provided that preliminary proofs should be delivered at the office of the company, and something purporting to be such proofs was delivered there to the adjusting agent of the company, occupying the office, which was accepted by him as sufficient, *held*, that this acceptance was a waiver of any defect therein, binding upon the company, unless his authority in that respect was expressly limited, and assured had notice of the fact: *Edgerly v. Farmers' Ins. Co.*, 48-644.

232. An agent authorized by the company to investigate a loss has power to waive notice of loss, although the policy provides that the company shall not be bound by the acts or declarations of its agents not contained in the policy: *Stevens v. Citizens' Ins. Co.*, 69-658.

233. Authority to waive forfeiture: The waiver of forfeiture can be inferred from the acts of the agent only in cases where he is expressly authorized to waive or to do such acts that in law amount to a waiver; and where such waiver is claimed, the authority of the agent must be shown: *Hollis v. State Ins. Co.*, 65-454.

234. The fact that a local agent knew of the assignment of the property insured and did not object thereto, he never having been asked to consent, and it not appearing that he had power to waive express conditions of the policy, *held* not sufficient to show waiver of the forfeiture caused by such transfer: *Ayers v. Hartford F. Ins. Co.*, 17-176.

k. Statutory provision as to companies.

235. Non-compliance as to method of doing business: The failure of an insurance

company to comply with the requirements of statute with reference to doing business does not, of itself, operate to close the business of the company and its officers. Although they may not take any more risks until the requirements of the law are complied with, they have authority to indemnify the company by re-insurance for any risks already taken: *Davenport F. Ins. Co. v. Moore*, 50-619.

236. Re-insurance: An insurance company may effect re-insurance on its risks in another company, and pay off such risks by transferring to the company in which such re-insurance is effected premium notes owned by it: *Ibid.*

237. Service upon agents: A foreign insurance company having, in accordance with the requirements of the statute (Code, § 1144), designated agents in the state to acknowledge service of process for it, service may be made upon any of such agents within the state, irrespective of the place of bringing action: *Niagara Ins. Co. v. Rodecker*, 47-163.

238. Defense to note given for insurance: To render a note given for insurance void in the hands of an innocent holder (under the provisions of the Code, § 1146, that notes taken for policies of insurance shall state upon their face that they have been given for insurance, and shall not be collectible unless the company or its agents have fully complied with the laws of the state relative to insurance), it is necessary that the fact that the note was so given be made to appear upon its face: *Cook v. Weirman*, 51-561.

II. LIFE.

239. Charter and rules of mutual company: Members of a mutual company are presumed to have knowledge of its articles of incorporation and by-laws, but not of regulations adopted by officers for the transaction of business, such, for instance, as instructions to officers and agents as to the discharge of their duties: *Walsh v. Aetna L. Ins. Co.*, 80-133.

To same effect, see *supra*, §§ 14-18.

240. Circulars or books issued by an insurance company are admissible in evidence as publications made to the world as to the rules governing the company in its business, and

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therefore binding upon it: *Walsh v. Aetna L. Ins. Co.*, 80-133.

241. Non-payment of premium; notice: Where a life insurance company has given a policy-holder reasonable ground for expecting that he will be advised when his premium shall become due, the company must continue to give such notice until the insured is notified that he need no longer expect it: *Mayer v. Mutual L. Ins. Co.*, 38-304.

242. A policy of life insurance considered in a particular case, and *held* not to require payment of premium notes, but only payment of interest thereof, the principal to be paid by dividends or by deduction from proceeds of the policy: *Ohde v. Northwestern L. Ins. Co.*, 40-357.

243. Forfeiture for non-payment: Where the policy provided that if the premium should not be paid on the dates mentioned for the payment thereof at the office of the company in New York or to agents producing receipts signed by the president, then the company should not be liable, *held*, that mere failure to pay, although the demand was not made by any agent of the company having a receipt for the premium, would forfeit the policy: *Williams v. Washington L. Ins. Co.*, 81-541.

244. Under a beneficiary certificate in a Roman Catholic Protective Association, by the constitution of which the rights of a member should be forfeited on account of neglect of his Easter duties (shown to mean attendance at the confessional, etc.), *held*, that the evidence was not sufficient to show neglect of such duties so as to render the certificate void: *Matt v. Roman Catholic Mut., etc., Soc'y*, 70—.

245. The failure of assured by reason of sickness to make payment of the premium at the time specified in the policy, by reason of which the policy becomes forfeited, cannot be excused on account of the impossibility of doing the act. Such act might have been performed by others in behalf of the assured: *Carpenter v. Centennial Life Ass'n*, 68-453.

246. Waiver: A proposition from the company to accept payment of dues and waive forfeiture already incurred by reason of their non-payment implies such payment within a reasonable time; and where, after

such proposition was made, the insured did not transmit the delinquent dues until the expiration of twenty-three days, *held*, that such payment was not within the terms of the proposition, and the company was under no obligation to accept it and reinstate the insured: *Servoss v. Western Mut. Aid Soc'y*, 67-86.

247. Therefore, *held*, that where the company, on such payment being made long after the proposition to reinstate insured was made, sent him a receipt therefor, containing a stipulation that the policy was continued in force provided the insured was then alive and in good health, and he was then in fact suffering from illness which soon afterwards terminated fatally, the forfeiture was not waived: *Ibid*.

248. A mutual benefit association cannot avoid liability for loss under one of its policies, on the ground that the contract was void from the very beginning on account of its want of power to enter into such a contract, when at the same time it has collected assessments thereon: *Matt v. Roman Catholic Mut., etc., Soc'y*, 70—.

249. Assessments: Under the constitution and by-laws of a mutual company providing that no member should be entitled to the benefits of the insurance if he did not comply with the regulations relating to payment of death assessments, *held*, that before the member could be in default for failure to pay such assessments, they must be regularly made as required by the regulations of the association, and that the custom of making such assessments in another manner would not, in the absence of knowledge by a member, defeat his rights: *Underwood v. Iowa Legion of Honor*, 66-134.

250. Construction of policy: A policy of insurance is to be construed strictly against the insurer: *Miller v. Mutual Benefit L. Ins. Co.*, 31-216.

And see *supra*, § 173.

251. Assignment: Where a wife having made an assignment in blank of a policy on her husband's life for a particular purpose, the husband delivered the same to the assignee in good faith for a different purpose from that intended, *held*, that the wife could not question the validity of the assignment and recover possession of the policy from the

assignee: *Plummer v. People's Nat. Bank*, 65-405.

252. Statements in application: Where the policy states that it is issued upon the faith of statements in the application, with a stipulation that if they shall be found in any respect untrue the policy shall be void, the materiality of such statements cannot be raised by the party suing on the policy. They become warranties that they are true in every particular, whether material or not: *Wilkinson v. Connecticut Mut. L. Ins. Co.*, 80-119.

253. The language of questions asked of an applicant for insurance is to have a reasonable construction in view of the purposes for which the questions are asked, and such a construction is to be put upon them as a person of ordinary understanding would put upon them, if asked him for answer: *Ibid.*

254. Therefore, *held*, that a negative answer to the question, "Has the person ever met with any accident or serious injury?" would not avoid the policy, although some years prior to the application the insured had received injury from a fall, which was simply temporary and passed off entirely in a few days without impairing his subsequent health: *Ibid.*

255. Warranties and representations: A warranty constitutes a part of the contract, and it is necessary that it shall be exactly and literally complied with, but a representation is collateral to the contract, and it is sufficient if it be equitably and substantially complied with. Moreover, in case of warranty, the burden of proof is upon the party seeking indemnity to establish a case in all respects in conformity with the terms under which the risk is assumed; but in case of a representation the burden is cast upon defendant to set forth and prove the collateral fact upon which he relies: *Miller v. Mutual Benefit L. Ins. Co.*, 81-216.

256. In considering whether a part of the contract is a warranty, the rule is that a warranty will not be created or extended by construction. The application for insurance is in itself merely collateral and not a contract of insurance, and its statements are to be considered as representations unless converted into warranties by force of a reference to them in the policy and a clear purpose manifest in the papers thus connected, that

the whole shall form one entire contract: *Ibid.*

257. While the substantial truth of representations is all that is necessary to be shown and this question is one for the jury, yet where the representation is made in response to a direct question asked in the application, the materiality of such representation cannot be questioned, and is not for the jury to determine: *Ibid.*

258. Where the defense of fraud is interposed in an action upon a policy on the ground of statements made to insurer by insured in the application, and is based upon the statements of others together with those of insured, such other statements should be considered in determining the question of fraud: *Ibid.*

259. Intemperance: To establish a defense under a policy providing that there shall be no liability for death caused by intemperate habits, it must be shown that the sole or paramount cause of the death was intemperance. It is not sufficient that the life of the insured was merely shortened by the use of intoxicating liquors, where such use is not the cause of the death: *Ibid.*

260. Where it appeared that the death of the assured was caused by inflammation of the brain and lungs, due to intemperance and exposure resulting therefrom, *held*, that there was no liability under the policy which contained a provision that it should be void if assured should die by reason of intemperance: *Miller v. Mutual Benefit Ins. Co.*, 84-222.

261. Evidence considered in an action upon a policy of life insurance, and *held* sufficient to show that the death resulted from the intemperate habits of assured within the terms of the exceptions in the policy: *Miller v. Mutual Benefit L. Ins. Co.*, 89-304.

262. Fraud: If an insurance company issues a policy upon a risk greater than the ordinary one, with full knowledge of all facts, it cannot escape liability by proving the nature of the risk: *Miller v. Mutual Benefit L. Ins. Co.*, 81-216.

263. Waiver of conditions: A policy is void by reason of violation of the conditions of the policy as to place of residence if waived. Any acts inducing a belief that the condition is dis-

Life.

the forfeiture waived will be sufficient to establish a waiver: *Walsh v. Aetna L. Ins. Co.*, 80-183.

264. The receipt of premiums upon a policy after knowledge of acts which work a forfeiture thereof constitutes a waiver of such forfeiture: *Ibid.*

265. Knowledge of agent: An insurance company transacting business through an agent having authority to solicit, make out and forward applications, to deliver policies when returned, and to collect and transmit premiums, is affected by the knowledge acquired by such agent when engaged in procuring an application, and is bound by his acts done at that time with respect thereto: *Miller v. Mutual Benefit L. Ins. Co.*, 81-216.

266. Waiver by agent: Where a company permits its agent to act in the collection of premiums and he receives premiums after they have become due, the company will be bound by his agreement as to the waiver of time of payment provided for in the policy: *Mayer v. Mutual L. Ins. Co.*, 88-804; *Walsh v. Aetna L. Ins. Co.*, 80-183.

267. If, without knowledge of any limitation on the power of such agent to issue permits to reside within limits not allowed by the terms of the policy, payments are made under such permits and accepted by him, under the belief that he has full power to act and that the permit has been granted, the company is bound by his acts: *Walsh v. Aetna L. Ins. Co.*, 80-183.

268. Power to extend policy: The receipt by the agent of an extra premium upon an application for extension of the privilege of a policy, and the execution of an acknowledgment thereof, may not of themselves be binding upon the company as an extension of the policy: *Ibid.*

269. Disposition of proceeds: The statutory provision (Code, § 1182) that a policy of insurance on the life of an individual shall, in the absence of an agreement or assignment to the contrary, inure to the separate use of the husband or wife or children of said individual independently of his or her creditors, contemplates a case where the policy is payable to deceased, or his or her legal representatives, and not a case where the policy is payable to another person for his

use and benefit, in which case it cannot be otherwise disposed of by will: *McClure v. Johnson*, 56-620.

270. Where the contract of insurance provides the method by which insured may change the beneficiary entitled to the proceeds of the policy, and such method is not pursued, a direction in the will of the assured making such change will be without effect: *Stephenson v. Stephenson*, 64-534.

271. Where absolute power is given to a member of a mutual benefit association to designate who the beneficiary shall be, such direction cannot be disregarded, although the articles of incorporation of the association provide that its object shall be to provide for the widows and orphans of deceased members, and the beneficiary designated is not a widow or child of the deceased member: *Mitchell v. Grand Lodge*, 70—.

272. The assured cannot by direction in his will provide for payment of the proceeds of a policy on his life to another beneficiary than the one mentioned in the policy. The contract with the company cannot thus be altered without its consent: *Wilmaser v. Continental L. Ins. Co.*, 66-417.

273. Where a decedent left a wife but no children, *held*, that under the statutory provision above referred to the proceeds should go to the wife alone and not be divided among all the distributees of his estate: *Rhode v. Bank*, 52-375.

274. The proceeds of the policy, when realized by the person entitled thereto, are not exempt from execution for the debts of such person. The exemption exists only as to the debts of the person insured: *Smedley v. Felt*, 48-607; *Murray v. Wells*, 53-256.

275. In a particular case *held* that the evidence did not show a contract to subject the proceeds of a life policy to the payment of a debt: *Herriman v. McKee*, 49-185.

276. Where the proceeds of a policy of life insurance are used to release other property from a claim under which it is held, the property so released becomes subject to the payment of debts: *Friedlander v. Mahoney*, 81-311.

277. The proceeds of a life policy are assets of the estate, and only differ from other assets in the manner of their distribution: *Kelley v. Mann*, 56-625.

278. Statutory provisions as to method of business: In an action to close the business of a corporation for failure to comply with the provisions of the statute with reference to the method of doing business, it must be assumed that the corporation is duly organized: *State ex rel. v. Iowa Mut. Aid Ass'n*, 59-125.

279. Mutual aid associations organized to afford financial aid and benefit to the families of deceased members, and assistance to members personally in case of sickness or disability, are not within the statutory provisions as to life insurance companies: *Ibid.*

280. Under the constitution of the association known as the Ancient Order of United Workmen, held, that such association, notwithstanding its fraternal character, was in effect a mutual insurance company, and that the supreme lodge of that corporation, being incorporated under the laws of Kentucky, was not authorized to exercise any powers or do business in Iowa without compliance with the laws of Iowa with reference to life insurance companies: *State ex rel. v. Miller*, 66-26.

III. ACCIDENT.

281. Negligence: Facts in a particular case held sufficient to show negligence on the part of a passenger such as to defeat his recovery under a policy of accident insurance against injuries occurring while "riding on a public conveyance provided by common carriers, . . . and in compliance with all rules and regulations of such carriers, and not neglecting to use due diligence for self-protection:" *Bon v. Railway Passenger Assurance Co.*, 56-664.

282. Disability: Where a policy of accident insurance provided for indemnity in a certain sum per week against loss of time by accident while totally disabled and prevented from the transaction of all kinds of business, held, that it was error to instruct the jury in such manner as to allow a recovery for partial disability in reference to some particular occupation: *Lyon v. Railway Passenger Assurance Co.*, 46-631.

283. Notice: Where the policy required that, in the event of bodily injury or death, immediate notice should be given to the company, held, that the giving of such notice

was a condition without which the company would not be liable, and that as to whether notice was given in proper time was a question for the jury: *Ibid.*

INTEREST.

I. LAWFUL INTEREST.

- a. *In general.*
- b. *Interest upon interest.*
- c. *At what rate.*
- d. *When interest commences to run.*

II. USURY.

- a. *In general of contracts held to be usurious.*
- b. *Effect of usury on the contract.*
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- f. *Usury, when paid.*
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When interest may be allowed as damages, see DAMAGES, I, f.

As to prayer for interest, and as to including interest in judgment, see PLEADINGS, 440-442.

As to allowance of interest against parties chargeable with moneys in their hands, see ESTATES OF DECEDENTS, §§ 447, 448; TRUSTS §§ 000-000; GARNISHMENT, § 111; GUARDIANSHIP, §§ 84-86; ATTORNEYS, §§ 72-74.

Construction of stipulations for interest see BILLS AND NOTES, §§ 55-59.

I. LAWFUL INTEREST.

a. *In general.*

1. Interest is chargeable upon unless exempted therefrom. When money is paid for the use of money imposing an obligation upon the lender to receive the benefit of the payment, the party paying, interest is chargeable from the date of the payment. *now v. Litchfield*, 63-275; C 67-654.

2. Partial payments; if the payment exceeds the interest on the principal

In general.—Interest upon interest.—At what rate.

payment, add this interest to the principal and then deduct the payment. If the payment falls short of the interest due, calculate the interest on the principal up to the time when the payments will exceed the interest due on the principal debt, and then deduct the payment, so as to avoid taking interest upon interest: *Huner v. Doolittle*, 8 G. Gr., 76.

3. Interest not claimed: To recover interest on an account it should be averred in the declaration and specified in the bill of particulars: *David v. Conard*, 1 G. Gr., 336.

4. Effect of war suspending payments: As to whether a debt due from a resident of a loyal state to a resident of a state in secession continued to draw interest while payment was rendered impossible by reason of the war, the court were equally divided: *Griffith v. Lovell*, 26-226.

5. Money wrongfully used or detained: An attorney who receives money for his client, and neither puts it upon deposit nor keeps it ready for demand, but uses it as his own, will be chargeable with interest thereon: *Mansfield v. Wilkerson*, 26-482.

And see ATTORNEYS, §§ 72-74.

6. Where money was paid into court to await its order, and there detained because of the erroneous order of the court, *held*, that the party finally found entitled thereto could not recover interest for the time of detention, it not appearing that the opposite party had not acted in good faith: *Van Gordon v. Ormsby*, 60-510.

7. Payment defeated by fraud: Where it was agreed by the mortgagee that the mortgaged premises should be reconveyed to him in satisfaction of the mortgage, and by fraud of the mortgagee's agent, and without wrong on the part of the mortgagee, such reconveyance was made to the agent instead of to the mortgagee, *held*, that although the reconveyance was void and the mortgage still in force, yet the mortgagee could not recover interest subsequent to the date that the reconveyance was made: *Hait v. Ensign*, 61-724.

8. Double damages: In an action against a railway company for double damages for stock killed, it is error to allow interest in addition to the damages allowed: *Brentner v. Chicago, M. & St. P. R. Co.*, 58-625.

9. Compound interest included in settlements: A debtor under a deed of trust was

found to have assented to certain settlements made during the existence of the trust deed, by which settlements he allowed compound interest at short rests, and also certain attorneys' fees, for the purpose of preventing a sale of the trust property at inopportune times and at a sacrifice. *Held*, that the debtor was not concluded by the settlements so made, but that he should be charged with simple interest compounded only according to the legal rule at each payment exceeding the interest then due: *Fockler v. Beach*, 82-187.

10. Illegal interest: As the consideration of a note, illegal interest, unlike usury, cannot be urged against an innocent assignee before maturity: *Burrows v. Cook*, 17-436.

b. Interest upon interest.

11. Payable annually: Where the interest upon a note is made payable annually, each instalment of interest will draw interest at six per cent. from the time it is payable: *Mann v. Cross*, 9-337; *Preston v. Walker*, 26-205; *Burrows v. Stryker*, 47-477; *White v. Savery*, 50-515.

12. If the interest is not made payable annually or at a specified time, it will not draw interest even from the time of the maturity of the principal: *Aspinwall v. Blake*, 25-319.

13. The parties may, by contract, stipulate that interest which is made payable annually, quarterly, or otherwise, shall bear interest at the rate of ten per cent. from the time it is due: *Ragan v. Day*, 46-239.

14. Lex loci: Interest upon annual instalments of interest may be collected under the decisions of this state, and it matters not that the contract itself was made under the laws of a state where interest on instalments of interest was not allowed to draw interest: *Burrows v. Stryker*, 47-477.

c. At what rate.

15. Interest after judgment: Judgment on a contract stipulating for the payment of interest will draw interest at the same rate as that stipulated in the contract: *Wilson v. King*, Mor., 106.

16. But so far as the judgment covers interest only, in the absence of any agreement in the contract that interest shall draw interest,

the judgment will draw interest only at six per cent.: *Burkhart v. Sappington*, 1 G. Gr., 66.

17. Ten per cent. should not be allowed upon a judgment where the contract specifies no rate: *Easley v. Redpath*, 9-300.

18. Where a member of a partnership which had previously been dissolved paid a portion of a judgment against the partnership which the other partner, by the terms of the dissolution, was bound to pay, and then sought to recover from such other partner the amount so paid, *held*, that the rate of interest to be allowed was not the rate drawn by the judgment paid, but merely the legal rate, there being no evidence of an agreement to pay any particular rate: *Myers v. Smith*, 15-181.

19. Unless a different rate of interest is expressed in the judgment or the decree, but six per cent. can be collected thereon, although the contract on which the judgment is rendered bears ten per cent. If the failure to express the higher rate of interest in the judgment is owing to mistake or oversight of the clerk, the judgment may be corrected in that respect by timely and proper proceedings. But after the amount of judgment with six per cent. interest thereon has been paid, the judgment cannot be enforced for an additional amount against the property upon which it was a lien: *Rice v. Hulbert*, 67-724.

20. Damages: It is incompetent for the court to allow a higher rate than six per cent., even as damages on a money demand, unless the parties otherwise agree in writing: *Venum v. Gregory*, 21-326.

21. Where the jury are directed to allow interest, without any instruction as to the amount, it will be presumed that they understand that interest is to be allowed at six per cent.: *Davis v. Walter*, 70—.

22. Affidavits of jurors are receivable to show whether or not the jury included interest in their verdict: *Swails v. Cissna*, 61-693.

23. After maturity of note or contract: A note providing for interest at ten per cent. per annum from date draws interest at that rate after as well as before maturity: *Hand v. Armstrong*, 18-324; *Lucas v. Pickel*, 20-490.

24. Where it was provided in a contract that a sum of money advanced and invested in behalf of one party by the other should be repaid within one year with interest thereon, *held*, that upon a subsequent waiver of the provisions of the contract requiring repayment to be made within a year, the sum of money advanced continued to draw interest at the same rate until repaid: *Warren v. Ewing*, 34-168.

25. Where a party holding a bond for a deed accepted, in conditional payment of the purchase money provided for therein, obligations of third parties which were not paid, and afterwards brought suit against the other party to the bond to recover the amount thus remaining unpaid, *held*, that he might thus recover the rate of interest stipulated in the bond: *Huse v. McDaniel*, 33-406.

26. Conflict in note and mortgage: Where a note stipulated that if interest was not paid annually, the same should become a part of the principal and bear the same rate of interest, and the mortgage contained the condition that if default should be made in the payment of the sums of money specified therein or any part thereof, principal or interest, then the whole amount of the indebtedness should become due, *held*, that payment of annual interest was not required, and that the whole amount of the indebtedness did not become due on failure to pay such interest annually: *Wood v. Whisler*, 67-676.

27. Indemnity bond: In an action on a bond to indemnify an officer for a levy of an execution upon property claimed by a third person, the measure of liability is the value of the interest of claimant in the property at the time the damages are paid, and the judgment should therefore bear the rate of interest borne by notes secured by mortgages upon the chattels sold: *Rand v. Barrett*, 66-731.

28. Conflict of laws: It is necessary that the rate of interest be "expressed in the contract" in order to authorize a judgment bearing a greater rate of interest than six per cent.; therefore, *held*, that although, as it seems, coupons made in Iowa, but payable in New York, in which no rate of interest is specified, would draw interest from maturity at seven per cent. (the rate in the latter state), yet a judgment in Iowa upon such

Commences to run, when.—Usury.—In general.

coupons could only draw interest at the rate of six per cent.: *Rogers v. Lee County*, 1 Dillon, 529.

29. Verbal contract to pay ten per cent.: Under a contract not in writing to pay ten per cent. interest, the plaintiff may set up and recover upon a contract to pay six per cent. interest: *Brockway v. Haller*, 57-368.

d. *When interest commences to run.*

30. Payment for another's use: When money is paid for the use of another, imposing an obligation upon the party who receives the benefit of the payment to reimburse the party paying, interest from the date of the payment is recoverable: *Goodnow v. Litchfield*, 83-275; *Goodnow v. Wells*, 67-654.

31. County warrant; particular fund: When county warrants or orders are drawn with words of limitation as to payment, interest is allowed thereon from date; but if payable out of a particular fund not otherwise appropriated, interest will not commence to run until after such fund shall be exhausted: *Brown v. Johnson County*, 1 G. Gr., 486.

32. If not paid when due: A note providing for "ten per cent. interest if not paid when due," draws interest from date if not paid at maturity: *Parvin v. Hoopes*, Mor., 294.

33. Custom: The custom of a creditor, known and acquiesced in by the debtor, to charge interest on accounts after the end of the year, may be shown as evidence of an agreement to pay interest: *Veiths v. Hagge*, 8-163, 182.

34. The custom of banks that interest shall be charged on balances due the bank from the dates of monthly settlements will be upheld where known to the debtor, and such computation will not be objectionable on the ground of allowing compound interest, even though the interest on the previous balance is carried into the next month's account: *Isett v. Oglevie*, 9-318.

35. Divided but unfinished account: While it may be that the presentation of an account showing a balance due to which the person charged makes no objection will raise a presumption of its liquidation, and that interest thereon will be chargeable afterwards,

yet continuous dealings represented in one account cannot be divided into separate accounts, which will be presumed liquidated simply by presenting bills of items covering parts of the transaction so that interest will run on the balance of such separate bills: *Raymond v. Williams*, 40-117.

36. For labor performed: In an action for money due on contract or for labor performed, the amount should draw interest from the filing of the petition: *Swails v. Cissna*, 61-693.

II. USURY.

a. *In general, of contracts held to be usurious.*

37. Previous statutes: The Code of 1851 repealed all the usury laws in existence at that time, and until the passage of the act of 1858, which was substantially the same as the law now in force, there was no law regulating the rate of interest: *Palmer v. Leffler*, 18-125.

38. Contracts of sale: The statute (Code, § 2079) forbidding usury applies not only to contracts for loans but also to any contract of purchase or sale of property where an unlawful rate of interest is provided for: *Callanan v. Shaw*, 24-441.

39. But a party may lawfully sell on time for a larger sum than his cash price, with lawful interest thereon to the time of payment, would amount to; therefore, held, that a sale of sheep for a sum to be paid at a future day, wherein it was agreed to pay annually two pounds of wool per sheep until time of payment (the value of the wool being greater than legal interest on the sum to be paid), was not usurious, in the absence of any showing that there was any intention to evade the usury law: *First Nat. Bank v. Owen*, 28-185; *Gilmore v. Ferguson*, 28-220.

40. Penal: The law of usury is in its nature penal and is therefore to be strictly construed: *Dickerman v. Day*, 31-444.

41. Intent: Where there is no evidence of an intent or agreement to contract for usurious interest, a jury would not be justified in finding usury: *Jones v. Berryhill*, 25-289.

42. Sale of commercial paper: Statutes against usury are aimed against the receiving

or contracting to receive a greater rate of interest than authorized upon a loan or forbearance of money and do not apply to the sale of a note or any other vendible commodity which may, in good faith, be sold or transferred for any price fixed by agreement of the parties. Where the contract is neither a loan nor a contract for extension of time on a note already due, but a sale of commercial paper without any corrupt or unlawful intent, it cannot be held usurious simply because the paper is an accommodation note: *Dickerman v. Day*, 31-444.

43. Purchase and repurchase of realty: Where land was purchased by A. without any previous agreement to hold it for B., and afterwards A. agreed to sell it to B. at an agreed time, for an amount which was more than the purchase price with the legal rate of interest, *held*, that such a contract of sale would not amount to usury: *Casady v. Scallen*, 15-93.

44. Contract to reconvey: Where an absolute conveyance was made as security and the grantee executed an agreement to reconvey on payment of the debt at maturity, *held*, that an indorsement on the contract by which the grantee agreed to receive payment at thirty-seven and one-half per cent. on the face of the bond from its date to time of payment, without any other evidence or explanation, though both parties were witnesses, would not raise the presumption of usury: *Brush v. Peterson*, 54-248.

45. Exchange; foreign and domestic: The charging of exchange in addition to the legal interest in discounting foreign bills of exchange is not usury unless resorted to for the purpose of covering up a usurious transaction; but it is otherwise as to domestic bills: *Burrows v. Cook*, 17-436.

46. Mortgage: Under the facts in a particular case, *held*, that a deed absolute in form was intended as a mortgage and included usurious interest: *Johnson v. Smith*, 39-549.

47. Evidence insufficient: Evidence in an action in which usury was set up, *held* not sufficient to sustain the specific findings of the jury: *First Nat. Bank v. Elliott*, 54-419.

48. Additional loan: Where a party, in order to raise an additional loan of money,

agreed that if the person who already held his note and mortgage for a certain sum would sell it and then take another loan under a mortgage for a similar amount, the bearer would repay to him whatever discount he was compelled to suffer in selling the first note and mortgage, *held*, that such a transaction was not usurious: *Comstock v. Wilder*, 61-274.

49. Note for usurious balance: A note given in payment of a balance due on a usurious note is itself usurious: *National Bank v. Eyre*, 52-114; *Callanan v. Shaw*, 24-441; *Garth v. Cooper*, 12-364.

50. Extension of time: Where the maker of a note drawing ten per cent. interest after maturity desired an extension of time, which was granted for a definite period upon the execution of a note, in addition to the ten per cent. embraced in the original note, as consideration for the extension of time, it was held that the note given in extension was usurious: *Ferrierv. Scott's Adm'rs*, 17-578.

51. The extension of time of a loan is a loan within the meaning of the usury laws, and a new note given by the surety to obtain an extension of time on the original undertaking would be usurious: *Kendig v. Linn*, 47-62.

52. Partial revival: Where a usurious indebtedness has been paid in full and discharged, notes subsequently given in partial revival of such indebtedness will not be usurious: *Hoopes v. Ferguson*, 57-39.

53. Note including usurious interest: Facts in a particular case *held* sufficient to show that the maker of a note bearing ten per cent. interest executed and delivered the same in consideration of a loan of a less amount of money, and that the transaction was therefore usurious: *Goodhue v. Teets-horn*, 65-403.

54. Note bearing date before money received: The fact that notes are dated and bear interest from a time preceding the receipt of the money thereon by the mortgagor will not be sufficient to show usury, it appearing that the date of the notes corresponds to the time of negotiating and making the loan, and it not appearing what was the cause of the delay in paying the money nor that there was any corrupt agreement: *Waterman v. Baldwin*, 68-255.

Usury; contracts held to be usurious.

55. Attorneys' fees: A stipulation for reasonable attorneys' fees, to be taxed up as a part of the costs in case of suit, does not constitute usury: *Nelson v. Everett*, 29-184; *Weatherby v. Smith*, 80-181.

56. Commissions to agent: The act of an agent for a loan in exacting a commission for himself beyond the legal rate of interest, without authority or consent of his principal, will not render the loan usurious: *Gokey v. Knapp*, 44-82; *Brigham v. Myers*, 51-397.

57. But a party making a loan to another in person cannot, under the name of commission, exact more than a legal rate of interest: *Pond v. Waterloo Agl. Works*, 50-596.

58. Under the facts in a particular case, *held*, that a note in suit did not appear to be given for usurious interest but for advances and commissions to maker's agent, and was not therefore usurious: *Wyllis v. Ault*, 46-46.

59. Where a person loans money for another party, retaining a sum in addition to legal interest for his own services, the transaction is not usurious. But where a person contracts with the debtor to pay interest coming due on such loan, and takes notes in excess of the amount of interest so paid and legal interest thereon, the transaction is usurious, and the additional amount cannot be considered as commission: *White v. Lucas*, 46-819.

60. The payment of the lender's traveling expenses in going to view the property offered as security will not constitute usury: *Smith v. Wolf*, 55-555.

61. The fact that the agent of the lender divides the commission received by him in excess of the legal interest with the agents of the borrower will not constitute usury: *Dickey v. Brown*, 56-426.

62. Where the plaintiff negotiated the loan in person, and under the guise of commission exacted more than the legal rate of interest, *held*, that he was chargeable with usury: *Pond v. Waterloo Agl. Works*, 50-596.

63. Facts in a particular case considered, and *held* not to show usury in connection with the payment of commission to a loan agency: *Hawley v. Howell*, 60-79.

64. Usury by agent; principal's knowledge: When an agent who is authorized by his principal to lend money for lawful inter-

est exacts more than the legal rate without the authority or knowledge of his principal, the loan is not thereby rendered usurious. It is immaterial in such a case whether the agent discloses his authority or not: *Call v. Palmer*, 116 U. S., 98.

65. Where the agent is the husband of the principal, although knowledge on the part of the wife would perhaps be assumed on slighter evidence than in other cases, yet the same rule is applicable, and knowledge on her part will not be presumed without evidence: *Brigham v. Myers*, 51-397.

66. The facts in a particular case *held* not sufficient to show that the party with whom the usurious transaction was had was the agent of the party whose money was loaned: *Weiser v. McKay*, 51-417.

67. Where a note for borrowed money is given to an agent without knowledge of the agency, but supposing the agent to be the lender, it will be usurious if it includes illegal interest, although it might not be usurious between the borrower and the principal if the principal had been disclosed: *Erickson v. Bell*, 53-627.

68. Gold at a higher premium: A note and mortgage given for a loan of gold coin in which a greater per cent. premium was allowed for gold than its market value, *held*, under the circumstances, to have been a cloak for usury: *Austin v. Walker*, 45-527.

69. Agreement to pay more than debt: A transaction in a particular case by which one party redeemed certain property from sale and gave title bond to the wife of the original owner, *held* to be in the nature of a loan, and that the amount mentioned in the title bond being greater than the amount paid in redemption with the legal interest, the transaction was usurious: *Wormley v. Hamburg*, 46-144.

70. Building association; interest on premium: Code, § 1186, permitting mutual building associations to loan their capital to members and to take notes or obligations and security therefor, provides that such notes "shall not be construed or held usurious by reason of any dues, fines or premiums for the right of preference in taking such loans paid in addition to the legal rate of interest." This provision does not, however, authorize the taking of interest upon the premiums bid

Effect of usury on the contr

for the loan. If the interest charged is more than ten per cent. *per annum* upon the amount actually loaned, the contract is usurious: *Hawkeye Benefit, etc., Ass'n v. Blackburn*, 48-885.

71. A premium bid for a loan in a building association cannot be regarded as a debt aside from the loan itself, for which interest can be charged: *Burlington Mut. Loan Ass'n v. Heider*, 55-424.

72. Interest upon interest: A contract providing for the payment of interest at the rate of ten per cent., payable semi-annually, and that the semi-annual instalments of interest shall draw interest at the rate of ten per cent. after they shall become due, is not usurious: *Hawley v. Howell*, 60-79.

73. Penalty for non-payment: A note providing for an illegal rate of interest from and after the maturity of the indebtedness is not usurious: *Wight v. Shuck*, Mor., 425; *Shuck v. Wight*, 1 G. Gr., 128; *Gower v. Carter*, 3-244; *Wilson v. Dean*, 10-432; *Conrad v. Gibbon*, 29-120.

74. But in such cases the court will not allow a recovery, either by way of penalty or liquidated damages, for more than the legal rate of interest for failure to pay when due: *Gower v. Carter*, 3-244; *Vennum v. Gregory*, 21-826.

75. A provision in a note that, if not paid when due, the principal shall draw ten per cent. interest from date, will not constitute usury unless it be shown that interest is included in the face of the note. But if interest is so included, the parties will not be allowed, by thus liquidating the damages for the mere non-payment of money, to evade the usury law: *Fisher v. Anderson*, 25-28.

b. *Effect of usury on the contract.*

76. Not void: A contract reserving usurious interest is not void: *Haggard v. Atlee*, 1 G. Gr., 44; *Shuck v. Wight*, 1 G. Gr., 128.

77. An agreement, after the maturity of the note, to pay more than a legal rate of interest for forbearance does not, alone, affect the note, but such contract itself is usurious, and anything paid thereon will be applied as a general payment on the note: *Mallett v. Stone*, 17-64.

And see *infra*, II, f.

78. Under *held*, that was void or the legal r Gr., 217.

79. Note payment of ness a note interest, su legal indebt given for th the purchas ance of the the note gi *Knight v. J*

80. Conve an action a the wrongfu pledged as were: 1st. sell the bon credit for th of plaintiff, with full kn due him on a bank account these defens 306.

81. Attor action on a lowed to rec therein: *Mill*

82. Confes of usury mu and a judgm tacked on the is included th *Twogood v. F* 37-325.

83. But a c into for the laws is void a the amount in may lawfully *v. Russell*, 46-

84. The an tion on a conf the confession evade the sta cient on dem time the con device or part ute: *Kendig*

Purging contracts of usury.—Who may set up usury.

85. The existence of usury in the note upon which a judgment by confession is rendered does not alone authorize the conclusion that the parties caused the judgment to be entered for the purpose of concealing it or evading the statute against it: *Kendig v. Marble*, 58-529.

86. A written statement authorizing entry of judgment upon a note does not, before judgment is entered, estop the party making it from setting up the plea of usury: *Lyon v. Welsh*, 20-578.

c. *Purging contracts of usury.*

87. **Usurious part abandoned:** Before petitioner in a court of equity can obtain relief upon a contract including usury, he must aver and show a willingness to abandon the usurious part of the contract: *Phelps v. Pier-son*, 1 G. Gr., 121.

88. **Refunding the usury:** If by consent of both parties to a usurious contract the unlawful interest already paid is refunded with the agreement that thereafter lawful interest only shall be charged, the contract is thereby purged of usury: *Phillips v. Columbus City Building Ass'n*, 53-719.

89. **Substitution of contracts:** The word contract, as used in the statutory provision regulating usury (Code, § 2079), refers to the entire transaction in which usurious interest has been reserved. The substitution of one contract for another, or the substitution of a new note for an old one, will not purge the usury: *Smith v. Coopers*, 9-376; *Campbell v. McHarg*, 9-354.

90. **Usury corrected by new contract:** However it may be covered by changes and substitutions, if usury be found to exist in the contract, directly or indirectly, its taint continues and affects all the parts through which it runs. The substitution of one contract for another, or the taking of a new note for an old one, will not purge it: *Garth v. Cooper*, 12-364.

91. If it satisfactorily appears that the parties at the time of making the second note intended to purge the contract of its usurious taint and to so reform and correct it that no part of the original illegal consideration entered into the new note, such new note will not be affected by the previous

usury, but if it is designed merely to cover up the usury, the taint attaches to it: *Ibid.*

92. **Consent of debtor:** A contract may be purged of usury only by making substantially a new contract with the consent of the debtor. The indorsement of usurious interest on the note as a payment, without the assent of the debtor, will not have that effect: *National Bank v. Eyre*, 52-114.

d. *Who may set up the defense.*

93. **In general:** The defense of usury is personal to the debtor, and cannot be interposed by one who is not a party nor privy to the usurious contract: *Drake v. Lowry*, 14-125; *Sternburg v. Callanan*, 14-251; *Carmichael v. Bodfish*, 32-418; *Miller v. Clarke*, 37-325.

94. **An agent with whom money is deposited by his principal to be loaned on terms constituting usury cannot set up usury by way of defense in an action by his principal for the balance in his hands:** *Sternburg v. Callanan*, 14-251.

95. **In case of conversion:** The defense of usury cannot be set up by one who has converted a note and collected the full amount, when sued by the true owner for the amount so collected: *Allison v. King*, 25-56.

96. **The grantee of land mortgaged to secure a usurious debt cannot interpose the defense of usury in an action to foreclose:** *Green v. Turner*, 38-112; *Greither v. Alexander*, 15-470; *Hollingsworth v. Swickard*, 10-385; *Frost v. Shaw*, 10-491; *Perry v. Kearns*, 13-174; *Burlington Mut. Loan Ass'n v. Heider*, 55-424.

97. **A judgment creditor of an insolvent cannot set up usury in behalf of his debtor in a proceeding to which he is not a party:** *Carmichael v. Bodfish*, 32-418.

98. **Junior mortgagee:** A junior mortgagee, in an action to redeem from the judgment in a foreclosure proceeding to which he was not made a party, and in which usury was not pleaded, cannot set up the defense of usury and compel the holder of the judgment to accept less than the amount of his lien: *Powell v. Hunt*, 11-430.

99. **Partner:** In an action on a copartnership note, either partner, without the consent of the other, may set up usury, and so may a

partner who has undertaken to pay the firm debts, in a suit brought against him alone after dissolution. If usury is set up by either partner, the penalty should be enforced against both: *Machinists' Bank v. Krum*, 15-49.

100. A renewal of a partnership note by one of the partners will not deprive him of the right to set up usury as to such note: *Ibid*.

101. Immediate assignee: Whether under the Code the usurer is liable to any one but his immediate assignee, discussed but not decided: *Brown v. Wilcox*, 15-414.

102. Subsequent purchaser: In an action to foreclose a mortgage, a subsequent purchaser of the premises cannot plead usury, but he may show payment of the debt, and hold the mortgagee liable for neglect in collecting rents: *Huston v. Stringham*, 21-36.

103. Homestead; wife: In an action to foreclose a mortgage upon the homestead, given by the husband and wife to secure a note of the husband, the plea of usury may be set up by the wife: *Lyon v. Welsh*, 20-578.

104. Mortgagor's grantee: Where R., having mortgaged certain premises, conveyed the same to O., who agreed to pay the mortgage debt, held, that O. could not set up usury in an action to foreclose where personal judgment against R. was expressly waived by the mortgagee. The fact that O. had an action pending against R. for the purpose of setting aside the mortgage as fraudulent, held not to alter the case: *National L. Ins. Co. v. Olmsted*, 32-354.

105. Sureties and guarantors: A surety may avail himself of the defense of usury to the same extent that the principal can, and so may a guarantor, guarantors being deemed sureties: *Conger v. Babbett*, 67-13; *Kendig v. Linn*, 47-62.

106. But the surety may pay the usurious debt when it becomes due, and need not wait until suit is brought, so as to set up usury; and in an action by him to recover from the principal the amount so paid, the principal cannot plead usury: *Culver v. Wilbern*, 48-26.

107. However, a surety who has paid a portion of the original usurious debt, and given his own note for the balance, cannot as against his own note interpose the plea of usury: *Ibid*.

108. Where the surety takes up the note of his principal and gives his own note, it must be regarded as payment or purchase and not as a renewal, and the surety cannot in such case interpose the plea of usury to such new note: *Ibid*.

109. Action by national bank: Although no penalty can be enforced against a national bank for taking usury except as provided by the national banking act, and that perhaps only in a federal court, yet in an action by such bank in a state court, the defendant may deny the validity of the claim by showing that it is for usurious interest: *National Bank v. Eyre*, 52-114.

110. Affirmative relief; tender: Usury may not only be relied upon as a defense but may in proper circumstances be made a ground of affirmative relief, and in such case the party is not required to tender the principal sum and legal interest. (Overruling *Phelps v. Pierson*, 1 G. Gr., 121): *Morrison v. Miller*, 46-84.

111. Form of procedure: Neither the rights of the defendant nor the duty of the court to enter up judgment in favor of the school fund should depend upon the form of the proceeding: *Ibid*.

e. Third parties as affected by the usury.

112. Bona fide holder of note: Usury may be pleaded against a bona fide holder for value of a negotiable instrument as well as against the payee: *Bacon v. Lee*, 4-490.

113. But illegal interest as a consideration unlike usury, cannot be urged against an innocent transferee before maturity: *Burr v. Cook*, 17-436.

114. Discount: A bona fide purchaser a note or bond may take it at any rate count without violating the statute of but if the note is made to be negotiable the intention is to arrange the transfer as to place the subsequent transferee in the position of a holder, and thus avoid the statute the payee giving no consideration a mere go-between, the contract is deemed usurious if the amount is greater than ten per cent. the purpose of usury: *Nichols* 362.

Usury; third parties as affected by.

115. The payee of a promissory note, who has acquired the right to sue the maker thereof, may dispose of it at any rate of discount from its face, and the purchaser will have the right to enforce its full amount against the maker without any defense on the ground of usury: *Dickerman v. Day*, 31-444.

116. No defense of usury can be set up against the purchaser of an accommodation note taken at a greater amount of discount than legal interest, unless such purchaser have knowledge of the character of the paper: *Ibid*.

117. Right of recovery limited: Where the assignee of a usurious note procured the same to be taken up by the maker and a new note made payable to him directly, and then transferred it to another, *held*, that the last assignee was limited in his right to recover to his immediate assignor and could not recover from the assignor of the first note: *Brown v. Wilcox*, 15-414.

118. Knowledge: An indorsee who takes with knowledge that the note is tainted with usury is not to be protected by the Code, § 2081, which protects *bona fide* assignees without notice of the usury: *Ibid*.

119. Under the facts of a particular case, *held*, that the transferee of a note which included usurious interest had knowledge of the fact of usury, although the maker advised him that the note was all right and that no defenses to it existed: *Watson v. Hoag*, 40-142.

120. Estoppel; *bona fide* holder: Where the holder of a note takes it upon the representations of the maker that it is not usurious, the latter will be estopped from setting up the plea of usury against such holder: *French v. Rowe*, 15-563; *Callanan v. Shaw*, 24-441.

121. But if the transaction is merely a device to evade the usury law, to which the assignee is privy, he will not be protected: *Nichols v. Levins*, 15-362.

122. Renewed promise: Where a note is given for money advanced to be used in the repurchase of property which has been sold under a mortgage covering usurious interest and the property has been bought in by the mortgagee, the note is subject to the defense of usury: *Switz v. Platts*, 15-298.

123. Where the plaintiffs purchased a usurious note, and subsequently the defendant, who was the maker, promised plaintiffs to pay the same, *held*, that such promise did not estop the maker from setting up the defense of usury in an action on a promise to pay the note, plaintiffs having parted with nothing on the strength of the promise: *Allison v. Barrett*, 16-278.

124. Assignee's right of action: Code, § 2081, which gives an assignee in good faith and without notice a right of action against the usurer, does not entitle the assignee to the action unless he has sustained loss by reason of the usurious character of the note: *Culver v. Wilbern*, 48-26.

125. Whether the usurer is, under this section of the Code, liable to any one but his immediate assignee, discussed but not decided: *Brown v. Wilcox*, 15-414.

126. Transfer from old to new firm: Where there was a change in the membership of a firm and a settlement made of plaintiff's account, which was transferred to the new set of books, and paid by the new to the old firm, it was held that this did not affect the question of usury between the parties prior to the change: *Burrows v. Cook*, 17-436.

127. Money borrowed to pay usury: If A. executes a security to B., for the purpose of raising money to pay C. a usurious debt, B. will not be affected by the question of usury. Nor would the case be altered by an agreement between A., B. and C., that in case the paper is not sold, B. shall retain it as evidence of that amount of indebtedness to C.: *Ibid*.

128. If money be borrowed to pay off a usurious debt, the lender, even if with notice, is not affected with usury in the original debt: *Wendlebone v. Parks*, 18-546.

129. Where the promisor in a usurious contract makes it the consideration of a new contract with a third party, not party to the original contract or to the usury paid or reserved, if the new contract is not a contrivance to evade the statutes against usury, it will not be illegal or usurious: *Call v. Palmer*, 116 U. S., 98.

130. Where the maker of a usurious note, which was secured by a deed of trust, borrowed money of a third person to pay the

same, and, instead of executing new securities for the money so borrowed, caused the note to be transferred by the payee to the lender as evidence and security of the new debt, *held*, that the note was not tainted with usury in the hands of the second holder: *Ibid*.

181. Where one person borrows money of another at a legal rate of interest to pay a usurious debt, he cannot defend against such new indebtedness on the ground of usury and that the new debtor had knowledge that the debt paid off was usurious: *Mason v. Searles*, 56-532.

182. **Redemption of collaterals; injunction:** Where a creditor is enforcing collection of collaterals pledged to him for the security of a usurious debt, the debtor may enjoin him from transferring such collaterals as are not necessary for the security of the legal indebtedness: *Binford v. Boardman*, 44-58.

f. Usury; when paid.

183. **General rule:** Usurious interest voluntarily paid cannot be recovered back: *Nichols v. Skeel*, 12-300; *Quinn v. Boynton*, 40-304.

184. **Usury paid without contract:** Where there is no contract for an illegal rate of interest, the mere receiving of such interest will not render the contract itself usurious, but the receiving of the usurious interest is itself unlawful, and the amount so received will be presumed to be applied to the payment of the debt and legal interest thereon: *Sexton v. Murdock*, 36-516.

185. **Limitation of claim for usurious interest paid:** Whether, after the lapse of two years from the payment of usurious interest, an action can be maintained to recover it back, or an application thereof to the extinguishment of the principal debt can be enforced, *quære*: *National Bank v. Eyre*, 52-114.

186. **Usurious payments; how applied:** If money is paid on a usurious indebtedness it shall be applied on the discharge of what the debtor was owing legally, and not that which (so to speak) he was owing illegally. Therefore, where it appears in a usurious transaction there has been a renewal of notes, in which interest was included, and

also at the time separate notes were given for usurious interest, all the payments will be applied to the extinguishment of the legal indebtedness: *Smith v. Coopers*, 9-376.

137. Usury once paid cannot be recovered back. If two notes are given in separate transactions, both usurious, and one is paid, the unlawful interest thus paid cannot be set up in an action on the note remaining unpaid: *Philips v. Gephart*, 53-396.

138. **Forbearance:** An agreement after the maturity of a note to pay more than a legal rate of interest for forbearance does not affect the note, but such contract itself is usurious, and anything paid thereon will be applied to the general payment of the note: *Mallett v. Stone*, 17-64.

139. **Balance due; payments applied:** A note given in payment of a balance due on a usurious note is itself usurious, for the debtor has the right to have all the payments made on the original note in discharge of usurious interest applied upon the principal: *National Bank v. Eyre*, 52-114; *Callanan v. Shaw*, 24-441; *Garth v. Cooper*, 12-364.

140. **Application of payments:** Where deposits were made from time to time by a debtor with his creditor, such creditor being a bank which held his notes, and from time to time balances were struck and new notes were given, usurious interest being included in the computation, *held*, that the deposit must be regarded, in the absence of evidence to the contrary, as having been applied *pro rata* upon interest and principal, notwithstanding the entry upon the books of bank showing application of such payments to the extinguishment of the interest: *v. Farmers' Nat. Bank*, 58-728.

141. **Usurious interest paid or afterwards put in judgment can** subsequently be applied as payment notes. In the absence of collusion to cover usury, a judgment conclusive between parties and *ips v. Gephart*, 53-396.

142. **Partial revival:** Where indebtedness has been paid charged, notes subsequently revival of such indebtedness: *Hoopes v. Ferguson*

Conflict of laws.—Pleadings and evidence.

g. *Conflict of laws.*

143. Place of performance: Where a contract is made in one state to be performed in another, the interest will be computed according to the law of the place of performance, but the parties may stipulate that interest shall be calculated according to the laws of the place where the contract is made: *Butters v. Olds*, 11-1.

144. In such cases the parties may adopt the rule of either state as to interest; and where the note was executed in one state, to be performed in another, and the maker resided in still another state, and the property pledged as security was there situated, *held*, that the law of that state might be adopted as to interest, provided such provision was not resorted to merely as a means of evading the usury law: *Arnold v. Potter*, 22-194.

145. What penalty will apply: While the courts of this state will not enforce the penal statutes of another state, yet where a contract made with reference to the laws of another state is usurious there, the forfeiture provided by such laws will be enforced: *Ibid*.

146. Place of delivery: A note executed and dated in Missouri, but delivered and the consideration thereof received in Iowa, is an Iowa contract and subject to the Iowa law of usury: *Hart v. Wills*, 52-56.

147. Where a resident of Iowa negotiated a loan in Massachusetts from a resident thereof, executing a promissory note dated in Iowa and payable in New York, securing the same by a trust deed on real estate in Iowa to a trustee there resident, *held*, that if the parties in good faith, without intending to evade the usury laws, stipulated for the rate of interest allowable in Iowa, although greater than the legal rate in Massachusetts or New York, the contract should be enforced: *Arnold v. Potter*, 22-194.

148. In such case the form of the transaction is immaterial, the cardinal inquiry being, did the parties resort to it as the means of disguising usury in violation of the laws of the state where the contract was made or to be executed: *Ibid*.

149. Foreign judgment: *Prima facie* the rate of interest upon a foreign judgment is governed by the law of this state. If it is claimed that the rate of interest is different

in the state in which the judgment is rendered, that fact must be averred and proved: *Crafts v. Clark*, 38-237.

h. *Pleadings and evidence.*

150. Equity; demurrer: Where usury is apparent upon the face of a bill in equity, and a decree including usury is prayed for, a demurrer to the bill will lie: *Phelps v. Pier-son*, 1 G. Gr., 121.

151. Tender: Usury may be set up as a defense in an equitable action without first tendering the amount legally due. The maxim, "He who seeks equity must do equity," is not applicable in such case: *Kuhner v. Butler*, 11-419; *Cox v. Douglas*, 12-185.

152. Chattel mortgage foreclosure: The question of usury may be raised in a proceeding for the foreclosure of a chattel mortgage, which is by action of injunction transferred to the court: *Hanlin v. Parsons*, 33-207.

153. Foreclosure: Usury cannot be shown as a defense in the foreclosure of a mortgage, when the debt itself is reduced to judgment: *Kendig v. Marble*, 58-529.

154. Dismissal of action: Where an action is dismissed before answer there is no right, either in the behalf of the defendant nor of the school fund, to interpose a plea of usury: *Tufts v. Bauserman*, 46-241.

155. Burden of proof: The burden of establishing the defense of usury is upon the party setting it up: *Hough v. Hamlin*, 57-359.

156. Where the execution of a lost note is shown and there is a conflict in the evidence as to the rate of interest stipulated therein, the burden of proving that the rate was usurious is upon the party affirming it: *Richards v. Burden*, 59-723.

157. Admissibility of evidence: Evidence of a usurious contract is admissible under an answer which alleges that the payee of a note received a greater rate of interest than the law allows: *Kurz v. Holbrook*, 13-562.

158. Evidence of the intemperance and financial embarrassment of the borrower and of the lender's knowledge thereof is not competent and relevant on the subject of usury: *Woodford v. Blood*, 32-600.

159. Competency of witnesses: The indorser of a promissory note is a competent

Forfeiture; judgment and

witness to prove usury in the inception of the note: *Richards v. Marshman*, 2 G. Gr., 217.

160. Under the provisions of Rev., § 1791, that the person contracting to pay unlawful interest should be a competent witness to prove that the contract was usurious, such witness was competent, notwithstanding the provisions of Rev., § 3982, which rendered the party incompetent to testify in a proceeding when the adverse party was the executor of a deceased person and the facts to be proved transpired before the death of such deceased person: *Rinehart v. Buckingham*, 34-409.

161. Code, § 2080, omits the provision of Rev., § 1791, as to the person contracting being a competent witness to testify. If he falls within the provisions of Code, § 3639, relating to actions by or against executors, administrators, etc., he is not now competent: *Wormley v. Hamburg*, 40-22.

i. *Forfeiture; judgment and costs.*

162. **Forfeiture:** In computing the forfeiture, the ten per cent. interest should be reckoned on the balance of the original sums loaned remaining unpaid, in the same manner as if the interest was going to the plaintiff; and not upon the entire sum originally loaned: *Smith v. Coopers*, 9-376.

163. It should be computed up to the date of judgment and not simply to the maturity of the contract: *Ficklin v. Zwart*, 10-387.

164. Computation should be made from the time the money was borrowed, notwithstanding the fact that the form of the indebtedness has been changed to that of a note bearing a later date: *Drake v. Lowry*, 14-125.

165. In computing the penalty which is to go to the school fund, the amount due is to be calculated exactly as between the borrower and the lender, and proper indorsements of credit allowed: *Sheldon v. Mickel*, 40-19.

166. The forfeiture is not a lien upon the premises mortgaged to secure the usurious debt, but becomes a lien only from date of judgment therefor: *Lewis v. Barmby*, 14-88.

167. In an action on a copartnership debt, if usury is set up by either partner, the pen-

alty should be shown by the plaintiff's witnesses.

168. I of the forfeiture; known;

169. A penalty is enforced, in a difficulty 17-436.

170. Judgment is given against the surety as against the action against the agent of the contractor for contribution to the rights of judgment: *Lütosh v. Lütosh*, 40-22.

171. No state, representation, absolute or right is known only when brought before the court and the usury is known to the plaintiff; was brought, the plaintiff has been paid, judgment against the school fund originally 1

172. Settle parties to the suit appears, in the state of a judgment: *Reynolds v.*

173. Judgment is an action in that plaintiff remit the usury there for the entered there the penalty, and on appeal: *Thompson v.*

174. Payment of Usurious interest put in judgment

In general.

plied as a payment on other notes. In the absence of collusion or intent to cover usury, a judgment is conclusive as between parties and privies: *Philips v. Gephart*, 58-396.

175. Costs: Costs are not to be recovered by the party making the loan: *Binford v. Boardman*, 44-53.

176. Although there is no declaration that judgment shall be rendered against the plaintiff for costs, yet where the defendant on the issue joined as to usury is successful, the costs may be taxed to plaintiff. It was not intended to leave each party to pay his own costs in such cases: *Garth v. Cooper*, 12-364.

177. The rule that costs are not to be recovered by the party making a usurious loan, applied in a particular case: *Binford v. Boardman*, 44-53.

INTOXICATING LIQUORS.

I. IN GENERAL.

II. PERMITS; SALES BY PHARMACISTS.

III. SEIZURE AND DESTRUCTION ON SEARCH WARRANT.

IV. ILLEGAL SALE OR KEEPING FOR SALE.

V. NUISANCE COMMITTED IN THE ILLEGAL KEEPING OR SELLING; INJUNCTION.

VI. RECOVERY OF CIVIL DAMAGES.

VII. LIENS OF JUDGMENTS FOR ILLEGAL SALES.

VIII. CONTRACTS FOR ILLEGAL SALE VOID; RECOVERY OF PURCHASE PRICE.

As to allowing minors to frequent saloons, see CRIMINAL LAW, § 729.

I. IN GENERAL.

1. Statutes constitutional: The provisions of the Code of '51 prohibiting the sale of intoxicating liquors by the glass, *held* constitutional: *Zumhoff v. State*, 4 G. Gr., 526.

2. The prohibitory act of 1855 considered and *held* not in conflict with the provisions of the state constitution: *Santo v. State*, 2-165.

3. The act of 1857, authorizing the people of each county to vote as to whether the provisions of the act of 1855 should be repealed in that county and those of the act of 1857 substituted, *held* unconstitutional, as making the repeal of a statute dependent

upon a vote of the people: *Geebrick v. State*, 5-491.

4. And the act of 1870 (13 G. A., ch. 82), providing for the submission to vote of the question whether the sale of ale, wine and beer should be prohibited, was also held unconstitutional as depending for its validity upon popular vote: *State v. Weir*, 83-184.

5. The statute prohibiting the sale of intoxicating liquors cannot be said to deprive the owner of his property therein without compensation in violation of constitutional guaranties, unless such property was owned by him prior to the prohibitory act of 1855: *McLane v. Leicht*, 69-401.

6. The power of the legislature to enact laws for the suppression of the general traffic in intoxicating liquors within the state has been recognized and affirmed by this court for more than twenty-five years. It has uniformly been held that the state, in the exercise of its police power, might regulate the traffic, or prohibit it entirely; and when the power to prohibit the traffic is recognized, the power to enact whatever laws may be necessary to make the prohibition effectual follows necessarily: *McLane v. Bonn*, 70—.

7. The provisions of the prohibitory liquor law are not in conflict with the constitution nor laws of the United States: *Santo v. State*, 2-165; *State v. Carney*, 20-82; *State v. Baughman*, 20-497.

8. Laws regulating the sale of intoxicating liquors are regarded as police regulations, and the state may in its discretion prohibit the sale of one kind of liquor and allow the sale of another kind, and the fact that it prohibits the sale of wine from foreign grapes, while permitting the sale of native wine, will not render the legislation unconstitutional as an improper regulation of interstate commerce: *State v. Stucker*, 58-496.

9. The restrictions found in the Code upon the sale of intoxicating liquors were adopted not for the purpose of securing an undue advantage to the citizens of the state, but for the purpose of preventing violations of the prohibitory laws of the state; and although, in effect, the citizens of other states are debarred from selling in Iowa liquors to be resold for legal purposes, this is but an incidental result of a valid exercise of police power by the state, and no provision of the

In general.

federal constitution is thereby violated: *Kohn v. Melcher*, 29 Fed. Rep., 433.

10. United States license: The fact that defendant holds a United States internal revenue license to retail liquors is no defense in a prosecution for illegally selling, etc., under the state law. Such license does not authorize the holder to violate the law of the state: *State v. McCleary*, 17-44; *State v. Carney*, 20-82; *State v. Stutz*, 20-488; *State v. Baughman*, 20-497.

11. Nor is the holding of such license a circumstance tending to show a violation of the state law: *State v. Stutz*, 20-488. (But it is provided by 21 G. A., ch. 113, that the fact of keeping posted a receipt or stamp showing the payment of a United States internal revenue tax for the privilege of selling liquor shall be *prima facie* evidence, as against a person not having a state permit, that any liquors found in his possession are kept for sale in violation of law.)

12. What deemed intoxicating: So long as liquors retain their character of intoxicating liquors capable of use as a beverage, notwithstanding other ingredients may have been mixed therewith, they fall within the provisions of the statute prohibiting the sale of such liquors. But when they are so compounded with other substances as to lose the character of intoxicating liquors and are no longer desirable for use as a stimulating beverage, and are, in fact, medicine, then their sale is not prohibited: *State v. Lafer*, 38-422.

13. Under the statutory provision (Code, § 1555, before its amendment) by which the manufacture and sale of beer, cider from apples, or wine from grapes, currants or other fruits grown in this state, was not prohibited, *held*, that wine was presumed to be an intoxicating liquor, unless it was shown that it was manufactured from grapes or fruit grown in this state: *Worley v. Spurgeon*, 38-465.

14. *Held*, also, that, in an indictment for the sale of wine made from fruit grown out of the state, an allegation that it was intoxicating was mere surplusage: *State v. Curley*, 38-359.

15. The meaning put by that section upon the term intoxicating liquors, so as to include those that were spirituous and vinous, exclud-

ing malt as the latter part of the definition: *J*

16. Also, the latter part of the definition does not apply to place where the sale is made.

17. A defendant is not bound to prove that the facts bring it within the exception, and prove that it does not. *Stapp*, 29-100; *v. Miller*, 1-100, in Code, § 1-100.

18. Sale for use in intoxicating liquor is not a negative thing with reference to the original character of the liquor. *State v. Be*

19. Sale (17 G. A., 439) giving prohibition to beer within constitution. *Centerville* 59-352.

20. By virtue of the regulation of the sale of liquor, operative without further action.

21. What jurisdiction otherwise, in jurisdiction, portion of the jurisdiction cannot be taken for violation. *Albia v. O'E*

As to the regulation of the sale of liquor, their limits are defined by law, see Mt 280.

22. Drunkenness: The definition: The

In general.—Permits.

of commitment, *held* to have the same legal signification as the word intoxication: *Smith v. Bigelow*, 19-459.

23. An instruction defining "intoxication," discussed: *State v. Huxford*, 47-16.

24. A person is drunk in a legal sense when he is so far under the influence of intoxicating liquor that his passions are visibly excited and his judgment impaired: *State v. Pierce*, 65-85.

25. Buyer not punished: The statutes punishing the illegal sale of intoxicating liquor are applicable to the seller and not to the buyer of such liquors, and the buyer is not guilty of a crime as accessory to the sale in such sense that he may be excused from testifying as to his purchase of such liquor on the ground that such testimony would tend to criminate him: *Wakeman v. Chambers*, 69-169.

26. One who buys intoxicating liquor from a person illegally selling the same does not become an accomplice in the crime of the illegal sale, and therefore the speaking of words charging a person with such purchase does not constitute slander actionable *per se*: *Sterling v. Jugenheimer*, 69-210.

27. Property in intoxicating liquors: While the commerce in intoxicating liquor as an article of beverage is unlawful, its character as property is not thereby destroyed; and where such liquor was seized on execution for the debt of one not its owner, *held*, that the owner might recover it by replevin, although it was kept for sale in violation of the statute: *Monty v. Arneson*, 25-383.

28. That intoxicating liquors are held for an unlawful purpose is no answer to an indictment for stealing the same: *State v. May*, 20-305.

29. That liquors are unlawfully kept is not a defense to an action of trespass for destroying them: *Turner v. Hitchcock*, 20-310.

30. Where liquor had been seized by an officer under an information which had subsequently been held defective and a return of the liquor ordered, *held*, that in an action by the owner against such officer to recover damages for a failure to return the property as so ordered, the plaintiff could not recover without proving that he owned and kept the liquor with a lawful intent: *Walker v. Shook*, 49-264.

31. In an action against a common carrier to recover the value of intoxicating liquors lost or destroyed by it, it is necessary for plaintiff to prove that he owned or possessed such liquors with lawful intent. (Overruling *Bowen v. Hale*, 4-430): *Sommer v. Cate*, 22-585.

32. Intoxicating liquors cannot be recovered by the owner unless he shows that they were in his possession with lawful intent, and that he was illegally deprived of them: *Funk v. Israel*, 5-438, 452.

33. The keeping of intoxicating liquors with no intent to sell within the state in violation of law is not forbidden. In the absence of such intention the possession is lawful, and will be protected. And it is immaterial that they were bought of one not authorized to sell: *Niles v. Fries*, 35-41.

34. Any person has the right to own and keep liquors unless he owns and keeps them with intent to sell them without lawful authority: *Wakeman v. Chambers*, 69-169.

35. Attorney's fees in prosecutions: The county is not liable for the fees of an attorney in prosecutions upon information by a private person for illegal sales, but only for those commenced by peace officers. (Code, § 1551): *Blair v. Dubuque County*, 27-181.

36. It is only a peace officer who files an information for the violation of the liquor law that is authorized to select an attorney other than the district attorney to prosecute the same and receive fees therefor from the county: *Foster v. Clinton County*, 51-541.

37. A special constable is not such peace officer as that he is authorized to employ an attorney at the expense of the county under such circumstances: *Ibid*.

II. PERMITS; SALES BY PHARMACISTS.

38. Granting of permits: The provision (Code, § 1526) that a permit shall only be granted to persons of good moral character is not unconstitutional: *In re Ruth*, 82-250.

39. An indictment for unlawful sale need not negative the authority to sell under a permit. Such authority, if it exists, must be pleaded in defense: *State v. Beneke*, 9-203; *State v. Collins*, 11-141.

40. A manufacturer has no right to sell without a permit: *Becker v. Betten*, 39-668.

INTOXICATING LIQUORS, II.

Permits; sale by pharmacists.

41. Any citizen of the county who appears to resist the granting of a permit may make a showing with reference to either of the questions which the board of supervisors is required to determine in granting such permit, and may introduce evidence to negative either of the facts which the statute provides must be proven before the permit should be granted. He, in effect, becomes a party to the proceeding and has sufficient interest in the matter to authorize him to institute a proceeding by *certiorari* to have any errors and irregularities by the board in granting the permit reviewed: *Darling v. Boesch*, 67-702.

42. The act (19 G. A., ch. —) purporting to amend Code, § 1527, with reference to permits, did not become a law by reason of failure of the governor to approve it in the proper manner, and therefore the board is not authorized to grant a permit without the certificate of a majority of the legal electors of the township, town or ward as to the applicant's good moral character, etc., and the action of the board in granting a permit without such certificate being presented is without authority and may be corrected by *certiorari*: *Ibid.*

43. Revocation of permits: In a proceeding to revoke a permit, defendant is not entitled to trial by jury. The permit is not property in such sense that by its revocation the party is deprived of his property without due process of law: *State v. Schmidt*, 65-556.

44. The proceeding to revoke a permit is not a criminal proceeding, but a special proceeding of a civil nature. The revocation, therefore, cannot be suspended by giving bail, nor by a *supersedeas* bond on appeal, for the reason that the judgment is self-executing and no process is necessary in order to carry it out. A *supersedeas* bond would, however, suspend the execution of the judgment for costs: *Ibid.*

45. A judgment revoking a permit, being a final order in a special proceeding affecting a substantial right, may be appealed from: *Ibid.*

46. Reports of sales: The provisions of Code, § 1537, as it originally stood, with reference to the time when the report of sales by a person having a permit should be

made, was directory, and a failure to such report at the time specified would subject such person to the penalty provided if it was in fact filed before action for penalty was commenced: *Abbott v. Sar*, 57-656.

47. But since the amendment of this tion so as to require the return to be made the day specified or within five days thereafter, the provisions as to the penalty n be regarded as mandatory, and a failure to make return within the time will render party liable for the statutory penalty: *State ex rel. v. McEntee*, 68-381.

48. Action on bond: In an action on bond of a person holding a permit, the signment of a breach thereof by selling intoxicating liquors to divers persons whose names are unknown, to be by them used as beverage, is sufficient: *Jones County v. State*, 25-25.

49. Illegal sales under permit: A person having a permit to sell is only bound to exercise due diligence and act in good faith determining whether the person buying intends to use the liquors for a lawful purpose: *Taylor v. Pickett*, 52-487.

50. Selling without a permit may be punished both under § 1540 and § 1543 of the Code: *State v. Waynick*, 45-516.

51. In case of a sale for purposes not specified in the permit, the defendant is not only liable on his bond, but also to a criminal prosecution for selling in violation of law: *State v. Adams*, 20-486; *State v. Stutz*, 20-488.

52. Sales by pharmacists: The provision of the original prohibitory liquor law requiring that sales for proper purposes are to be made only by persons holding permits are not repealed by the statute with reference to the practice of pharmacy, except, possibly, so far as is necessary to allow sales of liquors for medical purposes by registered apothecaries: *State v. Mercer*, 58-132.

53. Before the changes made by the law relating to the practice of pharmacy, apothecaries were forbidden to sell intoxicating liquors without permit. That statute so modified the prior law as to except registered apothecaries from the existing prohibition, but 20 G. A., ch. 143, repeals the provisions of the Code with reference to selling intoxi-

Seizure and destruction on search warrant.

cating liquors without permit, and enacts a prohibition in almost the language of the original statute with an increased penalty. It thus appears that the provisions as to permits are applicable to pharmacists: *State v. Bissell*, 67-616.

54. On an indictment of a druggist not a registered pharmacist for unlawfully keeping liquor for sale, it is no defense that the sales were made by a clerk who was a registered pharmacist, and for medicinal purposes only: *State v. Norton*, 67-641.

55. A licensed pharmacist selling intoxicating liquors must use the utmost good faith and ordinary caution, and show that the liquor was only sold by him as medicine, and his license will not protect him for artful sales of liquor for other purposes than as medicine: *State v. Harris*, 64-287; *State v. Knowles*, 57-669.

III. SEIZURE AND DESTRUCTION ON SEARCH WARRANT.

56. Information for warrant: In Code, § 1544, with reference to proceedings by search warrant to seize intoxicating liquors illegally kept for sale, the requirement that the information for the search warrant shall describe "as particularly as may be" the place where the liquor is supposed to be kept, conveys the idea of the greatest degree of certainty, and the provisions are therefore not in conflict with the constitutional provisions with reference to search warrants: *Santo v. State*, 2-165, 212.

57. Although the section requires that the information be filed by "a credible resident of" the county, it is not necessary that either the information or the warrant should state that it is made by such a person. That fact is to be found by the justice before whom information is filed: *State v. Thompson*, 44-399; *Weir v. Allen*, 47-482.

58. What subject to seizure: It is only liquors which are kept with the intention of selling the same in violation of law that may be seized: *State v. Harris*, 36-136.

59. The information must charge some specific person as owner or keeper of the intoxicating liquor with an illegal intent, and the liquor cannot be destroyed unless the evidence shows that the person who is charged

as owner or keeper had such intent: *State v. Intoxicating Liquors*, 64-300.

60. It will not be presumed that the place to be searched is a dwelling-house, etc., within the provisions of Code, § 1544, from the mere fact that the information avers that the liquors are kept in "a certain house or place, known," etc.: *Sanders v. State*, 2-280, 277.

61. A previous conviction of the owner of the liquors for selling the same will not bar a proceeding, under this section, against the liquors themselves: *Ibid*.

62. The jurisdiction here conferred upon justices of the peace is not exclusive, but may also be exercised by police justices in cities acting under special charter: *Weir v. Allen*, 47-482.

63. Seizure: Liquors seized as here contemplated cannot be taken from the officer by replevin: *Funk v. Israel*, 5-488; *State v. Harris*, 88-242; *Weir v. Allen*, 47-482; *Fries v. Porch*, 49-351.

64. A judgment rendered against the officer holding the liquor by stipulation on his part should be set aside on motion of the attorney representing the prosecution in the case against the liquors: *Fries v. Porch*, 49-351.

65. Where intoxicating liquors held for sale are seized in the custody of an express company, in a proceeding to condemn them, it is immaterial whether the officers of the company knew the character of the property and the use to which it was to be put. It is the duty of such company, under the statute, to know whether goods it receives for shipment are such as the law authorizes to be bartered and sold: *State v. United States Ex. Co.*, 70—.

66. Such a proceeding is not a criminal one against the express company and it becomes a party voluntarily, if at all, to the case: *Ibid*.

67. Proceeding criminal: These proceedings for the condemnation of intoxicating liquors illegally kept with intent to sell are criminal in their nature, and the defendant has the rights of the defendant in a criminal prosecution. For instance, a verdict of the jury for defendant should not be set aside upon motion in arrest of judgment in behalf of the prosecution: *State v. Harris*, 40-95.

IV. ILLEGAL SALE OR KEEPING FOR SALE.

68. Sales to minors or intoxicated persons: Code, § 1539, declaring it unlawful for any person to sell or give away by agent or otherwise intoxicating liquors, including wine or beer, to any minor, unless upon the written order of his parent, guardian or physician, or to sell the same to any intoxicated person, or person in the habit of becoming intoxicated, applies not only to persons having a permit to sell liquors but to all persons: *Cobleigh v. McBride*, 45-116.

69. To constitute the offense it is not necessary that defendant should have known that the person to whom sale was made was a minor. Knowledge of such fact need neither be charged nor proved: *Jamison v. Burton*, 43-282.

70. So in case of sale to a person in the habit of becoming intoxicated, it is immaterial whether the seller knew the habits of such person. He sells at his peril: *Dudley v. Sautbaine*, 49-650.

71. The principal is liable for a sale made by an agent in violation of this section, although the agent was positively forbidden to sell to such persons generally, or to the particular person to whom sale was made: *Ibid.*

72. In case of sale to a minor the consent of the parent will be no defense unless it is in writing: *State v. Coenan*, 48-567.

73. This section is to be construed as prohibiting the giving as well as the selling to an intoxicated person. (See Code, § 1554): *Church v. Higham*, 44-482.

74. Under this section the seller of liquor to an intoxicated person will be liable, although the liquor is bought and paid for by a third person by way of treating such intoxicated person: *State v. Hubbard*, 60-466.

75. Evidence of intoxication at a period subsequent to the sale of the liquor should not be received to prove that the person to whom it was furnished was intoxicated at the time of such sale: *Ibid.*

76. Sale of wine or beer to a minor or intoxicated person, or person in the habit of becoming intoxicated, will give a right to a civil action for damages caused thereby: *Jewett v. Wanshura*, 43-574.

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 Illegal sale or keeping for sale.

the illegal sale to specify the kind of liquor sold: *State v. Whalen*, 54-753.

85. However, if the kind of liquor is specified, it must be proven as charged: *State v. Hesner*, 55-494.

86. An information charging defendant with selling, etc., is sufficient without stating the method in which the sale was accomplished. A selling committed in any of the different methods referred to by statute constitutes one and the same offense: *Devine v. State*, 4-448.

87. Any number of violations may be charged in separate counts and a separate conviction had on each: *Walters v. State*, 5-507.

88. Under an ordinance providing a punishment for the sale of spirituous, vinous or malt liquors not prohibited by statute, *held*, that more than one offense might be included in the same complaint: *Jackson v. Boyd*, 53-536.

89. But the first and second, or second and third, offenses cannot be charged in the same indictment or information: *State v. Leis*, 11-416.

90. An information for the offense of illegal sales should charge that defendant sold, etc., to some person, giving the name if known: *State v. Allen*, 32-491.

91. An indictment charging defendant with keeping for sale and selling intoxicating liquors is good without the allegation that they were so kept and sold in violation of law: *State v. Jordan*, 39-887.

92. Where the information charges the sales of liquor to different persons named, on certain dates, the jury may convict on proof of sales to any of the persons named at any time within the statute of limitation and prior to the filing of the information: *State v. Johnson*, 69-633.

93. As the keeping of intoxicating liquors for sale within the state is unlawful in itself, unless the party thus keeping and offering for sale is authorized to sell, an indictment charging the keeping of intoxicating liquors in the state with intent to sell the same will be sufficient, and the indictment need not negative the authority to sell: *State v. Collins*, 11-141.

94. *Held*, that the expression in an indictment, "kept intoxicating liquors to sell," was

sufficient to charge the offense: *Vaughn v. State*, 5-369.

95. An indictment charging that "defendant did keep and was concerned, etc., in owning and keeping intoxicating liquors to sell," *held* to charge but one offense: *Ibid*.

96. An information charging defendant with keeping intoxicating liquors "for the purpose of sale," instead of "with intent to sell the same," as provided in the statute, *held* sufficient to support a conviction: *State v. Mohr*, 53-261.

97. Evidence: The provision (Code, § 1542) that the finding of the liquor, etc., should be presumptive evidence that it was illegally kept for sale, *held* not unconstitutional: *Santo v. State*, 2-165, 214.

98. Where a druggist has a permit to sell intoxicating liquors but makes unlawful sales, the fact that the owning and keeping is with intent to make unlawful sales, and therefore unlawful in itself, may be presumed: *State v. Sartori*, 55-340.

99. Where the only evidence of illegal sale was the testimony of a clerk in defendant's drug store that he sold at that store a half-pint of liquor to a certain person, it not appearing that defendant knew of such sale or kept intoxicating liquors for sale, or that there were any such in his possession or kept by him for any purpose, *held*, that the conviction could not be sustained: *State v. Findley*, 45-435.

100. In a prosecution for the illegal sale it is proper to ask a witness whether he purchased such liquor of defendant and whether he knows of defendant selling such liquor to any one. It is also proper to ask a witness what defendant's business was: *State v. Roben*, 39-424.

101. The testimony of a witness in a prosecution for illegal sale that he bought and drank in defendant's saloon what in his opinion was whisky, *held* not incompetent as being merely an opinion. A man who resorts to a saloon for intoxicating liquors may be presumed to be qualified to express an opinion as to the liquor supplied him: *State v. Miller*, 53-84.

102. Punishment: Under a previous act, *held*, that while a person holding a permit was liable on his bond for selling for im-

Illegal sale or keeping for sale

proper purposes, he was also liable to a criminal prosecution: *State v. Adams*, 20-486.

103. A person selling without a license may also be punished for the crime of keeping a nuisance under Code, § 1543, either independently of or in addition to the punishment for the illegal sale: *State v. Waynick*, 45-516.

104. Where a previous conviction was not shown, *held*, that it was erroneous to impose a greater fine than authorized for the first offense: *Walters v. State*, 5-507.

105. But where, on appeal, the prosecution offered to remit the excess, the supreme court modified the judgment in accordance with such offer and affirmed it: *State v. Shaw*, 23-316.

106. Under such former provisions, also *held*, that the length of time of imprisonment for non-payment of a fine imposed should be as there specified rather than as provided in the section regulating generally the extent of imprisonment for non-payment of fines: *Ibid.*

107. Under former provisions *held* that it was imperative that imprisonment should form a part of the punishment: *State v. Patton*, 19-458.

108. Under the present provisions (20 G. A., ch. 143) the length of imprisonment for non-payment of a fine is as provided generally in Code, § 4509: *Ex parte Tuicher*, 69-393.

109. By statutory provision a person sentenced to imprisonment for non-payment of a fine under the intoxicating liquor law is not entitled to avail himself of the provisions for the discharging of poor convicts: *Hanks v. Workman*, 69-600.

110. The provision of Code, § 1542, as amended, that defendant shall stand committed until the fine and costs are paid, does not take the offense out of the jurisdiction of a justice of the peace. Although such imprisonment may extend beyond thirty days, it is not as a punishment for the offense but only as a method of enforcing the payment of the fine: *Albertson v. Kriechbaum*, 65-11.

111. Subsequent convictions: Before defendant can be found guilty of the offense of a second sale, he must be charged, convicted and fined for the first offense of selling: *State v. Leis*, 11-416.

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Nuisance committed in the illegal keeping or selling.

120. **Indictment:** The offense of nuisance may be committed by the manufacture, or the sale, or the keeping with intent to sell, contrary to law. While an indictment charging the offense as committed in any one of these three ways would be sufficient, yet one charging its commission by any two, or all three, of the specified unlawful acts, charges but one offense, and is not bad for duplicity: *State v. Becker*, 20-438; *State v. Baughman*, 20-497.

121. Two indictments charging the offense as committed in two different ways charge the same and not two separate offenses; and the fact that the acts set out in the indictments are charged as committed at different times is not conclusive that the offenses are separate and not the same, since the time need not be proved as alleged: *State v. Layton*, 25-193.

122. An allegation that a certain building was used by defendants as a place for the sale of intoxicating liquors, and that they did then and there keep said intoxicating liquors for sale in said building with intent to sell, held sufficient without further averment that said building was under their control: *State v. Schilling*, 14-455.

123. An indictment charging the offense as committed by using and keeping a room and place for the purpose of selling and by selling therein intoxicating liquors in violation of § 1540, held sufficient: *State v. Freeman*, 27-333.

124. And so held, also, where the indictment, similar to the foregoing, charged the acts as "contrary to law," without specifying the section: *State v. Allen*, 32-248.

125. It is not necessary that the nuisance should continue up to and exist at the time of the indictment to make it punishable: *State v. Schilling*, 14-455.

126. An indictment charging the keeping and using of "a certain building or place," or "a certain frame building," for the purposes prohibited, is sufficiently definite: *Ibid.*; *State v. Kreig*, 13-462.

127. A matter of local description, though it need not have been stated, must be proved as laid: *State v. Crogan*, 8-523.

128. But on the trial of an indictment under this section, which charged the use of a building, etc., "next door west of Cham-

ber's store," etc., while the proof was that the building was next door west from "Chamberlain's store," the court were equally divided as to whether the variance was fatal: *State v. Verden*, 24-126.

129. The indictment need not state the names of the persons to whom liquor was sold: *State v. Becker*, 20-438.

130. An indictment for keeping a nuisance need not state the names of the persons to whom illegal sales are made: *State v. Jordan*, 39-387.

131. **Evidence:** Proof of the manufacture, sale, or keeping with intent to sell, in violation of law, is presumptive proof of the offense of nuisance: *State v. Guisenhouse*, 20-227; *State v. Baughman*, 20-497.

132. And this is true even though the sale be secret and by clerk: *State v. Freeman*, 27-333.

133. As proof of the finding of liquor in the possession of accused, in any place except the private dwelling, is by Code, § 1542, presumptive evidence that such liquor is illegally held for sale, the proof of such finding will be sufficient evidence of a nuisance committed by "keeping with intent to sell:" *State v. Norton*, 41-430.

134. The state is not bound to show affirmatively that the liquors were not kept in the original vessels or packages, or that they were not sold for proper purposes, these being proper matters of defense: *State v. Becker*, 20-438.

135. **Sales by clerk:** A barkeeper or clerk, having no interest in the business, may be convicted of the crime of nuisance for the mere sale by him of intoxicating liquors in a building used for that purpose: *State v. Stucker*, 33-395.

136. Where liquors are lawfully kept for sale and with intent to sell them for lawful purposes, an illegal sale by an agent without the knowledge or consent of the principal will not render such principal criminally liable for keeping a nuisance: *State v. Hayes*, 67-27.

137. **Punishment:** The punishment for the crime of nuisance, as defined in this connection, is that provided in Code, § 4092, for the crime of nuisance generally: *State v. McGrew*, 11-112; *State v. Collins*, 11-141; *State v. Schilling*, 14-455; *State v. Little*, 42-51, 54; *State v. Dean*, 44-643.

Injunction.—Recovery of civil damages.

138. A party may be punished for the offense of keeping a nuisance either independently of or in addition to the punishment for illegal selling: *State v. Waynick*, 45-516.

139. Abatement: The statutory provisions (21 G. A., ch. 66) with reference to the removal and abatement of the nuisance, where, in a civil action, the fact that premises constitute a nuisance has been determined, are applicable to acts committed before the enactment of the statute: *McLane v. Bonn*, 70—.

140. Liability of owner of premises: Where premises are leased for a lawful purpose, to render the owner liable to the penalties herein provided, it is not sufficient to show that he knew of their unlawful use, without taking steps to prevent it; but it must appear that, after he became aware of such illegal use, he did some act or made some declaration affirmatively assenting thereto: *State v. Ballingall*, 42-87.

141. Where leased property is being used as a place for the unlawful sale of liquors, the landlord may be made a party defendant to the action to abate such place as a nuisance without regard to his previous knowledge of such use. The building becomes a nuisance and its continuance as such may be enjoined and prevented: *Martin v. Blattner*, 68-286.

142. In a prosecution against a defendant for illegal sale of intoxicating liquor made upon his premises, *held*, under previous statutory provisions, that proof must be introduced that the sale was with the authority or consent of such defendant: *Goods v. State*, 3 G. Gr., 566.

143. Injunction: The action by a citizen of the county to obtain an injunction as contemplated by 20 G. A., ch. 143, although prosecuted in the name of such citizen as a private party, is for the public benefit, and it cannot be maintained except by a citizen of the county. A wife who has been injured in her means of support by illegal sales cannot maintain the action for an injunction if she is a resident of another county: *Applegate v. Winebrenner*, 66-67.

144. The statutory provision just referred to is not unconstitutional as depriving defendant of the right of trial by jury: *Littleton v. Fritz*, 65-488.

145. In such cases a preliminary injunction may be granted as in other proceedings for an injunction: *Ibid*.

146. The owner of the building in which unlawful sales of liquor are conducted permitting such sales by a tenant may properly be enjoined from further permitting such use: *Gray v. Stienes*, 69-124.

147. A temporary injunction should not be awarded against the premises. The injunction against the occupant and owner is all that is contemplated at that stage of the proceedings: *Ibid*.

148. An action to enjoin a nuisance caused by the selling and keeping for sale of intoxicating liquors contrary to law, *held* not to involve a federal question in such sense as to authorize a removal of the cause to the federal court: *Lemen v. Wagner*, 68-660; *Schmidt v. Cobb*, 119 U. S., 286 (the supreme court of the United States being equally divided).

149. While the penalty of fifty dollars for the violation of an injunction in such cases is extraordinary, the statute imposing such a penalty is not unconstitutional: *Jordan v. Circuit Court*, 69-177.

Disorderly houses: As to the offense of nuisance in keeping a house where drunkenness, etc., is carried on, see CRIMINAL LAW, §§ 702-718.

VI. RECOVERY OF CIVIL DAMAGES.

150. General liability for damages: A physician called to attend a person for an injury received or for sickness resulting from intoxication has no claim against the person selling the liquors: *Sansom v. Greenough*, 55-127.

151. Action by wife, parent, child, etc.: The cause of action provided for in Code, § 1557, authorizing a recovery by a wife, parent, child or other person injured in person or property or means of support by an intoxicated person, or in consequence of the intoxication of any person, against the person causing the intoxication by the sale of intoxicating liquors, is the selling of the liquors, yet the foundation of the action is the wrongful act of defendant in causing the intoxication of the husband, father or other person, which is a personal injury to him, and the action is

Recovery of civil damages.

one for injury to the person in such sense that it must be brought within two years as provided by the statute of limitations in reference to that class of actions: *Emmert v. Grill*, 39-690.

152. In an action by a plaintiff suing as wife, the fact of marriage is not essential and she may recover without proof thereof: *Kearney v. Fitzgerald*, 43-580.

153. By the provisions of this section a right of action was given for the sale of wine and beer to minors or intoxicated persons when sales of those liquors were in general not prohibited: *Jewett v. Wanshura*, 43-574.

154. Before the passage of the present law prohibiting entirely sales of wine and beer, there was no cause of action for injuries due to the sale of beer, unless it was sold in violation of Code, § 1539, prohibiting the sale of beer to minors, intoxicated persons, etc.: *Myers v. Conway*, 55-166.

155. And before the enactment of that statutory provision there was no liability whatever to civil damages for injury resulting from the sale of beer: *Woody v. Coenan*, 44-19.

156. Giving: Damages arising from the giving as well as from the sale of intoxicating liquors may be recovered: *Welch v. Jugenheimer*, 56-11.

157. Under circumstances indicating that liquor furnished to plaintiff's husband was for a pecuniary compensation, although not directly paid for nor charged to him, held, that it was not error to allow the wife to recover damages for such act: *Rafferty v. Buckman*, 46-195.

158. Damages for death: The wife may recover damages resulting from the death of her husband caused by intoxication: *Ibid.*

159. For what injuries: In order that a right of action may exist, the liquor sold must cause or contribute to intoxication, and the wife must sustain some injury by the intoxication: *Welch v. Jugenheimer*, 56-11.

160. The damages sustained "in person" as contemplated by the statute mean in body, and threatening language, vulgar conduct, etc., directed towards plaintiff by her husband, but not resulting in physical injury or impairment of health, will not entitle her to either actual or exemplary damages as against the person causing the intoxication of her

husband: *Calloway v. Laydon*, 47-456; *Welch v. Jugenheimer*, 56-11.

161. For wounded feelings, disgrace, etc., not resulting from injury to the person, no recovery can be had, but for mental anguish, shame or suffering resulting from violence to the person, plaintiff is entitled to recover: *Ward v. Thompson*, 48-588.

162. Plaintiff may recover for injuries to person, property and means of support, but not for wounded feelings or disgrace or loss of standing in society: *Jackson v. Noble*, 54-641.

163. The occupation and business capacity of the husband may be shown, and the manner in which he supported plaintiff previous to the intoxication, as showing of what plaintiff was deprived by reason of such intoxication: *Ibid.*

164. If it is shown that defendant has deprived plaintiff of the assistance of her husband in the support of herself and family by causing his frequent intoxication, her means of support would thus be shown to have been injured to that extent without reference to her condition before such injury: *Woolheather v. Risley*, 38-486.

165. The fact that plaintiff's husband has been for a long time habitually drunk cannot be shown in evidence for the purpose of affecting the wife's damages, but evidence as to the previous habits of the husband was material in such cases under the statute by which sale of beer was legal, except to persons in the habit of becoming intoxicated: *Huff v. Aultman*, 69-71.

166. Exemplary damages: This statutory provision gives a new and peculiar remedy not only for actual but also for exemplary damages. The injury is of a peculiar character not recognized or redressed by the common law: *Dunlavy v. Watson*, 38-396.

167. Exemplary damages may be allowed although no tort or breach of the peace has resulted: *Goodenough v. McGrew*, 44-670.

168. While threatening language and vulgar conduct by the husband towards the wife may result in the impairment of health, and thus amount to an injury for which damages might be recovered, yet such words and conduct unaccompanied with physical injury will not entitle her to actual damages, and therefore they cannot be a ground for exem-

Recovery of civil dam

plary damages, even where damages on other grounds are recovered. The exemplary damages in such case must be such as are called for under the circumstances under which the actual damages are sustained: *Calloway v. Laydon*, 47-456.

169. Where it appeared that defendant sold plaintiff's husband intoxicating liquor when he was in a state of intoxication, and continued to sell him liquors, knowing that he was in the habit of becoming intoxicated, held, that a verdict for exemplary damages was not erroneous: *Weitz v. Ewen*, 50-34.

170. Exemplary damages may be awarded in every case brought under this section where there has been a wilful violation of the statute, which has occasioned injury, for which a right of action is given. The party injured is entitled to exemplary damages in a proper case, and the awarding of them is not left to the discretion of the jury: *Fox v. Wunderlich*, 64-187.

171. No special prayer for exemplary damages is required: *Gustafson v. Wind*, 62-281.

172. Who liable: The right of action is given against any person who actually makes the sale of the intoxicating liquor, whether he be the owner, or the son, clerk, or servant of such owner: *Worley v. Spurgeon*, 38-465.

173. It is sufficient to hold a defendant liable, if it be shown that liquor sold by him contributed to the intoxication complained of: *Woolheather v. Risley*, 38-486.

174. Joint liability: A joint action will not lie against several defendants having independent places of business, where the injuries are successive and not the result of one particular intoxication. Code, § 2550, is not applicable in such cases: *La France v. Krayner*, 42-143.

175. Where a joint action will not lie, each party is liable for the damages which he occasions, and a settlement with one does not bar an action against another: *Jewett v. Wanshura*, 43-574.

176. But defendant may show that plaintiff has brought actions and obtained judgments against others for causing the same habitual intoxication, not by way of defense or mitigation of damages, but to show the actual extent of the damage caused by defendant's own act, and that he was not responsible for the entire damage resulting

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Recovery of civil damages.

son who would let him have it, *held*, that the several persons who had sold him liquor could not be considered as joint wrong-doers, but that each was severally liable for the damage caused by his own acts: *Richmond v. Shickler*, 57-486.

183. Persons who have contributed to habitual intoxication are not to be held responsible as joint wrong-doers, but each is liable for the part of the damages caused by his acts: *Ennis v. Shiley*, 47-553; *Flint v. Gauer*, 66-696.

184. **Plaintiff contributing to injury:** The wife cannot recover damages where she has herself contributed to her husband's intoxication: *Engleken v. Hilger*, 43-563; *Kearney v. Fitzgerald*, 43-580.

185. The fact that during the period covered by the wife's action for damages for sale of intoxicating liquors to her husband, she herself bought liquor for him, will not be such contribution on her part to the injury as to defeat her recovery if she had reason to believe that she would thereby keep him away from saloons and prevent the injuries for which she sues: *Ward v. Thompson*, 48-588.

186. In such case the fact that the wife has contributed to the condition of the husband by at times giving him permits to buy liquor will not absolutely defeat her recovery. Such connivance or assent will only defeat recovery for damages resulting from or caused by intoxication contributed to or connived at by her: *Rafferty v. Buckman*, 46-195.

187. The fact that the wife gives to the husband at his request sums of money belonging to him and placed by him in her custody, with knowledge on her part that portions thereof will be used for the purpose of procuring intoxicating liquors, will not necessarily constitute a voluntary contribution on her part to the intoxication of her husband, so as to defeat her right of recovering damages against the persons causing such intoxication: *Huff v. Aultman*, 69-71.

188. **Evidence:** In an action by the wife for damages for a sale of intoxicating liquors to her husband, the burden of proof is upon plaintiff to establish the fact that defendant sold liquor to the husband, and also that such liquor produced or contributed to produce the intoxication complained of: *Macleod v. Geyer*, 53-615.

189. In such an action by the wife, *held* not error to allow the husband as a witness to state about how much money he had paid defendant for liquor, such fact being material as tending to show the injury to plaintiff's means of support, but not otherwise: *Ward v. Thompson*, 48-588.

190. *Held*, that in such cases indictments against defendant and convictions thereon for illegal sales of intoxicating liquors were not admissible in evidence against defendant, at least where it was not shown that the indictments were founded upon unlawful sales made to plaintiff's husband: *Applegate v. Winebrenner*, 67-235.

191. Evidence of an assault committed upon the wife by the husband, *held* not admissible in an action by the wife against defendant for the recovery of damages for illegal sale of liquors to the husband, it not appearing that at the time of the assault the husband was intoxicated, nor that his intoxication, if any, was contributed to by defendant: *Ibid*.

192. The evidence necessary or competent to establish the injury and its extent is not confined within the bounds admissible to establish a common law tort: *Dunlavey v. Watson*, 38-398.

193. Evidence as to the age, condition, circumstances, etc., of the husband, his habits of industry and his ability to support his wife before and after the acts complained of, may be received: *Ibid*.

194. It is error, in an action by the wife, to allow evidence as to number, age, etc., of children: *Huggins v. Kavanagh*, 52-368; *Welch v. Jugenheimer*, 56-11.

195. The wife may show the number and ages of her children belonging to her family if she also shows that defendant had knowledge of the facts, and that they were in danger of being injured or compelled to leave home, and after such knowledge wantonly continued to sell liquor to the husband, by reason of which the right of action arose, such evidence being pertinent to the question of exemplary, not of actual, damages: *Ward v. Thompson*, 48-588.

196. **Life tables:** It is doubtful whether the Carlisle life tables are admissible as evidence in determining the amount of damages in such an action, the measure of actual damage being the amount which would,

Liens of judgments for illegal sales.

from a pecuniary point of view, compensate the wife for the injury: *Rafferty v. Buckman*, 46-195.

VII. LIENS OF JUDGMENTS FOR ILLEGAL SALES.

197. When accrue: The right to make the judgment a lien upon the property where the business is carried on, as is done by Code, § 1558, rests in the exercise of the police power and not in the right of eminent domain: *Polk County v. Hierb*, 37-361.

198. Property can only be made liable after it has been established in a competent court by a legal jury that it was used for the illegal purpose, with the knowledge or consent of the owner, and the statute does not, therefore, authorize the taking of private property without a trial: *Ibid.*

199. That under this section a party is liable to a pecuniary forfeiture does not constitute the act or omission so punished a crime. The section is not an *ex post facto* law, nor does it impair vested rights: *Ibid.*

200. Method of proceeding: The party injured by the illegal sale may bring action against the seller alone, and by subsequent action against the owner enforce the judgment previously obtained; or may join the seller and the owner of the building in the same action: *La France v. Krayner*, 42-143.

201. The action for damages against the person selling may be joined with that against the person owning the premises in which sales are made and against which it is sought to have the judgment established as a lien: *Loan v. Hiney*, 53-89.

202. If a joint action is brought, either party is entitled to a jury trial on the question of the illegal sale and damages, and the owner is entitled to a jury trial also on the question as to whether such use of the premises was with his consent and knowledge: *Ibid.*

203. Where plaintiff brought action for damages for sale of intoxicating liquors against three defendants jointly as sellers, and joined with them as defendant the owner of the property in which the business was carried on, and two separate judgments were rendered at separate trials against two sellers respectively, and at a third trial the judgments

were made a lien against the property of the owner, *held*, that on appeal of the owner from final judgment against him, he could not set up the fact of recovery of the former judgment against another one of the sellers by default: *Putney v. O'Brien*, 53-117.

204. In such case, *held*, that plaintiff might elect which judgment she would enforce and the other would be treated as satisfied: *Ibid.*

205. Where it is sought to subject property alleged to have been fraudulently conveyed for the purpose of evading the lien of a judgment, to the payment of the same, the action against the grantee is equitable in its nature, and the defendant cannot demand a jury trial: *Buckham v. Grape*, 65-535.

206. In such an action against the holder of the legal title, who was not a party to the original action in which judgment was recovered, the record of the judgment in the former action may be introduced in evidence for the purpose of showing that the plaintiff has recovered judgment against the defendant in such former action, but not as evidence of the amount for which the lien should be established, except that in no event can the lien be established for any greater amount: *Ibid.*

207. The court establishing the lien of a judgment for illegal sale of liquors against the premises in which the same were sold should ascertain specifically the property upon which the lien shall attach. Such a judgment should not be entered where there is no evidence on the trial showing the title to be in defendant, and that fact is only shown by an affidavit filed after the verdict: *Flint v. Gauer*, 66-696.

208. Knowledge of owner: A judgment in a proceeding to recover penalties for illegal sales to minors or intoxicated persons is not a lien upon the premises where such sales were made, unless the owner had knowledge of and consented to illegal sales of that character. His knowledge of and consent to sales without permit would not be sufficient. The owner should be shown to have had knowledge of and to have consented to the unlawful act on account of which the judgment was recovered: *Cobleigh v. McBride*, 45-116; *Myers v. Kirt*, 64-27.

209. Both knowledge and assent, on the part of the owner of the premises unlawfully

Contracts for illegal sales void; recovery of purchase price.

used, must be shown to render them subject to the lien of the judgment: *Meyers v. Kirt*, 57-421.

210. Facts in a particular case held to show knowledge and assent on the part of the owner of the building: *Putney v. O'Brien*, 59-117.

211. The consent of the owner need not be shown by any positive or affirmative act, but may be inferred from circumstances and knowledge of the illegal sales under such conditions as properly to call forth a protest, and a failure to make any objection: *Loan v. Etzel*, 62-429.

212. Lien attaches when; conveyance subject to: A purchaser of the property occupied and used for purposes of illegal sale, who purchases pending an action against the seller and the owner, in which it is sought to make any judgment recovered a lien upon the property, takes subject to lien of any such judgment. The doctrine of *lis pendens* applies: *O'Brien v. Putney*, 55-292.

213. The lien of the judgment upon the premises attaches only on the rendition thereof, and is subordinate to that of a mortgage previously executed: *Goodenough v. McCoid*, 44-659.

214. Where a conveyance of property on which it is sought to establish a lien is made pending the action, that fact is no defense for the original owner, against whom a lien is sought to be established: *Myers v. Kirt*, 68-124.

VIII. CONTRACTS FOR ILLEGAL SALES VOID; RECOVERY OF PURCHASE PRICE.

215. Recovery of payments made: Under Code, § 1550, providing that payment or compensation received for illegal sales of intoxicating liquor may be recovered back, a claim for money paid for intoxicating liquors may be set up by way of counter-claim in an action on account: *Tolman v. Johnson*, 43-127.

216. A manufacturer not being allowed to sell without the permit required by Code, § 1526, even to one having such permit, money paid on such sale may be recovered back: *Becker v. Betten*, 39-668.

217. The giving of a note for liquors does not constitute payment, even when it has

been sold and transferred by the payee, and until it is actually paid, the maker cannot maintain an action for the amount thereof: *Carlin v. Heller*, 34-256.

218. The action to recover money paid will not be barred until five years from time of payment: *Woodward v. Squires*, 41-677.

219. One who has exchanged property for liquors sold in violation of law may, instead of suing upon a promise to pay therefor, treat the transaction as void and sue for the value of the property; and if accord and satisfaction is then set up as a defense, he may, in reply, set up the illegal nature of the transaction: *Smith v. Grable*, 14-429.

220. The action to recover money paid is civil, and not quasi criminal in character: *Woodward v. Squires*, 39-435.

221. A party who has made payments for illegal sales of liquors and is entitled to recover back the purchase money paid, being garnished for the indebtedness thereupon arising to him from the person to whom the payments were made, it must be shown, in order to warrant judgment against him as garnishee, that the liquors were intoxicating and sold in violation of law: *Church v. Simpson*, 25-408.

222. The provisions for recovery of money paid do not apply to a non-resident selling liquor without permit to a registered pharmacist for lawful purposes and receiving payment therefor in another state: *Kohn v. Melcher*, 29 Fed. Rep., 433.

223. Sales, securities, etc., void: Under the further provisions of the section just referred to, that all sales, conveyances, liens, etc., and securities of every kind which shall either in whole or in part have been made for or on account of illegal sales of intoxicating liquors, shall be utterly null and void against all persons in all cases, etc., held, that the word securities includes promissory notes: *Taylor v. Pickett*, 52-467.

224. A promissory note given in part for intoxicating liquors is wholly void: *Ibid.*; *Braitch v. Guelick*, 37-212.

225. But where a note was given for the amount due on an account, some of the items of which were legal and others illegal as being for intoxicating liquors, and the account was continued and payments afterwards made on account generally, held, that the

Contracts for illegal sales void; recovery of purchase price.

note being void, the legal items of account included therein should be regarded as still due on account, and the subsequent payments applied thereto: *Quigley v. Duffey*, 52-610.

226. An assignment of a contract against a third person, made for intoxicating liquors sold in violation of law, is void, and the assignee cannot recover against such third person thereon: *Davis v. Slater*, 17-250.

227. A judgment recovered on a claim founded upon the illegal sale of intoxicating liquors is not void. The defense must be interposed before judgment or it is lost: *Smith v. Luddy*, 50-112.

228. A person who has sold another intoxicating liquor in violation of law cannot, on the ground that the sale is void, recover them back in an action of replevin from attaching creditors of his vendee. Being *particeps criminis*, the law will leave the seller where it finds him: *Marienthal v. Shafer*, 6-223.

229. In an action on a note in which defendant pleaded that it was given to him for liquors sold in violation of law, *held*, that an indictment against him for nuisance committed in the sale of intoxicating liquors was not competent evidence in his behalf: *Taylor v. Pickett*, 52-467.

230. Bona fide purchasers: A party claiming the benefit of the provision in such section protecting bona fide holders for value has the burden of showing that he is such holder without notice: *Rock Island Nat. Bank v. Nelson*, 41-563.

231. An assignee after maturity is not protected: *Barlow v. Scott's Adm'rs*, 12-63.

232. Sale made in another state: A contract for the sale of liquors, made in another state, with the intention of violating the laws of this state, will not be enforced in our courts, although good where made: *Davis v. Bronson*, 6-410.

233. Where the contract of sale is made outside of the state, it must, to render the contract void, be made to appear affirmatively that the vendor intended thereby to enable the vendee to violate the laws of this state: *Whitlock v. Workman*, 15-351.

234. It must be shown, not only that the vendor knew of the laws of this state, but that he made the sale with the intention of

enabling the purchaser to violate them: *Second Nat. Bank v. Curren*, 36-555.

235. But while mere knowledge on the part of the vendor that the purchaser intends to violate the liquor law of this state may not vitiate the sale, yet it is a fact from which the jury might infer the intent to enable the buyer to violate such law: *Tegler v. Shipman*, 33-194, 200.

236. Evidence that one of the partners in the firm making the sale had been in this state before the sale was made and had knowledge of the existence of the law in this state with reference to the suppression of intemperance, *held* admissible in order to show that he must have known that under the circumstances stated to him, the sale of the liquor by the purchaser in Iowa would be illegal: *Rindschoff v. Curran*, 34-325.

237. A sale of intoxicating liquors in violation of law, made in this state by an agent of a firm in another state, is void: *Second Nat. Bank v. Curren*, 36-555; *Taylor v. Pickett*, 52-467; *Schuenfeldt v. Junkermann*, 20 Fed. Rep., 357.

238. If the order for liquor is taken in this state by such agent, but subject to the approval or disapproval of his principal, the sale will be held as made in the state where the principal resides, and will be enforceable in Iowa unless made with intent to violate its laws: *Tegler v. Shipman*, 33-194; *Schuenfeldt v. Junkermann*, 20 Fed. Rep., 357.

239. Where a sale was made in another state, but notes in payment of the purchase money were executed in Iowa and forwarded to the seller, *held*, that the place where the contract and delivery was made, and not the place where the notes were executed, was the place of contract: *Whitlock v. Workman*, 15-351.

240. Where liquors are ordered by mail by a resident of one state, the contract is deemed made in the place where the order is received and the goods delivered to the carrier for shipment; and the same rule applies to a contract taken by an agent at the place of residence of the buyer, but subject to the approval of the principal in another state from which the goods are to be shipped in case of the approval of the contract: *Engs v. Priest*, 65-232.

Rendition.—Nature.

JUDGMENTS.

I. RENDITION.

- a. *Nature; form; in accordance with pleadings; after defendant's death.*
- b. *Upon what based; pleadings; special verdict; summary; order; agreement.*
As to including interest, see PLEADINGS, §§ 440-442.
- c. *Confession of judgment.*
- d. *Entry of judgment; record; index.*
As to judgment by default, see DEFAULT.
As to judgment for costs, see COSTS.
As to what is sufficient appearance to support a judgment, see APPEARANCE.
As to sufficiency of notice and service to support a judgment, see ORIGINAL NOTICE.

II. VALIDITY AND EFFECT.

- a. *Setting aside or vacating.*
- b. *How far conclusive; collateral attack.*
Presumptions in favor of, see JURISDICTION, IV.
- c. *Conclusive as to claims or defenses which might have been pleaded.*
- d. *Former adjudication; estoppel.*
- e. *Merger.*
As to effect of want of jurisdiction, or of irregularities, see JURISDICTION, V.
As to judgments *in personam* and *in rem*, see JURISDICTION, VI.
As to equitable relief against judgments, see EQUITY, II, c.
As to enjoining enforcement of judgments, see INJUNCTION, §§ 54-57.

III. ASSIGNMENT; SUBROGATION.

IV. SET-OFF AND DISCHARGE.

V. ACTION UPON JUDGMENT; REVIVOR; SCIRE FACIAS.

VI. LIEN.

- a. *Commencement and continuance.*
- b. *Upon what property.*
- c. *Effect of lien; priorities.*

Attorney's lien upon, see ATTORNEYS, III, d.

How enforced against ESTATES OF DECEASED, see that title, §§ 141-145.

Exceptions to, when necessary, how taken, see EXCEPTIONS, §§ 58-68.

How seized under attachment, see ATTACHMENT, § 115.

In attachment proceedings, see ATTACHMENT, VIII.

On attachment bond, see ATTACHMENT, IX, g.

On award of arbitrators, see ARBITRATION, §§ 52-55.

As to evidence of judgments, see EVIDENCE, §§ 537-554.

I. RENDITION.

a. *Nature; form; in accordance with pleadings.*

1. *Not a contract:* A judgment is not in fact a contract in itself, although it may be regarded as the result of a contract: *Sprott v. Reid*, 3 G. Gr., 489.

2. *Therefore, held,* that a judgment is not within the terms of a constitutional provision prohibiting legislation impairing the obligation of contracts in such sense that the statute requiring appraisal on an execution sale cannot be made applicable to judgments for costs already in existence: *Ibid*.

3. A judgment is not a contract, in a narrow sense, and is not synonymous with agreement, but, in a broad sense, it is a contract as distinguished from a tort: *Johnson v. Butler*, 2-585.

4. *Debt:* A judgment is a debt; so held with regard to a judgment for costs in a criminal prosecution: *Gray v. Ferreby*, 36-146.

5. *Not a proceeding:* A judgment is neither an "action" nor a "special proceeding commenced." It is the determination of an action or a special proceeding: *Gray v. Iliff*, 30-195.

6. *What constitutes:* A final judgment is not a resolve or decree of the court, but the sentence of the law pronounced in the court upon the action or question before it: *Zeigler v. Vance*, 8-528.

7. The filing and allowance of a claim against an estate in a probate court which has no authority to issue execution upon

Nature; form; in accordance with pleadings.

such allowance is not a judgment: *Smith v. Shawhan*, 87-538.

8. A judgment or decree of the court controls the written opinion, and if they are at variance, the former prevails and determines the rights of the parties: *Goodenow v. Litchfield*, 59-226.

9. Final judgment is the application of the law by the court to the particular case before it, and specifically denying or granting the remedy sought by the action: *Taylor v. Runyan*, 8-474.

10. Form: While no particular form of words is necessary, there must be something to show that the judgment stated or indicated by the court has been entered by the clerk; and *held*, that in the absence of some showing of the existence in a foreign jurisdiction of some particular statute, rule, or usage, a record of a judgment in such jurisdiction, not showing by whom the judgment was rendered or against whom or for what amount, was not sufficient: *Ibid*.

11. A mere memorandum of the minutes of the judge from which the record of the case is afterwards to be drawn up does not constitute a judgment: *Ibid*.

12. A record not corresponding in form to what would be necessary for a judgment in this state may be shown by the laws, practices and usages of the state in which the suit is brought, to be sufficient to constitute a judgment there: *Ibid*.

Further as to what is a sufficient entry to constitute a judgment, see COURTS, II, c.

13. An order for the recovery of money against one of two defendants, without naming which, is sufficient if it is manifest from the whole record which one is referred to: *Finnagan v. Manchester*, 12-321.

14. A judgment rendered against "Daniel Dougherty, Treasurer," *held* to be a personal judgment, and that in order to make it a judgment against him in his official capacity only, it should have been rendered against him "as treasurer:" *Dougherty v. McManus*, 36-657.

15. It is not necessary to set out in a decree the facts upon which it is founded: *Campbell v. Ayres*, 6-339.

16. Where the petition in an action upon a foreign judgment alleged that it was duly rendered by the court and set forth the en-

try thereof, which recited the name of the court, the title of the case, service, entry of judgment, etc., and was signed by the clerk, *held*, that a demurrer to the petition on the ground that the judgment record showed that judgment was rendered by the clerk instead of the court was properly overruled: *Thompson v. Cook*, 21-472.

As to form of judgments in justices' courts, see JUSTICES OF THE PEACE, §§ 135-139.

17. On contract payable in property: A judgment upon a promissory note payable in county orders should be for such property and not for money unless the notes have become money demands: *Ransom v. Stanberry*, 22-834.

18. Alternative: The finding of the court that defendant is indebted in one or the other of two different amounts, leaving the question as to which of the two is proper to be determined in the future, is not a judgment. A judgment cannot be alternative, conditional or contingent: *Battell v. Lowery*, 46-49.

19. A judgment awarding an execution against a party for costs if not paid within a time limited is not a condition, but a final and absolute judgment: *Sprott v. Reid*, 3 G. Gr., 489.

20. In abatement: By statute (Code, § 2851), where a matter in abatement is pleaded in connection with other matter, the judgment must, if it is rendered on a matter in abatement and not upon the merits, so declare: *Clise v. Freeborne*, 27-280.

21. The judgment in a particular case finding for defendant and reciting an offer to plaintiff of a nonsuit and the acceptance thereof by plaintiff, *held* sufficient to indicate that the judgment was upon matter in abatement pleaded in the action and not on the merits: *Atkins v. Anderson*, 63-739.

22. Must conform to pleadings: Relief not called for by the pleadings will not be granted by the decree: *Byam v. Cook*, 21-392.

23. A judgment different from that prayed for in the petition should not be entered: *Lafever v. Stone*, 55-49; *Marder v. Wright*, 70—.

24. The court should not grant to the plaintiff relief in any respect greater than that claimed in the petition: *Tice v. Derby*, 59-812.

Nature; form; in accordance with pleadings.

25. Judgment should not be rendered on a verdict upon an immaterial issue: *Hughes v. McCutchen*, Mor., 154.

26. When an answer is filed, the plaintiff is not limited to the relief asked by his petition: *Wilson v. Miller*, 16-111.

27. If the court has jurisdiction of the subject-matter and of the defendant, a judgment in excess of that asked is not void, but voidable only: *O'Connell v. Cotter*, 44-48.

28. Where the petition prayed for foreclosure of an equity of redemption, *held*, that personal judgment could not be rendered upon default: *McGlaughlin v. O'Rourke*, 12-459.

29. Where the petition asked only for judgment for the amount due at the commencement of the action, *held*, that it was error to give judgment for instalments of the indebtedness falling due after the suit was commenced and before decree: *Blake v. Blake*, 13-40.

30. In actions against several defendants jointly and severally liable, judgment may be taken as to one and the case continued as to others, and such judgment will not bar a right to recover against those as to whom the case is continued, when the cause is ripe for disposition as to them: *Smith v. Coopers*, 9-376.

31. In an action of replevin against joint defendants judgment may be rendered against one, although plaintiff is not entitled to judgment against the other: *Carothers v. Van Hagan*, 2 G. Gr., 481.

32. If plaintiff maintains his cause of action against one of several defendants, he may have judgment against that one and the other defendants may have judgments against plaintiff for their costs: *Eyre v. Cook*, 9-185.

33. Judgment against one of several defendants jointly and severally liable may be rendered without the cause being disposed of as to the others: *Poole v. Hintrager*, 60-180.

34. Where one of two joint defendants pleads matter going to the cause of action or which constitutes a defense for both in its nature, and succeeds, the other defendant, though in default, should have the benefit of such defense: *Morrison v. Stoner*, 7-493; *Campbell v. McHarg*, 9-354.

35. The practice is, where there are two defendants to an action on contract, one of whom makes defense, whilst the other suffers judgment to be given against him by default, not to enter final judgment against the party in default until the issues joined by the other defendant are disposed of: *Pierson v. David*, 4-410; *Loeber v. Delahaye*, 7-478; *Greenough v. Shelden*, 9-503.

36. Where judgment is entered against two defendants, motion for new trial may be granted as to one without vacating the judgment as against the other: *Gordon v. Pitt*, 8-385; *Terpenning v. Gallup*, 8-74.

37. Where defendant has recovered on a cause of action against joint defendants on which they are severally liable, the fact that, as between them, one rather than the other is under obligation to satisfy the judgment, will not affect plaintiff's right as to its enforcement: *Palmer v. Stacy*, 44-340.

38. So *held* in an action for injuries received by reason of the obstruction of a street brought against the city and the party guilty of the obstruction jointly: *Ibid*.

39. Where separate judgments are rendered against two or more defendants jointly sued for the same tort, plaintiff may elect what judgment he will enforce, and when it is satisfied the other will be regarded as discharged: *Putney v. O'Brien*, 53-117.

40. In an action for damages for a tort against two or more defendants sued jointly, judgment may be rendered against the defendant found liable: *Bosnell v. Gates*, 56-143.

41. A judgment cannot be rendered in favor of one defendant against a co-defendant, unless such judgment is asked for and there is an adjudication of the claims between them: *Beall v. West*, 13-61.

42. Against deceased defendant: Where defendant dies after the submission of the cause and before the rendition of judgment, the judgment should be entered as of the date of submission or at least of a date prior to the death. It is irregular to enter it as of a date subsequent to the death: *Flock v. Wyatt*, 49-466.

As to judgment after the death of plaintiff, see *infra*, §§ 200, 201.

Upon what based.

b. *Upon what based; pleadings; special verdict; summary order; agreement.*

43. Upon the pleadings: Under the statute (Code, § 2859) providing that judgment may be rendered in favor of a party appearing by the pleadings to be entitled thereto, though a verdict has been found against him, *held*, that where there was no answer judgment should have been rendered for plaintiff notwithstanding evidence on the part of defendant disproving the claim had been erroneously received: *Singer Mfg. Co. v. Billings*, 39-347.

44. Also *held*, that where defendant pleads a tender, judgment in plaintiff's favor for the amount of the tender should be rendered, although the verdict of the jury is for defendant: *Sheriff v. Hull*, 37-174.

Further as to TENDER, see that title.

45. Where, upon motion for judgment for an amount admitted on the pleadings to be due, the opposite party asked to amend and leave was granted, *held* that the court properly refused to enter judgment on the pleadings until the amendment was filed: *Snyder v. Phillips*, 66-484.

46. By statutory provision (Code, § 2856), if only part of the claim is controverted by the pleading, judgment may be rendered for the part not controverted: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633, 638.

47. Where plaintiff sued on two notes, and in a third count in his petition claimed the attorney's fee provided for therein, *held*, that a denial of the right to the attorney's fee did not put in issue the counts for amounts due upon the notes respectively, and judgment was properly rendered thereon for want of denial: *Musser v. Crum*, 48-52.

48. In an action to recover real property the party showing himself entitled to an undivided interest may recover such interest but not full title and may have the right of possession as against a stranger: *Hughes v. Holliday*, 3 G. Gr., 30.

49. Notwithstanding the verdict: Under the former system of pleading and practice, a motion for judgment notwithstanding the verdict was only entertained by the court under a certain state of the pleadings and findings of the jury, and was never enter-

tained on behalf of the defendant. It is only for plaintiff that such a judgment can be rendered: *Bradshaw v. Hedge*, 10-402.

50. Upon special verdict: Under the statutory provision (Code, § 2858) that when the verdict is special or when there has been a special finding of facts by the jury, or when the court has ordered the case to be reserved, it shall order what judgment shall be entered, to justify a court in rendering a judgment upon the special finding of facts against a general verdict, such finding must be manifestly inconsistent with the general verdict: *Bonham v. Iowa Central Ins. Co.*, 25-328; *Clark v. Warner*, 32-219; *Mershon v. National Ins. Co.*, 34-87.

51. To warrant such judgment, the special verdict must be such that, when taken together with the facts admitted in the pleadings, it establishes the right of the party to recover: *Lamb v. First Presb. Society*, 20-127; *Hardin v. Branner*, 25-364.

52. It is only where the general and special verdict are so inconsistent that both cannot stand that the latter will be allowed to defeat the former. The mere fact that the special verdict does not support the general will not render judgment on the general verdict erroneous: *Phoenix v. Lamb*, 29-352.

53. The court cannot properly render judgment for a party upon a special verdict; unless, taken in connection with the pleadings, it is such as to show conclusively that the party is entitled to judgment: *Crouch v. Deremore*, 59-43.

54. Where the general verdict is contrary to instructions it should be set aside, but it does not necessarily follow that judgment should be rendered upon a special verdict in accordance with the court's instructions; for, while the instructions were binding upon the jury, they are not binding upon the court, and it is under no obligation to follow them: *Evans v. St. Paul Harvester Works*, 63-204.

55. When a court is called to rule upon a motion for judgment upon a special verdict, it is to consider what the law is, and is not bound by its instruction previously given to the jury: *Baird v. Chicago, R. I. & P. R. Co.*, 61-359.

56. Under peculiar facts, *held*, that a special verdict was not sufficient to entitle plaintiff to judgment in a case where a general

Upon what based.—Confession of.

verdict for defendant was set aside on account of error in the instructions: *Hettus v. Farrell*, 59-296.

57. Where the special finding of the jury is in direct conflict with the general verdict, the judgment must be entered on the finding: *O'Donnell v. Hastings*, 68-271.

58. Where, after judgment upon a general verdict, the court on motion, without having first set aside such judgment, rendered a judgment for the opposite party upon a special verdict, *held*, that such final judgment was valid: *Morneyer v. Cooper*, 35-257.

59. The fact that it appears by the special verdict of the jury that they excluded from their consideration a material fact appearing in the evidence may be a ground for a new trial: *Baldwin v. St. Louis, K. & N. R. Co.*, 63-210.

That the special verdict controls the general, see also PRACTICE, §§ 153-166.

60. Summary judgments on motion: Under the statutory provision (Code, § 2906) authorizing judgments on motion by sureties against principals, or sureties against co-sureties, by clients against attorneys, by plaintiff in execution against sureties for money collected, etc., the court may order an attorney to pay the client money collected for him in the course of professional employment; and disobedience to such order may be punished by suspension or revocation of the license of the attorney: *Cross v. Ackley*, 40-493.

61. Under the same statutory provision, the court may make an order against a clerk to compel payment of money received by him on a judgment: *Elliott v. Jones*, 47-124.

62. By consent or agreement: An agreement for judgment, when properly filed, becomes a part of the record in the case, and a subsequent pleading inconsistent therewith should be stricken from the files: *Vail v. Stone*, 13-234.

63. The fact that counsel for a party is in court when judgment is rendered against his client and makes no objection thereto does not show that the judgment thus rendered is by agreement or consent: *Hershee v. Hershey*, 15-185.

64. Where an action for recovery of real estate was tried under an agreed statement of facts which recited that the plaintiffs were

entitled to the realty, excepting improvements thereon, unless prevented by the facts stated, *held*, that a judgment determining rights to the improvements as well as to the land was erroneous: *Burns v. Keas*, 21-257.

65. When parties by agreement determine the amount which is to be paid by way of compromise of the suit, their determination stands in place of a judgment of the court, and upon payment of the sum agreed upon defendant has the right to demand that the plaintiff shall do what in his petition he has expressed a willingness to do, although defendant has not asked such specific relief: *Robertson v. Central R. Co.*, 57-876.

66. Where a petition embraced two claims, and an offer to compromise by permitting judgment was accepted, *held*, that both claims were thereby satisfied and adjusted: *Ibid*.

67. Where an officer holds liquors under a warrant in a proceeding for their condemnation, he has no authority to stipulate for judgment against him in a proceeding by a third party for their recovery: *Fries v. Porch*, 49-351.

Judgment by agreement of attorney, see ATTORNEYS, §§ 4, 14.

c. Confession of judgment.

68. Statement: Under the statutory provision as to confession of judgment (Code, § 2896), it is not sufficient to state that the sum for which judgment is confessed is due upon a note, but the statement should show the manner in which the indebtedness arose for which the note was given, and it must state that the amount is justly due: *Edgar v. Greer*, 7-136.

69. Where the statement was that the amount was due on a promissory note given for a balance due on settlement, and it was not alleged that the amount was justly due, *held*, that a judgment on such statement was illegal and should not affect third parties, and that an existing creditor, subsequently obtaining judgment, might have the judgment by confession set aside on motion: *Bernard v. Douglas*, 10-870.

70. As between the parties judgments by confession are valid, although the statement does not substantially comply with the stat-

ute in showing how the indebtedness arose. (Criticising *Edgar v. Greer*, 7-136, and *Kennedy v. Lowe*, 9-580, which held that the defendant himself might take advantage of such defect): *Plummer v. Douglas*, 14-69. And see *Churchill v. Lyon*, 13-481.

71. A statement that the amount due was for money borrowed from plaintiff and interest, etc., evidenced by a promissory note, etc., held sufficient: *Vanfleet v. Phillips*, 11-558.

72. And so held where the statement was for "money borrowed:" *Marvin v. Tarbell*, 12-98; *Kendig v. Marble*, 58-529.

73. As to sufficiency of statements in particular cases, see *Daniels v. Clafin*, 15-152; *Müller v. Clarke*, 37-825.

74. In a particular case, held, that the statements of the confession of judgment did not render a party thereto liable to judgment thereon as principal, but only as surety: *Jarosh v. Easton*, 57-569.

75. The mere fact that the statement for the confession of judgment is sworn to before a notary public who at the time is one of the attorneys of the plaintiff does not necessarily render it void. But such circumstance might be considered if it were claimed that fraud was practiced in procuring the confession: *Vanfleet v. Phillips*, 11-558.

76. Failure of the notary to affix his seal to the jurat of the affidavit to the statement will render judgment thereon erroneous: *Chase v. Street*, 10-598.

77. Where the jurat to the statement for confession of judgment was defective in that the notary public omitted to sign his surname, but the seal attached gave his name in full, held, that the authentication was sufficient and the confession valid: *Grattan v. Matteson*, 54-229.

78. As between the parties, the statement will be sufficient without being sworn to. A defect in that respect may be amended on leave of court: *Thorp v. Platt*, 34-314.

79. As between the parties, if defendant swears that a certain sum is due and consents to the rendition of judgment for that amount, there is no necessity for a sworn statement: *Plummer v. Douglas*, 14-69.

80. If the honesty and integrity of the transaction is affirmatively shown, the judgment will not be invalid as to creditors or

parties, though based upon a defective statement: *Vannice v. Greene*, 16-574.

81. Warrant of attorney to confess judgment: In case of judgment on a *cognovit* no formal action or declaration is necessary. These are waived by the power conferred upon the attorney to confess judgment: *Ober v. Shepherd*, 1 G. Gr., 430.

82. Where a judgment rendered upon a power of attorney is reversed for error, the attorney may under the same power confess a correct judgment, his power not being exhausted under the first act: *Huner v. Doolittle*, 3 G. Gr., 76.

83. Judgment rendered in pursuance of the power of attorney executed in connection with an instrument evidencing the indebtedness, held binding even though in pursuance of such power the judgment was entered prior to the maturity of the debt, the execution on such judgment being delayed until the debt should become due: *McClish v. Manning*, 3 G. Gr., 223.

84. Under present statutory provisions, a confession of judgment can only be made as provided by statute, and a warrant of attorney to confess judgment which would be valid in another state where it is executed will not be sufficient in this state to authorize the entry of judgment thereunder: *Hamillor v. Schoenberger*, 47-385.

85. Power of partner to confess judgment: One partner has no authority to confess judgment against the firm, and such judgment would be void as to the other partners: *Christy v. Sherman*, 10-535.

86. But it would be binding as to the partner confessing judgment: *North v.* 13-496.

87. Where the statement was signed firm name, and sworn to by one and the judgment entry recited that acknowledged themselves just, etc., held, that the judgment was firm: *Edwards v. Pitzer*, 12-6.

88. Not without creditor: statute does not authorize judgment by the debtor, without edge or consent of the creditor: *Farmers', etc., Bank*

89. Appearance by necessary in order to

Confession of.

of judgment: *Edmonds v. Montgomery*, 1-148.

90. Entry by clerk: All the power the clerk has to render judgment on confession is given by the statute, and unless its provisions are strictly complied with, the power of attorney under which the clerk acts is a nullity: *Edgar v. Greer*, 7-136; *S. C.*, 10-279.

91. The statute authorizing confessions of judgment does not give judicial powers to the clerk of the court. The judgment entered is to be treated as one entered by the court itself: *Grattan v. Matteson*, 54-229.

92. In vacation: Judgment may be entered by the clerk in vacation and approved at the next term: *Vanfleet v. Phillips*, 11-558; *Kendig v. Marble*, 58-529.

93. Lien of: Where a confession of judgment stipulated that execution thereon should not be issued for two years, and that the judgment should be a lien upon the property described therein until fully paid, *held*, that such confession of judgment constituted in effect a mortgage upon the property described which would have priority over the lien of a subsequent judgment creditor, even after the expiration of ten years from the time of rendering judgment on the confession: *Sigworth v. Meriam*, 66-477.

94. Alteration of record: Evidence in a particular case, *held* insufficient to establish the alteration of the record of a judgment by confession: *Wright v. Howell*, 35-288.

95. Appeal: The judgment when entered is a judgment by the court, and is subject to revision on appeal in the same manner as any other judgment: *Edgar v. Greer*, 7-136; *Troxel v. Clarke*, 9-201; *Burge v. Burns*, *Mor.*, 287.

96. Execution: Process may issue for the enforcement of a judgment by confession before the approval of the record of such judgment: *Vanfleet v. Phillips*, 11-558; *Wright v. Howell*, 35-288.

97. Effect of: In the absence of fraud or other ground of equitable relief, the judgment is conclusive as to any defense, such as usury, which might have been interposed before judgment: *Twogood v. Pence*, 22-543; *Troxel v. Clarke*, 9-201; *Miller v. Clarke*, 37-325.

98. But a judgment by confession, entered into with the purpose of evading the usury

laws, is void, as between the parties, as to the amount in excess of the sum lawfully due: *Mulleh v. Russell*, 46-386; *Ohm v. Dickerman*, 50-671.

99. The mere fact that the note upon which judgment by confession is rendered is usurious does not in itself show that the parties caused judgment to be entered for the purpose of concealing usury or to avoid the statute against it: *Kendig v. Marble*, 58-529.

100. Where a surety's signature to a note was obtained by false representations amounting to fraud on the part of the payee, *held*, that a confession of judgment thereon, made before the fraud was known to the surety, would not estop him from setting up that fact in an action to set aside the judgment: *Melick v. First Nat. Bank*, 52-94.

101. Where, in an action of foreclosure, mortgagee set up a written agreement by mortgagor to confess judgment, and an issue was made upon the allegation that such agreement was obtained by fraud, which issue was found for plaintiff, *held*, that such determination only settled the validity of the agreement, and that defendant could still file another answer, setting up usury: *Lyon v. Welsh*, 20-578.

Further as to whether a confession of judgment is conclusive against usury, see INTEREST, §§ 82-86.

102. Confession of judgment by a principal will not bar action thereon against a surety: *Citizens' Savings Bank v. Olsen*, 47-492.

103. Offer to confess judgment: Under the statutory provision (Code, § 2899) an offer to confess judgment may be made orally, and there is nothing requiring it to be a matter of record. It is therefore competent, when the amount of the offer is questioned, to prove it by parol: *Barlow v. Buckingham*, 68-169.

104. An offer to confess judgment for a certain amount carries with it liability for costs, and it is not necessary that the offer to confess expressly include costs: *Manning v. Irish*, 47-650.

105. Where in an action for balance on mutual accounts an offer to confess was made for a certain amount, *held*, that it was an offer to confess a balance of that amount

due and not merely to confess items of indebtedness on defendant's part to plaintiff amounting to the sum specified: *Ibid.*

106. The offer to confess must be confined to claims embraced in the suit: *Phillips v. Shearer*, 56-261.

107. An offer to confess, unless accepted, does not entitle plaintiff to judgment for the amount offered: *Holmes v. Hamburg*, 47-348.

108. If the offer to confess is insufficient, it is to have no effect on the question of costs: *McClatchey v. Finley*, 62-200.

109. The provisions as to offer to confess judgment are applicable in cases of appeal from the award made by commissioners in assessing the damages for taking right of way: *Harrison v. Iowa Midland R. Co.*, 36-323.

110. Where an offer to confess was made in a justice's court, and plaintiff recovered judgment for a larger amount than the amount of the offer, but on appeal judgment was given for an amount not greater than the offer, *held*, that plaintiff should pay the costs; that the provisions of this section have reference to the amount finally recovered: *Watts v. Lambertson*, 39-272.

111. The provision as to offering to confess judgment does not contemplate admissions or confessions contained in the pleadings: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633.

112. Offer to compromise: Under the statutory provision (Code, § 2900) with reference to an offer by defendant, after service of notice and before trial, to allow judgment to be taken against him, it is error to allow the statement of an offer to compromise to be made to the jury: *McCormick v. Chicago, R. I. & P. R. Co.*, 47-345.

113. The only effect of the offer is as to costs: *Ibid.*

114. Where an offer to allow judgment to be taken is not accepted, an attempt on the part of the counsel for the party to whom it is made to introduce it in evidence constitutes misconduct, but no steps being taken at the time to have the jury discharged and a new one impaneled on account of such misconduct, *held*, that the act of the party objecting in proceeding with the trial of the cause was a waiver of his objection: *Riech v. Boleh*, 68-526.

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Entry; record; index.

124. Even though the judgment is not properly indexed as required, yet a sheriff's deed thereunder, duly recorded, imparts notice of all prior proceedings: *Cushing v. Edwards*, 68-145.

125. The entry and indexing of a judgment as *A. B. v. C. D. et al.* does not operate as notice to strangers of the judgment as against co-defendants of *C. D.* whose names do not appear: *Cummings v. Long*, 16-41.

126. A judgment not indexed is not notice to the purchaser at foreclosure sale of premises upon which such judgment would be a lien, and the holder of such judgment cannot, therefore, maintain an equitable action to redeem from such sale: *Sterling Mfg. Co. v. Early*, 69-94.

127. Impeachment of record: The record of the judgment must be taken as absolute verity. On appeal, the supreme court will not consider affidavits presented to the court below for the purpose of impeaching it: *Morner v. Cooper*, 85-257.

128. A writ of execution upon a judgment is as to third persons only secondary evidence of the amount due upon such judgment, the judgment itself being the first and best evidence: *Parsons v. Hedges*, 15-119.

129. Where the record is blank as to the name of the party against whom judgment is rendered, such judgment will be reversed on appeal: *Rigglesworth v. Reed*, *Mor.*, 19.

130. Assessment of damages: In an action upon a note which was submitted to the court, *held*, that the court having found plaintiff entitled to recover, might order the clerk to assess the amount of damages: *Rife v. Inghram*, 3 G. Gr., 125.

131. Where there was no controversy as to the amount of plaintiff's claim, but one as to whether defendant had a defense thereto, and the referee in his report found for plaintiff, but left the amount of recovery blank, and thereupon the court rendered judgment for the proper amount, *held*, that there was no error: *Drath v. Deitz*, 15-436.

132. Interest: Where judgment is entered *nunc pro tunc* at a subsequent term to that at which the verdict is rendered, the entry should be for the amount of the verdict to bear interest from the time the judgment ought to have been rendered, and not for the aggregate amount of the verdict and interest

up to the actual entry of the judgment: *Shephard v. Brenton*, 20-41.

133. In rendering judgment upon the verdict, interest on the amount of the verdict from the time of its rendition to the time of the actual entry of judgment may be included: *Carson v. German Ins. Co.*, 62-433.

134. Where judgment is rendered upon a principal sum drawing interest at a certain rate, and instalments of interest due which draw interest at a different rate, that portion of the judgment which is for interest should draw interest at the same rate which the interest was drawing before judgment: *Burrows v. Stryker*, 47-477.

135. Findings of the court as to interest to be allowed in a particular case where the judgment was modified and reduced on appeal, *held* correct: *Munson v. Plummer*, 58-736.

Costs: As to judgment for COSTS, see that title, §§ 53-56, and COURTS, §§ 204, 205.

136. What constitutes the record: All the papers of the case constitute the record, and the decree assumes them and their contents: *Campbell v. Ayres*, 6-339.

137. Construction: It is always proper, and in cases where the entry is obscure or not clear it is necessary, to read the record entry of the judgment in the light of the pleadings and the entire record: *Fowler v. Doyle*, 16-534; *Mayfield v. Bennett*, 48-194.

138. Where the entry recited that "service of notice had been made upon" defendant, and the record showed a service by publication, *held*, that it would not be presumed that there was personal service: *Mayfield v. Bennett*, 48-194.

139. Where the proof of a judgment is involved, the entire pleadings and records of the case are receivable in evidence: *Smith v. Smith*, 22-516.

140. The pleadings in the case constitute a part of the record, and the judgment may be established and construed with the aid of the light which they reflect upon it: *Tyler v. Langworthy*, 37-555.

141. If from an examination of the whole record such a construction may be fairly placed upon a judgment as to relieve it from error, the court should give it that construction: *Ibid.*

142. **Correction of record:** Where the judgment, erroneous when entered, is corrected in the proper manner before the rights of third persons have been acquired against it, such correction will be valid as against such subsequent rights: *Monroe v. West*, 12-119.

As to correction of records in general, see COURTS, §§ 223-247.

143. **Entry; nunc pro tunc:** Courts possess the inherent authority to enter judgment *nunc pro tunc*, and lapse of time will not bar its exercise. Such power is not taken away, nor the time within which it may be exercised affected, by the provisions of the statute with regard to proceedings to correct mistakes in the proceedings of the clerk. Therefore, *held*, that where the judgment had in fact been rendered by the court, as shown by the minutes in the judge's calendar, but had not been entered up by the clerk, a motion three years and six months afterwards for the entry of judgment *nunc pro tunc* was proper: *Fuller v. Stebbins*, 49-376.

144. A judgment *nunc pro tunc*, entered while an appeal from the ruling upon a demurrer was pending in the supreme court, and without the appellee having elected to stand upon his demurrer, and entered without notice to him, *held* unauthorized and void: *Turner v. First Nat. Bank*, 30-191.

As to other entries *nunc pro tunc*, see COURTS, §§ 248, 249.

145. **Lost records:** Courts of record have inherent power, independent of statute, to restore judgments the records of which have been lost or destroyed, as fully as other records; and such power is not taken away by the statute permitting action to be brought on such judgments: *Gammon v. Knudson*, 46-455.

146. In a proceeding to restore the record of a judgment which had been destroyed, *held*, that the prior existence of the record and its destruction were the only matters in issue and its original validity could not be inquired into: *Kanke v. Herrum*, 48-276.

As to restoring or supplying other lost records, see COURTS, §§ 250-254.

147. **Presumptions in favor of the record:** Where a decree recited that the cause came on for hearing in the presence of coun-

sel for plaintiff and defendants, *held*, that it was sufficiently shown that there was an appearance by all of the defendants: *Cooper v. Miller*, 10-532.

148. Where it was recited in a decree that it was made upon proof read in evidence to the court, *held*, that it would be presumed that evidence to support the plea was introduced: *Wahl v. Phillips*, 15-478.

149. The presumption is strong in favor of the verity and truth of judicial records and they can only be impeached by evidence clear and satisfactory. Evidence that the draft of a decree was filed and entered in vacation is not sufficient without a showing that the court never ordered the decree in term time: *Parker v. Slaughter*, 28-125.

150. The presumptions of law are all in support of a judgment, and when it is sought to avoid it because rendered on Sunday, the evidence must clearly establish the fact in order to overcome the presumption of regularity: *Bishop v. Carter*, 29-165.

151. The cancellation of a portion of the record of a judgment entry being shown, *held*, that the presumption would be that such cancellation was made at the time of the approval of the judgment, and was authorized, rather than that it was subsequently made without authority: *Lutz v. Kelly*, 47-307.

Further as to presumptions in support of the record, see COURTS, §§ 259, 260.

152. **Entry in vacation:** Although a judgment be entered after the close of the term and without special direction of the court, yet if not contrary to the pleadings and verdict, and its entry was a matter of course, it is not void, but at most irregular, and such irregularity must be taken advantage of on motion: *Collins v. Chantland*, 48-241.

153. The entry of a judgment in vacation, except in cases authorized by statute, is irregular, and whether it is void, *quære*: *Car-michael v. Vandebur*, 50-651.

154. The court may hear a case and render judgment during vacation if the parties consent thereto: *O'Hagen v. O'Hagen*, 14-264.

155. A valid judgment or decree cannot be rendered in vacation without consent: *Townsley v. Morehead*, 9-565; *McClure v. Owens*, 21-138.

156. Where it appears that a judgment is

Setting aside or vacating.—How far conclusive.

it need not inquire into the validity of the defense offered. If it becomes necessary to do so, however, not only the sufficiency of the answer, but the truth of its averments, must be determined: *Niagara Ins. Co. v. Ro-decker*, 47-162.

217. The judgment is only to be vacated after a trial of the defense on its merits, and the finding of the sufficiency thereof: *Brewer v. Holborn*, 34-473.

218. Where irregularity and fraud in obtaining a judgment were found, but there was no evidence that there was a valid defense, held error to order the judgment vacated: *Dryden v. Wyllis*, 51-534.

219. The court should first try the question of the validity of the defense, and if that should appear insufficient should overrule the application: *Miracle v. Lancaster*, 46-179.

220. The court, without a jury, is to decide upon the question of whether the judgment shall be vacated or not, and a new trial granted: *Carpenter v. Brown*, 50-451.

221. It is not the duty of the court, where it is sought to have a judgment vacated on the ground of fraud in procuring it, to carefully weigh the evidence and determine upon which side there is a preponderance as to whether there is a defense to the action or not, but to examine the evidence produced, and therefrom, in connection with the evidence introduced on the former trial, determine whether there is a reasonable ground to believe that a different result will be reached upon a retrial; and it is not proper for the court to render another judgment without first having decided whether the original judgment should be set aside and a new trial ordered: *Brown v. Byam*, 59-52.

222. Where the party asking that a judgment be set aside presents a meritorious defense, the court will not pass upon the sufficiency of the evidence to support it. If the evidence tends to support it, even though it is not conclusive as to the facts, that will be sufficient: *Bowen v. Troy Portable Mill Co.*, 31-460; *State Ins. Co. v. Granger*, 62-272.

223. An appeal lies from a proceeding to vacate a judgment for fraud: *Dryden v. Wyllis*, 51-534.

224. Such appeal is not triable in the su-

preme court *de novo*: *Independent School Dist. v. Schreiner*, 46-172.

225. A party cannot, by moving to vacate a judgment, and then appealing from the order refusing to grant such relief, extend the time for taking appeal from the judgment: *Russell v. First Nat. Bank*, 65-242.

226. Corrections of mistakes of clerk: Payment and satisfaction of a judgment by defendant will not bar a proceeding by plaintiff, within proper time, to correct a mistake of the clerk: *Goldsmith v. Clausen*, 14-278.

227. The statutory provision (Code, § 3156) for the correction of mistakes of the clerk on motion does not apply to an application for the entry of a judgment *nunc pro tunc* which has been entirely omitted: *Fuller v. Stebbins*, 49-376.

228. Nor does such statutory provision apply to a motion to correct a record, made by a party against whom the court has by mistake rendered a personal judgment without having jurisdiction to do so: *Shelley v. Smith*, 50-543.

229. Where a mistake of the clerk has remained undiscovered until too late to correct it by motion, under the statutory provision, the party being without fault and remediless in law, may be granted relief in an action in equity, and the fact that the erroneous judgment has been affirmed on appeal will not affect such right: *Partridge v. Harrow*, 27-96.

b. How far conclusive; collateral attack.

As to attacking judgment for want of jurisdiction, see JURISDICTION, §§ 154-164.

That a foreign judgment may be attacked for want of jurisdiction of the court rendering it, see JURISDICTION, §§ 153-162.

230. Conclusive: Judgments are designed to be finalities and are not to be controlled by agreements between the parties by which such judgments are not to be regarded as settling their rights: *Sutliff v. Brown*, 65-42.

231. Collateral attack: A stranger to a judgment cannot attack it in a collateral action because of matters preceding its rendition: *Johns v. Pattee*, 55-665.

232. The title of the purchaser at execution sale under a judgment cannot be attacked by

How far conclusive; collateral

a stranger for fraud in the judgment: *Webster v. Reid*, Mor., 467.

233. Even conceding that an anterior, independent collateral agreement resting in parol can be shown to affect a subsequent judgment and control the rights of the parties thereunder, it must be clearly and satisfactorily established in point of fact: *Burton v. Mason*, 26-392.

234. Where no steps have been taken to correct an erroneous judgment by way of appeal or other direct proceeding, it must be regarded as conclusive against a collateral attack: *Thompson v. McKean*, 43-402.

235. Where a court has jurisdiction of the person and subject-matter, the judgment not being void, is conclusive until set aside upon appeal or by other direct method, and cannot be attacked collaterally: *Darrow v. Darrow*, 43-411; *Finch v. Hollinger*, 47-178.

236. In a summary proceeding against a clerk to compel the payment by him of money received under the provisions of a judgment, he is bound by the judgment and cannot attack its validity: *Elliott v. Jones*, 47-124.

237. Where a court has jurisdiction of the subject-matter and of the parties, the record must be received as conclusive of the rights adjudicated, and no fact established by the judgment of the court can be controverted: *Moore v. Jeffers*, 53-202.

238. Hence, *held*, that a provision in a foreclosure decree in a federal court, that the property should be sold without redemption, could not be attacked in a proceeding for the recovery of the property on the ground that such a decree was void, the error being one to be corrected on appeal, and not by collateral attack: *Ibid*.

239. The judgment of a court having jurisdiction of the parties and subject-matter cannot be attacked in a collateral proceeding for a mere error. Error can only be corrected on appeal or in a direct proceeding: *Perry v. Miller*, 54-277; *McCrillis v. Harrison County*, 58-592; *Central Iowa R. Co. v. Piersol*, 65-498.

240. Therefore, *held*, that where a justice of the peace rendered a judgment prior to the expiration of the hour which by law is allowed to the defendant in which to appear, the judgment, although erroneous, was not subject to be impeached in a collateral pro-

ceeding: *C* 498.

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Conclusive as to claims or defenses.

Further as to effect of want of authority of attorney, see ATTORNEYS, §§ 40-54.

248. Mistake: That a judgment was inadvertently rendered by the court may be good ground to set it aside by direct application, but cannot be made available collaterally: *Hayden v. Anderson*, 17-158.

249. The judgment finally rendered after appeal cannot be collaterally impeached because the opinion of the appellate court directed a different judgment to be entered: *Cooley v. Smith*, 17-99.

250. Evidence: Where a judgment is offered simply as an instrument of evidence, it is not competent to attack it collaterally by proof that it was fraudulently procured: *Smith v. Smith*, 22-516.

251. In an action to set aside a fraudulent conveyance, the validity of the judgment of the party seeking to set such conveyance aside cannot be attacked by the party claiming under such conveyance: *Strong v. Lawrence*, 58-55; *Kaiser v. Waggoner*, 59-40.

c. Conclusive as to claims or defenses which might have been pleaded.

252. Defenses: A judgment is conclusive as against any defense which defendant might have interposed and relied on, although he failed to interpose it, and he cannot in a subsequent action relitigate the matter which could thus properly have been determined: *Hackworth v. Zollars*, 80-488; *Wolfinger v. Betz*, 86-594; *Johnson v. Butler*, 2-535.

253. A defense which might have been interposed in an action in which judgment is recovered cannot afterwards be made a ground for setting such judgment aside: *Ebersole v. Lattimer*, 65-164.

254. A defense which a party has failed to interpose in an action in which judgment is recovered cannot afterwards be made the ground of collateral attack upon the judgment: *Smith v. Luddy*, 50-112.

255. Matter which might have been pleaded to an original action cannot be made available as a defense to a suit on process of reviver upon a judgment obtained in such action: *Thompson v. Hurley*, 19-831.

256. After decree in a suit in which the court is shown to have had jurisdiction, a

party to the suit cannot prove, as against a title derived under such decree, any defense which he had to the original proceeding: *Gaylord v. Scarff*, 6-179.

257. Defense of usury: A judgment, unless collusive, is, as between parties who are privy thereto, conclusive of all matters pertaining to the right of action of plaintiff therein or of defenses which were pleaded or could have been pleaded by defendant. So held where it was claimed that usurious interest had been paid on the debt before judgment: *Philips v. Gephart*, 53-896.

258. In the absence of fraud, accident or mistake occurring in an action at law in which judgment is entered, defendant therein cannot relitigate by an action in equity a defense which he could have successfully set up in the law action: *Dalter v. Laue*, 13-588.

259. A defendant failing to interpose a defense which he has to an action at the proper time cannot set up such defense as against the judgment, unless he was prevented from interposing it by fraud of the plaintiff: *Lawrence Savings Bank v. Stevens*, 46-429.

260. In the absence of fraud or artifice on the part of his adversary, a party defendant is estopped from relitigating what he might have successfully set up in defense to a former action, and this estoppel operates against those claiming under him: *Tredway v. McDonald*, 51-668.

261. Judgment against sureties on motion: Any defense which would have been available in the action in which judgment was rendered cannot afterwards be urged as against the judgment. Therefore, held, where judgment was rendered on motion against sureties in a bond given to release attached property, such sureties could not afterwards interpose an objection to the enforcement of such judgment which would have been available to them by motion before judgment against them was rendered, although such judgment was rendered summarily in the original action as authorized by law and not in a separate action: *Bedwell v. Gephart*, 67-44.

262. Defenses in foreclosure proceedings: Any facts which would defeat recovery in an action to foreclose must be interposed as a defense in that action and cannot afterwards be raised as a ground for setting aside a de-

Conclusive as to claims or defenses.

cree and sale thereunder: *Dewey v. Peck*, 33-242.

263. A defense which might have been interposed in a foreclosure suit cannot be set up in an action for possession under a surety's deed given in pursuance of the foreclosure sale: *Mally v. Mally*, 52-654.

264. Where the rights of a party to a foreclosure are directly put in issue, and he has opportunity and is directly called upon to establish them, he cannot, after judgment against him on default, relegate his claims as against the plaintiff in foreclosure who has bought in the property: *Wolfinger v. Betz*, 66-594.

265. Homestead exemption: Where a judgment has been in a proper action made a lien upon property the judgment is conclusive between the parties, and defendant cannot in an independent action assert the exemption of the property as a homestead: *Collins v. Chantland*, 48-241.

266. Such exemption cannot be first interposed after the property has been sold to satisfy the lien of a judgment: *Hemenway v. Wood*, 58-21.

267. In a proceeding for alimony: Whatever necessarily inheres in a defense to a claim must be presumed to be adjudicated when the claim is adjudicated. Therefore, where a husband brought action against his divorced wife for the proceeds of a judgment recovered in her name, and claimed to be in fact his property, *held*, that this matter should properly have been set up as a defense in the wife's action for alimony, and would be considered adjudicated in that action: *Patton v. Loughridge*, 49-218.

268. Sale under execution: In an action by the purchaser at a judicial sale under judgment against the defendant for possession of the lands sold, a defense to the action wherein the judgment was rendered cannot be interposed or set up by cross-bill to defeat the action: *Evans v. Robbins*, 29-472.

269. Where objections to a sale under execution have been urged in an action to set it aside, other objections to the validity of such sale cannot afterwards be interposed in an action by the purchaser for the possession of the property: *Austin v. Walker*, 61-158.

270. Title to real property: In an action brought to settle the title to real property

and obtain the possession thereof, everything going to show that plaintiff had no right nor title should be pleaded; and by not putting in issue any fact affecting or tending to defeat such title, the right to afterwards rely thereon as against plaintiff's title is surrendered, unless the failure to do so occurred under such circumstances as that equity will grant relief: *Campbell v. Ayres*, 1-257.

271. The plaintiff in a partition proceeding must set up all the interest or title which he claims in the land; and he cannot, after partition has been effected, set up a different right than that alleged in the action of partition, for the purpose of defeating the title of the other parties: *Oliver v. Montgomery*, 39-601.

272. Where, in an action to quiet title, brought by a purchaser of land, it was determined that a person made defendant therein had no claim to the premises, and the same person subsequently brought a partition proceeding against the same defendant in which a portion of the land was set off to the latter, *held*, that the interest thus set off could not be set up by the purchaser as a defense in an action for the purchase money, for the reason that the adjudication in the action to quiet title might have been interposed by him as a bar to any proceedings for partition: *Collins v. Jennings*, 42-447.

273. The validity of a tax which has been litigated in a state court in which every question touching its validity and constitutionality might have been raised cannot be again litigated in a federal court, where the two suits are for the same relief and based upon the same facts: *Snell v. Campbell*, 24 Fed. Rep., 880.

274. Conflicting decrees: Where two decrees of different effect are entered in relation to the same matter, the one last rendered will take precedence, and unless the party claiming under the prior decree sets it up in answer in the subsequent action, his rights thereunder will be concluded: *Cooley v. Brayton*, 16-10.

275. An equitable defense not allowed to be interposed in an action at law may be made the ground of a bill in equity: *Arnold v. Grimes*, 2-1.

276. Where a defendant permits judgment to go against him by default on a legal de-

Conclusive as to claims or defenses.

Further as to effect of want of authority of attorney, see ATTORNEYS, §§ 40-54.

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266. Such exemption cannot be first interposed after the property has been sold to satisfy the lien of a judgment: *Hemenway v. Wood*, 53-21.

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mand, he may in a subsequent action set up and rely upon equitable matters which would have constituted an available defense in the first action; and *semble*, that the same would be true where the claim available as a defense is a legal one: *Fairfield v. McNany*, 37-75.

277. Counter-claim: A recovery at law on a cause of action against which a defendant holds a claim available as a defense does not defeat his right to bring a subsequent action upon such claim: *Ibid*.

278. The fact that plaintiff is under obligation to save defendant harmless on the very cause of action upon which plaintiff sues (plaintiff being assignee of such cause of action) must be set up as a defense and not as a counter-claim, and therefore, if not set up, the judgment is conclusive against such claim: *Lawrence Savings Bank v. Stevens*, 46-429.

279. Separate cause of action: Where parties were entitled to a new trial for the reason that the judgment had been rendered against them upon service by publication without appearance, *held*, that the fact that in such motion for a new trial they might have set up fraud in the prior proceedings would not estop them from making such fraud the basis of an independent action in equity to set aside the sale had at such proceedings: *Fleming's Heirs v. Hutchinson*, 36-519.

280. Excuse for not making defense: Where there is an agreement to credit the amount paid on a note and the debtor has no reason to doubt that it has been done, and fails to defend an action on the note on the faith thereof and in ignorance that an unjust amount is sued for, he will not be negligent in failing to defend, and in such case may be relieved against the judgment, if not paid, to the extent of payments not credited, or if the judgment has been compulsorily collected, he may, it seems, recover back the amount paid above the just indebtedness: *Doyle v. Reilly*, 18-108.

281. Compromise: Where by reason of compromise a defendant fails to set up a defense or counter-claim which he might have made available, but allows judgment to go against him for a larger amount than his real indebtedness, by reason of such arrange-

ment, he is not bound by the judgment, in case the opposite party repudiates the terms of the compromise: *Savery v. Sypher*, 39-675.

d. *Former adjudication; estoppel.*

282. Judgment conclusive as to the issues: A judgment upon an issue involved in an action is a bar in a subsequent proceeding upon the cause of action embraced in such issues and settled by the judgment. The adjudication, whether correct or erroneous, is conclusive: *Bettys v. Chicago, M. & St. P. R. Co.*, 43-602.

283. Where the validity of a settlement was called in question in one action, *held*, that the adjudication was binding in a subsequent action between the same parties in which the same settlement was in issue: *Reynolds v. Babcock*, 60-289.

284. Where an action was brought against defendant served by publication only, in which his title to real property was adjudged inferior to the lien of a judgment in attachment, *held*, that he could not afterwards relitigate that objection in an action to remove the cloud from his title: *Everhart v. Holloway*, 55-179.

285. Judgment of court without jurisdiction: A judgment *in rem* in another jurisdiction against a defendant not appearing or personally served with notice and remaining unsatisfied will have no force or effect in this state upon the cause of action upon which it is claimed to be founded: *Melhop v. Doane*, 31-397.

286. Proceedings in a court not having equitable jurisdiction will not constitute a bar to an equitable action for the relief which the other court could not have given: *Gordon v. Kennedy*, 36-167.

287. One who obtains an adjudication that a judgment is void by reason of want of jurisdiction cannot, in the face of such decision, afterwards insist that such judgment is valid: *Sweezy v. Stetson*, 67-481.

288. Party relying on judgment cannot afterwards question it: Where defendant has, for the purpose of defeating an action against him, set up a previous judgment, asserting its validity, he is estopped from afterwards, when it is sought to enforce his previous judgment against him, denying that

it is valid: *District T^p v. Independent Dist.*, 69-88.

289. Change of statute: A judgment involving the construction of a statute, and turning upon such construction, cannot be invoked, after the repeal of such statute, as an estoppel as to the law under a subsequent statute, though similar in its provisions: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-683.

290. Mutuality: Estoppel by judgment must be reciprocal, and it can make no difference in practice whether a party is plaintiff or defendant in the action: *Oliver v. Montgomery*, 39-601.

291. That a judgment may be pleaded as a bar it must equally estop both parties. Unless both litigants are precluded by it, the judgment cannot be set up against either: *Myers v. Johnson County*, 14-47; *McDonald v. Gregory*, 41-513; *Goodnow v. Litchfield*, 63-275.

292. A judgment upon demurrer is as conclusive of the facts confessed by the demurrer as a verdict finding the same facts would have been: *Coffin v. Knott*, 2 G. Gr., 582.

293. Judgment for defendant upon demurrer to a petition is conclusive upon the same petition in another action, but not upon a good and different petition on the same cause of action: *Keater v. Hock*, 16-23; *Felt v. Turnure*, 48-397.

294. The facts in a particular case discussed and held to be the same as involved in a preceding case in which a demurrer to the petition was sustained: *Felt v. Turnure*, 48-397.

295. Dismissal: Where the case is dismissed by reason of the sustaining of a demurrer based on the fact that it appears that the court has no jurisdiction of the action, such an adjudication does not bar a subsequent action in the proper court on the same cause of action: *Roberts v. Hamilton*, 56-683.

296. In a former action upon substantially the same allegations, defendant demurred to the petition and the demurrer was sustained, but plaintiff had leave to amend and no judgment was entered. The action being afterwards abandoned, *held*, that the prior proceedings did not constitute a bar to a subsequent action: *Allison v. Hess*, 28-388.

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defendant from setting up failure of performance as a defense to an action on the contract: *Burlington, C. R. & M. R. Co. v. Benton County*, 56-89.

303. A decree in equity that the equities of the case are with plaintiff is equivalent to a finding that the allegations of his petition necessary to maintain an action are true: *Benson v. Connors*, 63-670.

304. Judgment on matter in abatement: In order that a judgment may be a bar to a subsequent action, it must appear that such judgment was rendered upon the merits of the subject-matter. If the former action was decided against plaintiff on account of a temporary disability, or a mistake in the form of the action, or if from any cause the matter has not been judicially passed upon, a subsequent action will not be barred: *Miller v. Langworthy*, 3 G. Gr., 347.

305. Therefore, where an action by an assignee was defeated because not brought in the name of the assignor (the common law rule as to assignment of causes of action being then still in force), *held*, that a subsequent action in the name of the assignor for the benefit of the assignee was not barred: *Ibid*.

306. Where the judgment in a former action on a guaranty was in abatement on the ground that it did not appear that plaintiff had exhausted his legal remedies against the principal debtor, *held*, that it was not a bar to a subsequent action on the same guaranty: *Boyer v. Austin*, 54-402.

307. In order to enable a party to interpose a plea of prior adjudication successfully it must appear that the actual point of issue between the parties has already been determined, and that such decision has been upon the merits: *Griffin v. Seymour*, 15-30.

308. Where there are two objections raised against plaintiff's right of recovery and one is preliminary (such as misjoinder of parties), the presumption is that the court passed upon that one, and if the objection there raised was sufficient to defeat the action it would be presumed that the ruling of the court was upon that ground and that the court did not pass upon the merits of the case: *Ibid*.

309. A verdict in favor of either party will be presumed to be on the merits where nothing to the contrary appears: *Levi v. McCraney*, Mor., 91.

310. Judgment in probate: A settlement, in the proper court, of the accounts of a guardian, wherein he was ordered to pay over a certain amount, part of which was the proceeds of the sale of real property of his ward, *held* to be an adjudication that the property belonged in fact to the ward and not to himself, and was binding not only upon him but upon the surety upon his bond who had become a party to the proceedings: *McWilliams v. Kalbach*, 55-110.

311. The allowance of a claim against an administrator in a foreign jurisdiction does not constitute an adjudication binding upon an administrator appointed within the state, and is not competent evidence in an action to enforce the claim against the administrator in this state: *Cresswell v. Slack*, 68-110.

Further as to allowance of claim constituting a prior adjudication, see ESTATES OF DECEDENTS, §§ 207, 208.

312. Habeas corpus: A party who, after his application for discharge from arrest by *habeas corpus* has been denied, gives a bond for his appearance, cannot in an action on this bond again call in question the regularity of the acts of the magistrate which have been reviewed in the proceeding for *habeas corpus*: *State v. Tucker*, 22-224.

313. Acquittal in criminal case: In an action for maintaining a nuisance in the sale of intoxicating liquors, an adjudication that defendant is not guilty of an offense punishable upon information filed before a justice of the peace cannot be pleaded as a prior adjudication: *Martin v. Blattner*, 68-286.

314. The ruling on motion to set aside default is binding as a former adjudication of the question acted upon but not as to a matter not included in the motion, but growing out of the default: *White v. Watts*, 18-74.

315. Remedy against attachment: Where it was provided by statute that in an action commenced by attachment the rights of defendant to the attached property might be investigated by a jury, *held*, that such proceedings should not be considered to prevent the claimant of property so taken from seeking his remedy in an action of replevin: *Morrill v. Miller*, 3 G. Gr., 104.

316. Counter-claim: Where a counter-claim was interposed in an action and not

withdrawn and judgment was rendered for plaintiff's entire claim, *held*, that this was an adjudication of the counter-claim and it could not be made the basis of a new action: *Gunsaulis v. Cadwallader*, 48-48.

317. Allowance of part of claim: Where action was brought for the recovery of two tracts of land, and after trial on the merits judgment was rendered for one tract only, *held*, that this constituted an adjudication in favor of defendant as to the second tract which would bar a second action therefor by plaintiff: *Woodin v. Clemons*, 32-280.

318. Judgment for want of evidence: Judgment for defendant upon failure to introduce any evidence by plaintiff in an action as to the issues made by defendant therein will be conclusive as to plaintiff's right of action, and he cannot relitigate the same issues: *Hayden v. Anderson*, 17-158.

319. The defendant having once been compelled to litigate a claim made in an action and prepare for his defense has the right of immunity from being again required to answer the same claim, even if it is shown by the record that no evidence was offered by the other party, the action not having been dismissed nor the unsupported claim withdrawn before judgment: *Schmidt v. Zahensdorf*, 30-498; *Gunsaulis v. Cadwallader*, 48-48.

320. Issues involved: A judgment upon an issue of fact is conclusive upon the parties as to questions directly involved, although no reference is made thereto in the pleadings: *McGregor v. McGregor*, 21-441.

321. Where, under a former suit on a contract, a defense was set up in denial of plaintiff's right to recover at all thereon, and a verdict was returned and judgment entered for plaintiff, *held*, that such adjudication was conclusive in a subsequent action upon the same contract, and defendant could not insist that the recovery in the former case had been upon another contract claimed by defendant in that case to have been substituted for the one upon which plaintiff sued, such issue being necessarily involved in the issue determined in the former case: *Stapleton v. King*, 40-278.

322. A judgment of a court of competent jurisdiction is conclusive on the parties as to all the points directly involved in it, and

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the same plaintiff based his action on the ground that defendant wilfully and through gross carelessness ruined said plow. *Held*, that to have defeated plaintiff's action in the first case as to one plow, defendant must have established that he took ordinary care, and that the same issue could not be retried again, although the latter action was for tort, while the former was based on contract: *Newby v. Caldwell*, 54-102.

328. Where plaintiff had brought replevin for property as improperly seized by an officer and had been defeated and a judgment against him for the value of the property rendered, one of the issues being that he did not give proper statutory notice to the sheriff of his claim upon the property, *held*, that he was concluded by such judgment from afterwards suing for damages for conversion: *Finch v. Hollinger*, 46-216.

329. Issues not involved: A decree in an equitable action in another state, brought merely to determine the ownership of property, cannot be considered to establish ulterior questions, as, for instance, the validity of a compromise settlement not involved in the issue in the first case: *McGregor v. McGregor*, 21-441.

330. In an action against a minor for shooting a horse, *held*, that the judgment in a prior action against his father for the same trespass, which failed because it was held that the father was not responsible for the minor's torts, could not be received in evidence to establish a former adjudication: *Tucker v. McClure*, 17-583.

331. An action against a railway company for permanently abandoning the use of a switch, *held* not to be barred by an adjudication in a previous action between the same parties for damages for refusing to remove a car of freight over such switch: *Amaden v. Dubuque & S. C. R. Co.*, 32-288.

332. The fact that in a former action for divorce on the ground of adultery with a certain party plaintiff was unsuccessful will not bar a second action for divorce on the ground of conviction for a felony, although the felony consists of a rape committed on the same party with whom adultery was formerly charged and at the same time: *Vinsant v. Vinsant*, 49-639.

333. If the pleadings present several prop-

ositions of fact, the judgment is not conclusive upon any one of them, unless it appears from the record or *aliunde* that the issue upon which it was rendered was upon that proposition: *Davis v. Clinton*, 58-389.

334. In order to constitute a former adjudication it must affirmatively appear that the matter in dispute was put in issue and tried. Therefore where it appeared that in a former action defendant stated as a matter of defense to a note sued on that it had been fraudulently altered in a material respect and judgment was rendered in his favor, *held*, that as a material alteration would have defeated recovery on the note, although not fraudulent, the adjudication in the case was not conclusive as to the question whether the alteration was fraudulent or innocent and would not operate as a bar to a subsequent action on the indebtedness on which the note was given: *Eckert v. Pickel*, 59-545.

335. An adjudication in favor of defendants in an action against them, *held* not to amount to an adjudication as between them as to a question in which they were not then adversely interested: *Tama County v. Melendy*, 55-395.

336. Where defendants in an action on a written instrument set up that they were merely sureties, the adjudication of that fact in the judgment does not constitute, as between such defendants, an adjudication preventing them from establishing their respective relations to the indebtedness; especially if the person alleged to be the principal debtor was not a party to the proceeding: *Walters v. Wood*, 61-290.

337. Different issues: An adjudication against the holder of a note that he is not entitled thereto is not binding upon the maker in a subsequent action in which he pleads payment to such party made at a time prior to such adjudication and when he had a right to make such payment: *Stoddard v. Burton*, 41-582.

338. An adjudication against the validity of a tax title will not constitute an adjudication barring the assertion by the same party of title under a tax deed subsequently issued under the same certificate: *Mallory v. French*, 38-431.

339. Where a tax title is attacked in a federal court for invalidity of the tax, which

might have been urged in a prior action in the state court, the judgment in the state court will be deemed an adjudication, but if another question is presented, involving the amount necessary in order to redeem from a tax sale which had not taken place at the time of the prior adjudication, the right of redemption and amount to be paid not having been involved, the second action is not barred: *Snell v. Campbell*, 24 Fed. Rep., 880.

340. Identity of issue: No matter can be pleaded as *res adjudicata* which was not embraced in or covered by the pleadings in the former suit. Matters which arise only incidentally, however much they may influence the mind of the judge or jury in arriving at a conclusion, are not to be deemed as having been adjudicated: *Haight v. Keokuk*, 4-199.

341. While parol evidence is sometimes admissible to show what was tried or submitted in a former case, it is admissible only to show that some particular item of demand, claim or right which would be covered by the pleadings was or was not submitted, as, for instance, under a general submission to an award: *Ibid.*

342. The subject-matter of the two actions must be the same in order to make the one conclusive in the other: *Ibid.*

343. Estoppel by reason of former adjudication will arise when the matter in question was covered by and embraced in the pleadings and judgment in the former suit. If it does not appear affirmatively from the face of the record that the matter was so embraced, it is competent to prove, in connection with the record, by parol, that the matter did arise and was adjudicated: *Carl v. Knott*, 16-379.

344. Upon the question of the identity of the matter involved in the respective suits, if the records do not show such identity, or it is left in uncertainty, parol evidence is admissible: but evidence of this kind cannot be introduced to contradict the record: *Stapleton v. King*, 40-278.

345. This rule has never been extended, however, to the introduction of evidence to show the action of the jury, or what matters were taken into consideration: *Crum v. Boss*, 48-433.

346. Where a former judgment or decree is relied upon as a bar to an action it must

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Former adjudication; estoppel.

the whole matter in dispute in the cause in which it is rendered, and therefore to every point decided in the proceedings leading to the judgment: *Whitaker v. Johnson County*, 12-595.

854. The judgment is evidence in a subsequent action to prove an estoppel, though the form of the action in the second case is different from the first, if the cause of action is the same: *Ibid.*

855. But the former adjudication must have been between the same parties, and, what is a better test, the matter previously adjudicated should have the effect to estop equally both parties: *Myers v. Johnson County*, 14-47.

856. The general rule is that the judgment of a competent court is conclusive between the parties upon all questions directly involved in the issues, and necessarily determined by it. If the verdict of the jury is special and it is made to appear by the record that the failure to recover was owing to the failure to prove the existence of a material fact, the judgment will not estop the party from showing in a subsequent action such fact as existing after the judgment in the former case. But if the verdict and judgment are general and upon the merits, they must be regarded as an adjudication of all the issues in the case: *Hahn v. Miller*, 68-745.

857. **Part of claim:** A party cannot recover in parts a claim which, in its legal nature, is indivisible. Under the facts of this case, *held*, that a principal, whose agent had sold various articles of property for him, might recover in an action for money received by such agent from one of the sales, although there had been a recovery for the proceeds of other sales in a prior action. If the facts were such as to create a running account between the principal and agent, a different rule might apply: *Sweeny v. Daugherty*, 23-291.

858. **Subsequent damages:** Therefore, where, in an action for damages by one landowner against an adjoining owner for the construction of an embankment which it was claimed obstructed a water-course, and threw the water back upon the land of plaintiff, *held*, that a judgment for defendant would be conclusive in a second action

in which the construction of such embankment was alleged, coupled with an allegation that, since the former action, it had been heightened and extended, the primary cause of action, consisting in causing the flowing back of water upon the premises of plaintiff, being the same, and it being immaterial that the embankment as maintained at the time of the second action had the effect to throw back upon the plaintiff's land a greater quantity of water than was thrown back by it as it was maintained when the former suit was instituted: *Hahn v. Miller*, 68-745.

859. Where plaintiff in his first action claimed damages generally for the diversion of a stream of water across his land, by the construction of an embankment by defendant, and in a subsequent action claimed damages for continuing to divert said stream in the same manner, *held*, that the damages were entire, original and susceptible of an immediate recovery, and the second action could not be maintained, although in the first case the jury were instructed that they were not to consider permanent damage, for the reason that plaintiff might institute other suits for damages subsequently accruing. In such case plaintiff should have protected himself from such erroneous instructions by appeal: *Stodghill v. Chicago, B. & Q. R. Co.*, 53-341.

As to continuing damages, see DAMAGES, I, g.

860. **Claims subsequently accruing:** Where plaintiff had in a former action sued upon a special contract in writing under which he had furnished material and built a house for defendant, and the jury being charged that under the pleadings and evidence plaintiff could not recover unless they found that defendant had accepted the work, a verdict was returned for defendant, *held*, in a subsequent action brought upon a *quantum valebat*, that if there was an acceptance of the work since the former action the suit might be maintained under the circumstances of this case, but that such acceptance was not manifested alone by use and occupation of the house, if under protest and without circumstances indicating acquiescence: *Corwin v. Wallace*, 17-374.

861. Where suit was brought for foreclosure of a mortgage and power of sale upon

default in the payment of interest, and judgment was given for the interest due and for foreclosure, *held*, that the right to foreclose for the whole debt or subsequent accruing interest was not adjudicated, and part of the land having been sold under the first foreclosure, the balance could be foreclosed and sold upon a judgment for the principal debt declared due for failure to pay subsequently accrued interest: *Pope v. Durant*, 26-233.

362. A former adjudication against plaintiff by reason of a payment due is not a bar to a subsequent action brought for a tender made subsequently to the former suit and not in issue therein: *Dwyer v. Goran*, 29-126.

363. An adjudication as to the legality of taxes for one year will not be binding in an action between the same parties in reference to the taxes of another year. Each year's taxes constitute a distinct and separate cause of action. They do not grow out of the same transaction: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633.

364. Where a claim for exemption from taxation rests upon facts which are liable to differ from year to year, an adjudication respecting an exemption for one year is not an adjudication respecting an exemption for other years: *Tubbesing v. Burlington*, 68-691.

365. An adjudication as to the rights of parties under a contract not fully performed and covering an unexpired time will not affect matters arising under such contract after the adjudication and prior to the expiration of the time: *Drake v. Vorse*, 42-653.

366. Where a wife brought suit for divorce and claimed generally to be entitled to a fund in court which was the proceeds of a sale of homestead property, and her petition was dismissed, *held*, that she was estopped by said decree from claiming the fund by reason of any of the grounds alleged in her action for divorce, but not from claiming it on any other ground: *Wright v. Wright*, 16-496.

367. A second bill in equity setting up equities materially different from those set up in the former bill will not be barred by an adjudication in such former bill, although relating to the same property and the same parties: *Morris v. Stuart*, 1 G. Gr., 375.

368. Presumptions: It must be presumed from a judgment that all the issues were de-

cided in affirmance of the court's decision as a reversal: *Holling*.

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same issues raised in the second action: *Whitaker v. Johnson County*, 12-595.

873. An adjudication by one court involving coupons from school bonds afterwards in suit in another court must be held conclusive upon all questions which it appears were in fact litigated and decided in the former action. But where the latter suit is upon bonds and coupons not included in the former judgment, it is open to all parties to be heard upon all questions which were not in fact nor of necessity involved in and decided by the former adjudication. The burden of showing what was decided in the former case is upon the party affirming the adjudication: *Geneva Nat. Bank v. Independent School Dist.*, 25 Fed. Rep., 629.

874. An adjudication of a court touching the validity of coupons is not necessarily an adjudication as to the validity of the bonds to which the coupons were attached: *Nesbit v. Independent School Dist.*, 25 Fed. Rep., 635.

875. Recovery of taxes: An adjudication by a competent tribunal is conclusive not only in the proceeding in which it is announced, but in every other in which the right and title are the same, although the cause of action may be different. Therefore where an action had been tried in the federal court, in which plaintiff's assignor had sought to recover from defendant possession of certain land, and in case of failure therein then to recover from defendant taxes paid upon said land, and in said suit, upon appeal to the supreme court of the United States, the bill was dismissed, *held*, that such adjudication was a bar to a subsequent action in a state court not only for taxes claimed in that action but also for taxes subsequently paid under the same state of facts: *Goodenow v. Litchfield*, 59-226.

876. A special finding as to one particular fact made by the jury on one trial is not binding upon the parties upon a new trial of the same case: *Hollenbeck v. Marshalltown*, 62-21.

877. Second appeal: A determination of a question on appeal amounts to an adjudication and is not subject to review in a second appeal in the same case: *Star Wagon Co. v. Swezy*, 68-520.

On a second appeal the rulings on the

former appeal constitute the law of the case: See **APPEALS**, §§ 973, 974.

878. Upon whom binding; persons not parties: An adjudication is not binding upon persons who are neither parties nor privies to the proceeding: *Hultz v. Zollars*, 89-589; *Tiffany v. Stewart*, 60-207.

879. One who is not a party to an appeal cannot be bound by the decision on the appeal: *How v. Jones*, 60-70.

880. Where judgment was rendered against defendant, and a garnishee in the same answer was adjudged liable to a certain amount, *held*, that such adjudication was not binding upon the defendant as to the amount owed by the garnishee, at least where the original judgment was satisfied without resort to such garnishee: *Collins v. Jennings*, 42-447.

881. An adjudication as to a fact, made in one action, is not binding in a subsequent action as to those who were not parties to the former action. Upon the trial of the second action, the facts found in the former one may be shown to have been entirely different: *Hine v. Keokuk & D. M. R. Co.*, 42-636.

882. A judgment in an action to foreclose a mechanic's lien is not conclusive as to lienholders not parties thereto, either as to the time the lien accrued or as to the amount due thereunder: *Crosby v. Winter*, 54-652.

883. Where S. was sued as guarantor on a county warrant, and G. as primarily liable, and during the course of the proceedings the service of the notice was quashed and G. was not again brought into court, *held*, that there was no adjudication of the question of G.'s liability, and the judgment was no bar to a subsequent action against him: *McCormick v. Grundy County*, 24-382.

884. A decree declaring a deed void for fraud, as between certain parties who file bills for that purpose, will not be conclusive in a subsequent action in behalf of a plaintiff who was not party to the action in which the decree was rendered. As to such plaintiff, the deed may not have been fraudulent: *Huntington v. Jewett*, 25-249.

885. A decree canceling a debt mentioned in a trust deed, entered in an action to which an assignee of the note which constituted

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the debt was not made a party, such assignee being known to plaintiff and plaintiff consenting to pay costs, is, as to the debt evidenced by the note, *res inter alios acta* and not binding upon such assignee: *Griffith v. Lovell*, 26-226.

886. Where in a previous action a certain note secured by mortgage which had been issued by a railway company to plaintiff on a debt due from defendant to plaintiff was held to be an extinguishment and payment *pro tanto* of defendant's claim against the railroad company, *held*, that this was not an adjudication between plaintiff and defendant of the question whether such note had been accepted by plaintiff in payment or only as collateral security: *Vogel v. Wadsworth*, 48-28.

887. Where an action by one partner was dismissed on the ground that he was not a proper party plaintiff, *held*, that this judgment would not bar an action in the firm name on the same indebtedness, although the partner first bringing suit was entitled to the entire proceeds of the recovery: *White v. Savery*, 50-515.

888. The dissolution of an injunction *held* not to be an adjudication, under the facts of a particular case, of the issues in a subsequent case concerning the same subject-matter, but between different parties: *Barr v. Patrick*, 52-704.

889. An adjudication in an action for taxes by a municipal corporation against a railway company, which was procured by a stockholder of the company in his own name, is not binding in a subsequent litigation as to the validity of such tax between the municipal corporation and the company. A stockholder of a corporation cannot be considered either as party or privy to an action to which the corporation is a party: *Davenport v. Chicago, R. I. & P. R. Co.*, 38-633.

890. An adjudication in an action between a city and a property owner that a square mentioned in the plat of ground upon which lots were sold was not dedicated to the city, *held* not to be an adjudication, as between the grantee of such property owner and the purchasers of lots on such plat, that the square was not dedicated to the public: *Fisher v. Beard*, 40-625.

891. As between co-defendants: Where, in a suit in equity, plaintiff asserted title as

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Former adjudication; estoppel.

399. In order that a judgment may be binding upon a party in interest who is not a party to the record, he must have notice of the pendency of the suit and be requested to defend it, but such notice may be oral: *Conger v. Chilcote*, 42-18.

400. A party cannot sit quietly by and allow an adjudication to be made between the proper parties, and, after finding it adverse to his interest, demand that the court set aside its judgment and retry the cause in order that he may assert the same claim set up in the prior case: *Tredway v. Sioux City & P. R. Co.*, 39-663.

401. In order to render a person not a party liable to respond to a judgment of which he had knowledge, but to which he has not been made a party, there must be a recovery of a valid judgment against a party defendant. A third person cannot become liable on a judgment against a defendant not in existence: *District Tp v. Independent Dist.*, 63-188.

402. An adjudication in a proceeding for partition of a claim by one of joint heirs for a lien on the property on account of services rendered the ancestor, *held* to be a bar to a subsequent action against the other joint heirs to recover the amount so claimed and have it made a lien upon their respective parcels of the property: *Janes v. Brown*, 48-568.

403. A person who is liable to defendant in an action for the amount recovered therein may be bound by a judgment against such party, if he has notice of the action: *Goodnow v. Litchfield*, 63-275.

404. But the mere fact that a person is interested in a similar question and contributes to the expense of defending the suit will not render a judgment therein binding upon him: *Ibid.*

405. The fact that counsel for one party are permitted to be heard in another action involving a question of interest to both parties will not render the adjudication binding upon the person thus represented by counsel who is not a party to the action: *Goodnow v. Stryker*, 62-221.

406. Identity of parties: It is not true in all cases that in order to plead a former adjudication in bar of a subsequent suit, it must be shown that both or all the parties are

identical in the two suits: *Davis v. Milburn*, 4-246.

407. Therefore, *held*, that a former action upon an attachment bond against the principal and sureties on the bond was a bar to an action against the principal for damages covered by the bond: *Ibid.*

408. Parties in privity: A purchaser from a party who has been successful in an action may rely upon the adjudication therein as a bar in a subsequent action against him by the plaintiff in the former action or his privies with reference to the same subject-matter: *Woodin v. Clemons*, 82-280.

409. The grantee being privy in estate with his grantor is estopped from again litigating the validity of a claim against the property which has been adjudged valid as against the grantor before the conveyance to the grantee: *Hackworth v. Zollars*, 30-433; *Gray v. Coan*, 40-327; *Cushing v. Edwards*, 68-145.

410. A vendee in possession under contract of purchase is not to be regarded as a tenant and is not bound by a judgment against his vendor in an action brought subsequently to his purchase to which he is not made a party: *Montgomery v. Severson*, 64-326.

411. An adjudication in respect to real property is not binding upon the grantee by conveyance executed before the suit in which the adjudication is rendered was commenced, if the grantee in such conveyance is not a party to the suit: *Prouty v. Tallman*, 65-354.

412. A judgment of eviction against one who claims possession under an agreement for a lease made with plaintiff's grantor will be conclusive upon the right of the former in an action by him against his lessor, the grantor of plaintiff in the first action: *Sobey v. Beiler*, 28-323.

413. The fact that the wife of a party to the former action is made party to a new action will not prevent the judgment in the former action being conclusive against her, if she claims her right in the property through her husband, who was a party in the former action: *Campbell v. Ayres*, 18-252.

414. A mere assignee of a claim is bound by the final adjudication thereof had as against his assignor before the assignment: *Goodenow v. Litchfield*, 59-226.

415. Parties not in privity: An action of right against the second husband of a woman who, with the heirs of her previous husband, is in possession of the estate of her deceased husband, will not be binding upon such widow and heirs: *Hamilton v. Wright*, 30-480.

416. A judgment operates as an estoppel in a subsequent action only when the subsequent litigation is between substantially the same parties or their privies. The term privity in this connection means mutual and successive relationship to the same rights of property: *McDonald v. Gregory*, 41-513.

417. An assignor is not in privity with his assignee in such sense as to be bound by an adjudication affecting the latter: *Ibid.*

418. An adjudication in an action by one assignee of the title to land against a third person claiming title, in which such assignee asserts the right to recover taxes paid, is not binding in an action by another assignee of the same assignor, with reference to other taxes, even though the assignor had notice of the first suit. The results of the first suit would be binding on the assignor and his subsequent assignee as to the taxes in dispute, but would not be a prior adjudication as to the other taxes in the same situation, but not in suit in such action: *Goodnow v. Stryker*, 62-221; *Goodnow v. Wells*, 67-654.

419. Judgment against county binds citizen: A judgment against a county for the collection of a tax voted in aid of a railroad concludes a citizen of the county though he was not individually a party to the judgment. The county is in such case to be considered as agent of the citizen, and a judgment against it binds the citizen as to any defense which he held and failed to set up: *Clark v. Wolf*, 29-197.

420. Therefore, *held*, also, that the judgment in a proceeding in which the board of supervisors and the county treasurer attacked the validity of a railroad aid tax was conclusive upon a tax-payer of the county: *Lyman v. Faris*, 53-498.

421. Pleadings; evidence: The defense of former adjudication can be taken advantage of under the general issue as well as by a special plea in bar under the former procedure: *George v. Gillespie*, 1 G. Gr., 421.

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Assignment; subrogation.

431. Where, on a proceeding by *scire facias*, a new judgment was rendered for the whole amount due on the former judgment and execution issued thereon, *held*, that such new judgment merged the former one: *Bertram v. Waterman*, 18-529.

432. Where a judgment was transferred to one who had acquired the property on which it was a lien, *held* that, it not appearing to have been his intention or to his interest that the lien be preserved, the judgment would be deemed merged: *Shimer v. Hammond*, 51-401.

433. A new judgment in the supreme court, on appeal on the *supersedeas* bond, merges the former judgment: *Swift v. Conboy*, 12-444.

III. ASSIGNMENT; SUBROGATION.

434. Assignment: A judgment may be assigned and actions thereon maintained by the assignee in his own name, subject, of course, to any defenses which the judgment debtor may have against it: *Edmonds v. Montgomery*, 1-143; *Charles v. Haskins*, 11-329.

435. The assignment of the record of a judgment, duly authenticated, is *prima facie* evidence of the fact of assignment: *Walker v. Sleight*, 30-310.

436. The assignment of a judgment in favor of a bank, signed by persons designating themselves as president and secretary, *held* not sufficient to show a valid assignment in the absence of any other evidence that they were such officers: *Klemme v. McLay*, 68-158.

437. A judgment is a mere chose in action, and in a suit brought thereon by an assignee the consideration for its assignment is immaterial: *Cottle v. Cole*, 20-481.

438. Where a judgment is assigned for a certain portion of the face thereof, the amount is to be computed on the largest amount for which the judgment is rendered, not including interest accrued thereon: *Osgood v. Bringolf*, 32-265.

439. One who assigns a judgment which, by mistake, has been rendered for a larger amount than actually due, is liable to the assignee for the amount in which by mistake the judgment on its face exceeds the amount for which it should have been rendered, even

though the assignment is expressly made without recourse. However, if the assignment is simply of the assignor's right and interest, he will not be liable: *Miller v. Dugan*, 36-433.

440. Subject to equities: The assignee of a judgment is in no better position than his assignor: *Preston v. Turner*, 36-671.

441. The assignee succeeds only to the rights of the assignor and takes subject to equities, although purchasing without knowledge of any defense and after time for appeal and for vacating the judgment has passed: *District T'p v. White*, 42-608.

442. The assignee of a judgment having knowledge of the insolvency of the assignor takes the same subject to the right of the judgment debtor to offset a mutual judgment held by him against such assignor: *Hurst v. Sheets*, 14-322.

443. An assignment of a judgment conveys merely the rights which the assignor then possesses, but it does not necessarily draw after it all equities of an independent nature: *Davis v. Milburn*, 3-163.

444. The rule that the assignee of a judgment takes it subject to all the equities which could be asserted against it in the hands of the assignor, *held*, by two members of the court, the other two expressing no opinion, not to apply when the equity is asserted by a stranger to the judgment who claims adversely to both parties, the rule being applicable that equities between the parties to such judgment arising from other and independent transactions are not available against the judgment in the hands of the assignee: *Isett v. Lucas*, 17-503.

445. Where S. agreed to sell to H. a judgment against plaintiff, and H. agreed with plaintiff to satisfy the same upon the performance of certain services which were accordingly rendered, and H. afterwards transferred his interest in the judgment to a bank which paid to S. the balance due for the judgment, under the agreement between him and H., and had no notice as to the agreement between plaintiff and H. for the satisfaction of the judgment, *held*, that the bank was not bound by the equities between H. and plaintiff, and the latter could not compel the cancellation of the judgment: *Hale v. First Nat. Bank*, 50-642.

446. The assignment of a judgment by the administrators of an estate to the attorney who acted in recovering the same in compensation for his services, *held* valid, irrespective of whether the contract under which the services of the attorney were originally rendered was champertous or not. Also *held* that notice to the attorney of the judgment defendant that the assignee of the judgment had some interest in it was sufficient to put defendant upon inquiry, and prevent a settlement with the administrator such as to defeat the interest of assignee: *Ross v. Chicago, R. I. & P. R. Co.*, 55-691.

As to ASSIGNMENTS is general, see that title, §§ 3, 39, 49.

447. Assignment to party jointly liable: Where a party liable for the payment of a portion of a judgment paid the entire amount thereof and took an assignment, *held*, that the judgment was thereby discharged and a liability created in favor of the assignee against those for whose benefit the money was advanced: *Myers v. Farmer*, 52-20.

And see *infra*, §§ 467-469.

448. Subrogation: Where a surety pays off a judgment, the judgment is considered discharged and can no longer be enforced at law, but in equity the lien will be regarded as surviving for his protection, and by an action in equity he may avail himself of the lien. But the action to recover from the principal the amount paid is based upon an implied promise and is barred in five years from the time of payment: *Johnston v. Bel-den*, 49-301.

449. The statements of the petition in a particular case *held* sufficient to entitle plaintiff, as surety, having paid the claim, to subrogation to the rights of the judgment creditor against the estate of a deceased defendant, whether such deceased defendant was the principal debtor or a co-surety with plaintiff: *Hollingsworth v. Pearson*, 53-53.

450. The purchaser of a judgment in foreclosure becomes subrogated to the rights of the original holder, and may have the premises, upon which the judgment is a lien, sold thereunder: *Shimer v. Hammond*, 51-401.

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459. Part payment in full satisfaction: An acceptance of a sum less than the amount of the judgment in full payment, where the judgment is a lien upon property and the debtor is insolvent, may amount to a full satisfaction: *Ruddlein v. Smith*, 36-669.

460. Satisfaction on motion: In some cases the question whether a judgment has been satisfied or not may be raised on motion, while in others it may be necessary to go into equity to obtain proper relief: *Traer v. Lytle*, 20-301.

461. An agreement to satisfy or discharge a judgment entered into before it is obtained should be supported, where there is no design to defraud others thereby and where it has no such effect: *Church v. Simpson*, 25-408.

462. An agreement which provides for the satisfaction of a judgment, and for certain things to be done in case property has been sold thereon, is no defense to the cause of action upon which the judgment was rendered: *Morton v. Coffin*, 29-235.

Collection and satisfaction by attorney, see ATTORNEYS, § 5.

Satisfaction by levy: That levy upon sufficient property amounts to *prima facie* satisfaction of the judgment in case of personal property, but not of real property, see EXECUTIONS, §§ 97-101.

463. Satisfaction procured by fraud: In an action in one court upon a judgment of another, it may be urged by way of incidental relief that the satisfaction of the judgment entered in the latter be set aside as procured by fraud: *Darrow v. Darrow*, 48-411.

464. In a particular case, held, that the evidence showed that a satisfaction of a judgment was procured upon a forged receipt, and that the same should therefore be set aside: *Milligan v. Bowman*, 42-414.

465. Evidence considered sufficient in a particular case to show the satisfaction of a judgment: *Fuller v. Lendrum*, 58-353.

Cancelling satisfaction upon setting aside a sale made under the judgment, see EXECUTIONS, §§ 305-307.

466. Garnishment; real party in interest: Where a judgment is taken nominally in the name of one party, but really for the benefit of another, a judgment in garnishment at the suit of a creditor of the

real party in interest will bar proceedings on the judgment by the nominal party: *Matter v. Phillips*, 52-232.

467. Payment by one joint defendant: The payment of a judgment by one of several defendants operates as an extinguishment thereof, and this is so although such payment be made by one who is in fact a mere surety: *Bones v. Aiken*, 35-534; *Drefahl v. Tuttle*, 42-177.

468. One of the judgment debtors cannot take an assignment thereof and issue execution thereon as against other defendants therein: *Drefahl v. Tuttle*, 42-177.

469. But the fact that a person is surety on a bond for an injunction to stay the enforcement of a judgment does not prevent him from purchasing such judgment and enforcing the lien thereof: *Davis v. Wilson*, 52-187.

470. Release of joint wrong-doer: If judgment has been rendered against one joint wrong-doer, and an action is still pending against another on the same cause of action, the settlement with or release given to the latter in consideration for the payment of the costs merely, and with no intention of satisfying the judgment, does not amount to satisfaction of or payment *pro tanto* on the judgment against the former: *Bell v. Perry*, 43-368.

471. Cancellation: In the absence of statutory authority, the court has no jurisdiction to cancel a judgment, and the right to cancel given by statute (Code, § 2967) arises only out of matters subsequent to the judgment: *Brett v. Myers*, 65-274.

472. Merger: Where defendant, while holding a certificate of purchase of a portion of certain premises at judicial sale, bought a judgment on foreclosure which was a lien on the entire premises, and afterwards received a sheriff's deed under his first purchase, *held*, that in the absence of a showing that it was the intention or to the interest of defendant that his two interests should merge, a merger would not be inferred: *Shimer v. Hammond*, 51-401.

473. Satisfaction set aside: A satisfaction of a judgment rendered against one of two joint debtors, which satisfaction is afterwards set aside for fraud, will not defeat an action against the other joint debtor, it not appearing that the other debtor had changed his

condition in reliance upon the satisfaction of the judgment against the joint debtor: *Gilman v. Foote*, 22-560.

V. ACTION UPON JUDGMENT; REVIVOR; SCIRE FACIAS.

474. Scire facias: At common law, after the expiration of a year and a day from the rendition of judgment without the issuance of a writ of execution, it was presumed that the judgment was satisfied or the execution released, and to overcome this presumption the party was compelled to resort to his action of debt on the judgment or sue out a writ of *scire facias* to show cause why execution should not issue. This writ was a mere continuation of the proceeding, and the judgment when revived was of the same force and effect and liable to be proceeded on in the same manner as if the time within which execution might legally have been issued had not been suffered to elapse: *Von Puhl v. Rucker*, 6-187.

475. Such a revivor was binding against innocent purchasers subsequent to the judgment: *Ibid.*

476. The writ of *scire facias* being founded upon some record, as, for instance, upon a judgment, such record or judgment upon its face imports absolute verity and cannot be impeached by any matter going behind it, but matters arising subsequently to the rendition of the judgment may be pleaded: *Vredenburg v. Snyder*, 6-39.

477. Merger: Where plaintiff brought action to revive a judgment and asked for a writ of *scire facias* and judgment for the amount due on the original judgment, and the court rendered judgment for the total amount then due under the original judgment as in an action of debt, and execution issued under the latter judgment, *held*, that such judgment was a merger of the former judgment and the lien only commenced at the date of the new judgment: *Bertram v. Waterman*, 18-529.

478. Revivor: A judgment against a decedent may be revived against his administrator: *Carnes v. Crandall*, 10-377.

479. A creditor cannot bring an action to revive, as against the heirs, a judgment rendered against decedent in his life-time. The

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Action upon; revivor; scire facias.

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V. ACTION UPON JUDGMENT; REVIVOR; SCIRE FACIAS.

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only method provided for the enforcement of such a judgment is by proceedings against decedent's estate: *Bridgman v. Miller*, 50-892.

480. In case of judgment in attachment proceedings, a special execution in pursuance thereof cannot issue after the death of the judgment debtor: *Welch v. Battern*, 47-147.

481. Where the plaintiff, in a suit for the revivor of a judgment, has failed to perform that which was the consideration whereon the judgment was based, such fact may be pleaded as a defense: *Thompson v. Hurley*, 19-831.

482. Action on judgment: In the absence of any statutory provision to the contrary, an action may be maintained on a domestic judgment which is in full force and upon which execution may issue: *Simpson v. Cochran*, 28-81; *Thomson v. Lee County*, 22-206.

483. Although a former statute gave a remedy by *scire facias*, *held*, that this did not in itself take away the right of action on the judgment: *Haven v. Baldwin*, 5-503.

484. Under the statute (Code, § 2521) providing that no action shall be brought on any judgment against a defendant therein, rendered in any court of record of the state, within fifteen years after the rendition thereof, without leave of court, on good cause shown, it is a ground of demurrer to a petition on such a judgment that the action appears to be brought within fifteen years without leave of court: *Watts v. Everett*, 47-269.

485. This statutory provision affects the remedy and applies to judgments rendered before as well as after its passage: *Ibid.*

486. Where the record of the judgment is lost or destroyed, suit thereon, even if proper, is not the only method for supplying such record: *Gammon v. Knudson*, 46-455.

487. An action to foreclose a mortgage given to secure a note which is already reduced to judgment is not prohibited by the statutory provision above referred to: *Matthews v. Davis*, 61-225.

488. The statutory provision above referred to has no application to suits in the federal courts. A person who, under the constitution and laws of the United States, has the right to bring his action in the federal

Action upon; revivor; scire facias.—Lien.

court upon a judgment, cannot be compelled first to obtain leave of a state court to do so: *Phelps v. O'Brien County*, 2 Dillon, 518.

489. Defense to action on judgment: The plea of *nil tiel record* raises the existence of the record and is only triable by the court. Under such a plea fraud in the rendition of the judgment can be inquired into, but under the plea of *nil debet* the defendant may show that the court had no jurisdiction or that the judgment was procured by fraud: *Hindman v. Mackall*, 3 G. Gr., 170.

490. To constitute a defense to an action on a judgment, the facts pleaded should be such as would justify a court of equity in perpetually enjoining the judgment or in decreeing its cancellation, and an allegation that it was obtained by false testimony at the trial, the defendant being in court at the time, cannot be set up as a defense: *Cottle v. Cole*, 20-481.

491. In an action upon a judgment rendered by a justice of the peace of this state, want of notice may be shown by extrinsic evidence, contradictory to the averments of the judgment reciting due notice: *Salladay v. Bainhill*, 29-555.

Further as to showing want of jurisdiction by way of defense in an action on a judgment, see JURISDICTION, §§ 158-165.

492. Objection to the certificate of the transcript of the judgment upon which the action is brought cannot be presented by demurrer. It should be taken on the trial when the transcript is offered in evidence: *McGlasen v. Wright*, 10-591.

493. Action on foreign judgment; defenses: In an action in this state upon a judgment rendered in another state, any facts which would either constitute a good defense to such judgment or would authorize its cancellation will be a good defense here: *Rogers v. Gwinn*, 21-58.

494. That defendant, in the action in which the judgment sued on was recovered, had filed his answer and afterwards left the state, relying upon plaintiff's assurance that the cause would be dismissed, notwithstanding which judgment was taken at a subsequent term without further notice to defendant, held a good defense, at least in equity, to an action on the foreign judgment: *Ibid.*

495. The fact that by the statutes of the

state where the judgment was rendered it had become dormant, held not sufficient to defeat an action thereon in this state: *David v. Porter*, 51-254.

496. Pleading and evidence: Plaintiff in an action on a foreign judgment need only set out so much of the judgment as to show that the court had jurisdiction of the person and subject-matter, and that the judgment was rendered. It may become necessary to introduce the judgment record in evidence, but it cannot be required that it be set out in the pleadings: *Johnson v. Butler*, 2-585.

497. Where the court rendering the judgment has but a limited and special jurisdiction, as that of a justice of the peace, the statute of the state in which the judgment is rendered must be introduced to show affirmatively that the justice had jurisdiction in such case. The courts of one state will not take judicial notice of the statutes of another: *Gay v. Lloyd*, 1 G. Gr., 78.

498. Judgment without service upon or jurisdiction over defendant, rendered upon a warrant of attorney, is not valid in this state, and will not be presumed valid if rendered in another state without evidence that such judgment is valid under and according to the laws, practice and usages of that state: *Crafts v. Clark*, 31-77.

As to how a foreign judgment is to be shown in EVIDENCE, see that title, §§ 541-547.

Defense of want of jurisdiction: See JURISDICTION, §§ 158-162.

499. Judgments under foreign statutes: While statutes prescribing proceedings to compel the fathers of bastard children to support them are merely local police regulations enforceable alone by the state enacting them, yet where the local jurisdiction has attached and the courts of the state have taken cognizance of the case and rendered judgment for the penalty provided in such statutes, the judgment is entitled to full faith and credit in every other state: *State of Indiana v. Helmer*, 21-370.

VI. LIEN.

a. Commencement and continuance.

500. When lien attaches: A verdict without the rendition of judgment thereon does

not give plaintiff any interest in the property of defendant in advance of the rendition of judgment: *Miller v. Wolf*, 63-283.

501. A *nunc pro tunc* judgment will not become a lien upon property prior to its actual rendition so as to bind third persons: *Ibid.*

502. As between the judgment debtor and a purchaser under execution on such judgment, the purchaser may show by the pleadings or record in the action that the judgment attached as a lien on the property purchased by him, though from the face of the judgment that fact does not appear: *Markham v. Buckingham*, 21-494.

503. So held where individual property was sold under judgment nominally against a partnership: *Ibid.*

504. A judgment on a debt contracted prior to the time that property assumes the homestead character, although rendered after that time, is a lien on such property, certainly as to persons chargeable with notice of the character of the debt; and if one claims under a homestead right, he is bound to ascertain when such right began: *Hale v. Heaslip*, 16-451.

505. As between judgment creditors and third persons it is not competent for the judgment creditor to extend the lien of his judgment by proof *aliunde*, but as between the parties to the judgment and their heirs such proof is admissible: *Delavan v. Pratt*, 19-429.

506. Under prior statutory provisions, the lien of a judgment on a note secured by mortgage attached as between the parties from the date of the recording of the mortgage, but as to third persons the lien only attached from the date of the rendition of the judgment unless the property was described in the judgment and a special execution directed: *State v. Lake*, 17-215.

507. In such case the mortgage lien continues until the debt is satisfied and is not merged in the judgment on the note secured: *Ibid.*

Judgment by confession, lien of, see *supra*, § 93.

Record; index, etc.: See *supra*, I, d.

508. Transcript: Under the statutory provision (Code, §§ 2884, 2885) for filing a transcript of a judgment in another county from

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516. Release of lien: In order to establish a parol release of real estate from a judgment lien the proof must be clear, satisfactory and conclusive: *Dalby v. Cronkhite*, 22-222.

517. After death of judgment debtor: A judgment may be enforced against property upon which it is a lien, after the death of a debtor, without filing it as a claim against the estate; but this must be done while the judgment lien exists: *Baldrin v. Tuttle*, 28-66; *Davis v. Shawhan*, 34-91; *Boyd v. Collins*, 70—.

518. Effect of bankruptcy: A valid, subsisting judgment lien in a state court existing at the time of bankruptcy of defendant cannot be assailed in the bankrupt court, and a decree in the state court subsequent to the bankruptcy, subrogating a surety to the benefit of such lien on account of payment of the judgment made before bankruptcy, will not be void, although the assignee in bankruptcy is not made a party to the action: *Perry v. Miller*, 54-277.

b. Upon what property.

519. Origin of judgment liens: Before the statute of Westminster 2, judgments could not be collected by sale of land, but by that statute creating the writ of *elegit*, although no lien was created, yet lands were considered as subject to judgment and the courts inferred a lien from the power to take lands on execution: *Woods v. Mains*, 1 G. Gr., 275.

520. Under a statute of the territory of Iowa providing that judgments in the courts of the territory should be liens upon the real estate of judgment defendants, held, that judgments then existing, as well as those thereafter to be rendered, were given that effect: *Ibid.*

521. After-acquired property: Further, held, that under that act such judgments did not become liens upon after-acquired property: *Ibid.*; *Harrington v. Sharp*, 1 G. Gr., 131. (But see Code, § 2882.)

522. The mortgagee's interest being deemed personal property, a judgment against the mortgagee does not become a lien upon the real property covered by the mortgage: *Scott v. Meuchirter*, 49-487.

523. Claim for tort: The holder of a judgment against one having a claim for a tort has no equities as against such claim which give him a prior right thereto over a creditor to whom the claim may be assigned: *Gray v. McCallister*, 50-497.

524. A leasehold interest is such interest in real estate as is subject to the lien of a judgment: *First Nat. Bank v. Bennett*, 40-537.

525. The creditor does not, in such cases, need the aid of a court of equity to enforce his judgment. He can sell the leasehold interest upon execution: *Swozey v. Jones*, 65-272.

526. The lien of a judgment attaches to the interest of a tenant in real property leased by him and a building erected thereon, unless the right to remove such building at the expiration of the tenancy appears, and the lien of the judgment will be prior to that of a chattel mortgagee of such building: *Hayden v. Goppinger*, 67-106.

527. It appears that the same rule would apply even where the right of the tenant to remove the building at the expiration of the lease is shown: *Ibid.*

528. License: A judgment lien will not attach to a mere license or privilege to use real property for a particular purpose, which may be terminated at pleasure by the party having such privilege: *Melhop v. Meinhardt*, 70—.

529. A building erected under a license upon the land of another is a chattel and is not subject to the lien of a judgment: *Walton v. Wray*, 54-581.

530. A vendor's lien is not such an interest in real estate, without a judgment against the purchaser, that it can be enforced against such real estate. Equitable proceedings, or proceedings by garnishment, must be resorted to for that purpose, and until such proceedings are commenced the purchaser of the real estate may discharge the lien by payment to the vendor: *Baldwin v. Thompson*, 15-504; *Woodward v. Dean*, 46-499.

531. Does not attach to fund: Where land subject to a lien is sold, the lien still remains on the land, and does not attach to the fund: *Sullivan v. Leckie*, 60-326.

532. Option to purchase: The mere right of an option to purchase real property is not

a right in the property to which a judgment lien can attach: *Sweezy v. Jones*, 65-272.

533. A pre-emption right to lands being a right which is temporary in its nature and unknown to the common law is not subject to the lien of a judgment: *Harrington v. Sharp*, 1 G. Gr., 131.

534. Naked legal title: A judgment lien does not attach to property, the naked legal title of which passes through the judgment debtor without any interest in such property having vested in him: *Atkinson v. Hancock*, 67-452.

535. In enforcing a judgment lien, the law looks for the equitable interest in the property. If defendant has no such interest and holds only the legal title, the lien does not attach. If he has such interest, and another person holds the legal title, the lien will attach: *Rice v. Kelso*, 57-115.

536. Therefore, held, that a judgment would not attach to property already acquired by the judgment defendant which had been mortgaged by him previous to its acquisition. In such case the prior mortgage would attach to the subsequently acquired title before the attachment of the judgment lien: *Ibid.*

537. The lien of a judgment attaches, not to the naked legal title of property, but to the interest which the debtor has therein: *Blaney v. Hanks*, 14-400; *Patterson v. Linder*, 14-414; *Churchill v. Morse*, 23-229.

538. Equitable interests: A judgment becomes a lien upon any interest in real estate owned by the debtor, whether it be equitable or legal: *Blain v. Stewart*, 2-378; *Crosby v. Elkader Lodge*, 16-399.

539. But the unsatisfied portion of a judgment does not remain a lien upon the debtor's interest in property which has been sold in partial satisfaction of such judgment: *Clayton v. Ellis*, 50-590.

And further, see EXECUTIONS, §§ 421-426.

540. A judgment is a lien upon any equitable interest in land in the judgment debtor which may be sold on execution, but is subordinate to vendors' liens and homestead rights existing prior to the judgment: *Two-good v. Stephens*, 19-405.

541. A judgment is a lien upon the equitable interest of the debtor in real estate, and if such equitable interest is of record, it may be sold under execution, and the title thereby

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Lien; upon what property.—Effect of; priorities.

551. Property held in trust: A judgment is a lien upon the equitable interest of the debtor in property conveyed by trust deed, and the surplus in the hands of the trustee may be subjected to the payment of the judgment, but the lien does not attach to such surplus until steps are taken to subject it to the payment of the judgment: *Cook v. Dillon*, 9-407.

552. If proceedings have been commenced to reach the surplus in the trustee's hands, the jurisdiction of the court in such proceedings will not be ousted by garnishment of the trustee to subject the money in his hands to a judgment against the debtor: *Ibid.*

553. Property fraudulently conveyed: A judgment recovered by a creditor after a fraudulent conveyance by his debtor does not become a lien upon the property so conveyed, in the absence of proceedings to subject the property to such judgment. The conveyance is absolute as to the grantor, and leaves no interest in him subject to the lien: *Howland v. Knox*, 59-46.

554. Where the debtor has made a fraudulent conveyance of his property to one who purchases in bad faith, the lien of the judgment attaches, and the creditor may sell the land under execution, and after expiration of the time of redemption may bring action to set aside the fraudulent conveyance and quiet his title: *Harrison v. Kramer*, 8-543.

555. Survivor's right in homestead: A judgment against the husband does not become a lien on his right to occupy the homestead as survivor upon the death of the wife, owning the fee: *Smith v. Eaton*, 50-488.

556. Exempt property: The lien of a judgment does not attach to property which is exempt from execution, as, for instance, a homestead: *Lamb v. Shays*, 14-567; *Cummings v. Long*, 16-41.

557. Therefore, a judgment against the city does not become a lien upon its public buildings which by statutory provisions (Code, § 3048) are exempt from sale on execution: *Davenport v. Peoria M. & F. Ins. Co.*, 17-276.

And see EXECUTIONS, §§ 150-152.

c. Effect of lien; priorities.

558. Nature of lien: A judgment lien upon land constitutes no property or right in

the land itself: *Independent School Dist. v. Werner*, 43-643.

559. Rights of owner subject to lien: The owner of property subject to a judgment lien has the right to cut wood and timber upon the land. Timber thus cut but not removed becomes personal property and does not pass under a sale of the property under execution subsequently levied: *Ibid.*

560. Enjoining sale: Where execution is levied on real property, upon which the judgment is not a lien, a sale may be enjoined to prevent a cloud being cast upon the title: *Key City Gas Light Co. v. Munsell*, 19-305.

561. But if the judgment is a lien, it cannot be enjoined on the ground that it is inferior to the lien of plaintiff. The senior lienholder is not entitled to an injunction to prevent the junior lienholder from selling: *Wiedner v. Thompson*, 66-283.

562. Redemption by lienholder: The holder of a judgment lien not made a party to a foreclosure proceeding may make equitable redemption from a purchaser at the foreclosure sale: *Wright v. Howell*, 85-283.

And further, see MORTGAGES, §§ 463-466.

563. Priority of lien: The lien of a judgment creditor is subject to equities upon the property of the debtor existing in favor of third persons at the time of the recovery of the judgment: *Jones v. Jones*, 13-276; *Parker v. Pierce*, 16-227; *Welton v. Tizzard*, 15-495.

564. A specific lien, though unrecorded, such as that specially arising by stipulation in a confession of judgment, takes priority over a judgment lien: *Sigworth v. Meriam*, 66-477.

565. A judgment creditor, not having a specific lien upon the property, but merely such lien as the statute gives, acquires no priority over an unrecorded mortgage or other conveyance: *Seevers v. Delashmutt*, 11-174; *Welton v. Tizzard*, 15-495; *Hays v. Thode*, 18-51; *Hoy v. Allen*, 27-208; *Rice v. Kelso*, 57-115.

566. If the prior unrecorded instrument is recorded before sale of the property under an execution issued upon the judgment, the purchaser at such sale is affected with notice thereof. In this respect the assignee of the judgment stands in no better position than the original judgment creditor, and is equally

affected with all equities and conveyances of which he has notice before becoming a purchaser at the sale: *Chapman v. Coats*, 26-288.

That a judgment creditor is not a purchaser in such sense as to be protected against prior unrecorded instruments, see RECORDING ACTS, §§ 75-78.

567. Neither a judgment creditor nor an assignee of such judgment acquires any interest in lands standing in the name of the judgment debtor, such as will be paramount to the right of one who conveyed such lands, to have the conveyance set aside on the ground that it was procured by fraudulent representations: *Rider v. Kelso*, 53-367.

568. A vendor's lien is subordinate to a judgment lien acquired without notice of the vendor's rights: *Culler v. Ammon*, 65-281.

569. Prior sale under junior judgment: The purchaser at a sale under a judgment which is in existence as a lien will acquire priority over a purchaser at a sale prior in point of time, but under a junior judgment: *Marshall v. McLean*, 3 G. Gr., 363.

570. Judgments of same date: As between judgment creditors whose liens are of the same date, he who first takes the property in execution has the preference to be first paid out of its proceeds. This is the rule, whether the property be real or personal, or choses in action, not subject to actual or manual seizure, and are taken and seized only by garnishment: *Cook v. Dillon*, 9-407; *Lippencott v. Wilson*, 40-425; *Wilson v. Baker*, 52-423.

571. Priority of seizure: Where neither of two judgments is a lien upon the real property in question, the one under which the real property is first seized by actual levy will be a prior lien thereon: *Lathrop v. Brown*, 23-40.

572. As between judgments for partnership and individual debts: A judgment against an individual partner for a partnership debt which is prior in time to a judgment against him for an individual debt will be prior in lien also. Such priority is not affected by the rule for marshaling assets in such cases: *Gillaspy v. Peck*, 46-461.

And see PARTNERSHIP, §§ 117-120.

573. Lien under judgments by agreement: Where judgment was entered in favor of M. against C., and F. as his surety, in one county, with the agreement with F. that a

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In general.—Essential to validity of judgment.

I. IN GENERAL.

1. Territorial: The courts of the state take judicial notice of the fact that the island of Rock Island is within the state of Illinois and forms a part of its territory for judicial and all other purposes: *Gilbert v. Moline Water Power, etc., Co.*, 19-319.

2. A cause of action under the statutes of another state may be enforced in this state, if such statutory provision is not contrary to the policy of our laws: *Boyce v. Wabash R. Co.*, 63-70.

And see ACTIONS, §§ 80-83.

3. Exclusive: Where a tribunal has been provided for the determination of questions connected with a particular subject, the jurisdiction thus conferred is exclusive, unless otherwise clearly or expressly manifested: *Macklot v. Davenport*, 17-379.

4. Final: Under a statute giving a court final jurisdiction as to a matter, the right to appeal from its decision is negatived. In this respect there is a difference between final judgment and final jurisdiction. The one is the decision of the law given by the court as the result of proceedings therein instituted. The other has reference to the power conferred to take cognizance of and determine causes according to law and to carry the same into execution: *Lampson v. Platt*, 1-556.

As to the jurisdiction of the federal and state courts with reference to each other, see COURTS, §§ 73-81.

II. ESSENTIAL TO VALIDITY OF JUDGMENT.

5. Subject-matter and parties: A judgment rendered without the court having acquired jurisdiction over either the subject-matter or the parties is a mere nullity, and may be declared void by a competent tribunal whenever attempted to be enforced: *Reed v. Wright*, 2 G. Gr., 15; *Melhop v. Doane*, 81-397.

6. Plaintiff essential: It is as necessary to the validity of the judgment that there should be a plaintiff as that there should be a defendant, and that both should be in court. Therefore, *held*, that a judgment by confession entered at the request of defendant, and

without the knowledge or consent of plaintiff, should be canceled on motion of the latter: *Farmers', etc., Bank v. Mather*, 30-283.

7. Defendant essential: If a school district has gone out of existence by reason of being divided up into independent districts, an action against it in the old name would confer no jurisdiction upon the court of either the subject-matter or of the person: *District T'p v. Independent Dist.*, 63-188.

8. Judgment against persons not parties: A decree against persons who are not parties to the suit is erroneous: *McClure v. Owens*, 21-188.

9. The court does not acquire jurisdiction over stockholders of a corporation in an action wherein a receiver of the corporation is appointed by an interlocutory order served upon the stockholders, who are not parties to the original action, requiring them to pay certain instalments upon their stock notes: *Lamar Ins. Co. v. Hildreth*, 55-248.

10. A judgment ought not to be enforced as a lien upon property until the owner either by himself or his privies has had an opportunity to resist it. It should not be regarded as evidence of liability of the property, if the owner has not been a party to the proceeding in which it was rendered: *Buckham v. Grape*, 65-535.

11. After dismissal of suit: In an action to set aside a conveyance and subject the land to the payment of the grantor's debts, *held*, that it was erroneous to grant the relief when it appeared that the plaintiff had dismissed his action as to the grantees before trial: *Brooks v. Cutler*, 18-433.

As to jurisdiction of the court after entry of judgment, see COURTS, §§ 244-246.

As to jurisdiction after the taking of an appeal, see APPEALS, §§ 649-654.

12. Subject-matter: A judgment absolutely void upon its face for want of power in the court to render judgment at the time it was rendered is liable to collateral attack: *Scott v. Babcock*, 3 G. Gr., 133.

13. Where the court has no jurisdiction of the subject-matter, any adjudication or order it may make is void, and a judgment so rendered is not binding, although never appealed from: *Osborn v. Cloud*, 23-104.

14. Want of jurisdiction is a matter which may always be interposed against an adju-

dication when sought to be enforced or when any benefit is claimed for it, and want of jurisdiction either of the subject-matter or of the person of either party renders the judgment a mere nullity: *Kline v. Kline*, 57-386.

15. Where the court has jurisdiction of the subject-matter and the parties, its action in rendering a decree which it might render under certain circumstances will not be void for want of jurisdiction, although it may be erroneous, and therefore it will not be subject to collateral attack: *Traer v. Whitman*, 56-443.

Further, as to collateral attack, see JUDGMENTS, II, b.

III. HOW ACQUIRED.

By service of notice: See ORIGINAL NOTICE.

By appearance: What constitutes an appearance, such as to give a court jurisdiction, see APPEARANCE.

In garnishment proceedings, see GARNISHMENT, §§ 5, 6.

16. **Effect of appearance as waiving defects:** By appearing and submitting to the jurisdiction of the court, defendant waives all defects in the process and service thereof: *Bell v. Pierson*, Mor., 21; *Hall v. Biever*, Mor., 113; *Hedinger v. Silsbee*, 2 G. Gr., 363; *Houston v. Walcott*, 1-86; *Van Vark v. Van Dam*, 14-232; *Childs v. Limback*, 30-398.

17. Where the court has jurisdiction of the subject-matter, mere irregularity in the process or its service will be cured by voluntary appearance; so held in case of an appeal from a justice of the peace: *Wilgus v. Gettings*, 19-82.

18. Appearing and submitting to the jurisdiction is a waiver of all objection to any preceding irregularity: *Cane v. Watson*, Mor., 52.

19. A subsequent appearance of defendant will validate the previous service of a writ of injunction made without the court having obtained jurisdiction of defendant: *District T^{wp} v. District T^{wp}*, 54-115.

20. **Amendment of pleadings:** A party by amending his pleadings and submitting to the action of the court will waive any error in prior proceedings, for instance, in having

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change was not authorized by law, the court being one having jurisdiction of the subject-matter: *Davidson v. Wheeler*, Mor., 238.

28. While consent will not confer jurisdiction over the subject-matter, yet defects and irregularities both as to time and manner may be waived so as to preclude future objections by the silence of the party, even in the absence of his open consent or written agreement. Therefore, *held*, that where the court had jurisdiction of the subject-matter, the hearing of the cause out of term time or at a place not designated for holding court, even in another county than that in which the cause was pending, was at the most nothing more than an irregularity which was waived by consent of the parties to such proceeding: *O'Hagen v. O'Hagen*, 14-264.

Further as to consent to hearing outside of the county, see COURTS, §§ 171-173.

29. Where the court has the right to assume general jurisdiction of the subject-matter, the parties may waive the ordinary process and voluntarily give the court jurisdiction over the person: *Groves v. Richmond*, 58-69.

30. Therefore where proceedings for a writ of *certiorari* were commenced in the district court, which by statute has no jurisdiction of such proceedings in a civil case, *held*, that the transfer of the case by agreement to the circuit court having general jurisdiction of the subject-matter, conferred jurisdiction of the case upon that court: *Ibid*.

31. Where a cause was appealed to the district court from a judgment of a justice of the peace, before the circuit court was given jurisdiction of such appeals, and was then improperly transferred to the circuit court, *held*, that the appearance of the party in the circuit court without raising objection to its jurisdiction was sufficient to give jurisdiction, and such objection could not be raised for the first time on appeal: *Iowa N. C. R. Co. v. Ritter*, 38-568.

32. Where an action commenced as a law action was by change of venue transferred to the circuit court, which at that time had jurisdiction of actions at law, but not of those in equity, and afterwards, upon motion to change the action to the equity docket, such change was granted, the circuit court

then having by statute jurisdiction in equity, *held*, that it could properly try the case: *Polk County v. Hierb*, 87-961.

33. In actions before justices of the peace: Consent cannot confer upon courts a greater power than the law confers. Parties cannot by agreement give jurisdiction to courts which could not be exercised by virtue of legal process. Therefore, *held*, that under the provisions of statute limiting the jurisdiction of justices of the peace to actions against residents of the state, who are actual residents of the county in which the action is brought, consent of defendant cannot give jurisdiction in an action in any county other than that of his residence: *Chapman v. Morgan*, 2 G. Gr., 374; *Boyer v. Moore*, 42-544; *McMeans v. Cameron*, 51-691.

34. A failure to raise this objection before the justice of the peace before whom the action is properly brought does not prevent a party from raising it on appeal: *McMeans v. Cameron*, 51-691.

35. On appeal from justices of the peace: Where a party appears on an appeal from a justice of the peace to a higher court and without objection proceeds to a trial of the case, it being one as to the subject-matter of which the court to which the appeal is taken has jurisdiction, he thereby waives the objection that there was no jurisdiction in the justice's court from which the appeal was taken: *Danforth v. Thompson*, 34-243; *Drake v. Achison*, 4 G. Gr., 297.

36. But an appeal from the justice will not give the circuit court jurisdiction of a case in which the justice lacked jurisdiction of the subject-matter, even though the circuit court would have had jurisdiction had the cause been originally brought there: *McMeans v. Cameron*, 51-691.

37. On appeal to the supreme court: Where the court below has jurisdiction over the subject-matter in controversy, irregularities in the lower court may be waived by appeal, but where the trial court has no jurisdiction, or is not such a tribunal as is authorized by law to try the case, appeal will not confer jurisdiction: *Burlington University v. Stewart's Ex'rs*, 12-442.

38. Though a jurisdictional question appearing on the record is not raised in the lower court or on appeal, it may and should

be raised by the appellate court for itself: *District T^p v. District T^p*, 45-104.

39. Where it appears that there is want of jurisdiction in the court below, or where the ruling made is in excess of the power or authority of the court, it is the duty of the supreme court to recognize such want of jurisdiction, even if no objection is made: *Groves v. Richmond*, 53-570. And see *St. Joseph Mfg. Co. v. Harrington*, 53-380.

40. Want of jurisdiction of the lower court over the subject-matter may be raised for the first time in the supreme court: *Cerro Gordo County v. Wright County*, 59-485; *Walters v. Steamboat Mollie Dozier*, 24-192.

41. Where there is no judgment rendered in the court below from which an appeal may be taken, consent of the parties will not give the supreme court jurisdiction: *Long v. Long*, Mor., 381; *Rutler v. State*, 1-99; *Kimble v. Riggin*, 2 G. Gr., 245.

IV. HOW SHOWN; PRESUMPTIONS.

a. Courts of general and courts of limited jurisdiction.

42. General jurisdiction: In the absence of any affirmative showing the proceedings of a court of general jurisdiction will be presumed legal and regular: *State v. Clark*, 30-168.

43. Nothing will be presumed against a court of general jurisdiction: *Bridgman v. Wilcut*, 4 G. Gr., 563.

44. In regard to courts of superior and of general jurisdiction, every presumption is made in favor not only of their proceedings, but of their jurisdiction: *Cooper v. Sunderland*, 3-114; *Morrow v. Weed*, 4-77.

45. Presumption of regularity of proceedings: If the court has jurisdiction, every presumption thereafter is in favor of the regularity of its proceedings, and they cannot be inquired into collaterally: *Davenport Mut. Savings, etc., Ass'n v. Schmidt*, 15-213.

46. A judgment of a court of general jurisdiction which has acquired jurisdiction of the person is presumed to be regular until error is affirmatively shown: *State v. Winstrand*, 37-110.

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thing occurring in the record, jurisdiction will always be presumed when the judgment is questioned collaterally: *Hunger v. Barlow*, 39-539.

55. A court possessing general jurisdiction is not required to rebut and repel every presumption which might arise against the regularity of its action. Thus, where a judgment rendered in one county three days after the term of the same court should, by law, have commenced in another county, *held*, that in the absence of a record as to the fact, it would be presumed that the term in the second county had been adjourned and the court was being properly held in the first county by the continuance of the previous term, or by order for a special term: *Weaver v. Coolidge*, 15-244.

56. Where a trial was had at a special term of court, *held*, that it would be presumed that the notice required by law to be given of such term had been given, although such notice was not specified of record: *Harriman v. State*, 2 G. Gr., 270.

57. The presumption in case of a judgment by a court of record is that the court had jurisdiction of the parties, and where, in order to support such jurisdiction, it is necessary to presume that one of the parties resided in a particular place, such presumption will be entertained in the absence of proof to the contrary: *Doran v. Davis*, 43-86.

58. Where the judgment recited "that service of notice had been made upon" defendant, but the record showed service by publication only, *held*, that personal service would not be presumed and the judgment would be regarded as *in rem*: *Mayfield v. Bennett*, 48-194.

Further as to the record, see JUDGMENTS, I, d; and COURTS, II, c.

59. **Presumptions as to foreign judgment:** Where the courts of a sister state have jurisdiction, their mode of procedure will be presumed to be regular and the judgment will not be subject to attack: *Otto v. Doty*, 61-23.

60. It appearing that the county court of Wisconsin is a court of record having a seal, and a clerk, its judgments are entitled to the same force and credit in this state as in the state in which they were rendered, and its proceedings will be deemed regular and con-

clusive as those of courts of general jurisdiction: *Danforth v. Thompson*, 34-243.

61. The judgment of a court of another state, where the jurisdiction properly appears upon the record, is entitled to the same credit in this state as it is entitled to in the state where rendered: *Melhop v. Doane*, 81-397.

62. While the record reciting jurisdiction should have a large degree of sanctity attached to it, and a party should not be allowed to attack it unless he is entirely free from negligence, yet if his right is clear, the injury palpable and the evidence convincing, a sale thereunder will be void if no jurisdiction was in fact acquired: *Harshey v. Blackmarr*, 20-181.

63. **Recitals not conclusive:** A judgment which recites that defendant was duly and legally served with notice is not conclusive on the parties as to the fact of notice and appearance, and if the court did in fact proceed without jurisdiction, its decision is a nullity as to each and every fact found or question decided: *Newcomb v. Dewey*, 27-381.

64. Where it appears that judgment was rendered without service of any kind upon defendant, it will be held void regardless of the recitals of the judgment as to service: *Stone v. Skerry*, 31-582.

65. The entry of a decree or judgment raises the presumption of legal service, but does not prevent defendant from showing in a proper manner that there was no service, nor is a recital in the decree that the court inspected the record, and that it appeared therein that notice was duly served at the time and in the manner provided by law, conclusive: *Hartley v. Boynton*, 5 McCrary, 453.

66. The fact that a judgment recites appearance by the parties is not sufficient to show an appearance by a co-defendant not served with notice: *Kite v. Bonafield*, 3 G. Gr., 199.

67. In an action upon the judgment of a sister state, want of jurisdiction in the court rendering it may be shown by evidence contradicting the recital of service of process: *Lowe v. Lowe*, 40-220.

68. Where the notice is fatally defective, by reason of not informing defendant of the time and place when and where he is required to appear, the court acquires no juris-

diction even by a recital showing that notice was given: *Lyon v. Vanatta*, 35-521.

69. Entire want of notice: Such a case is not a case of defective notice, but of entire want of notice: *Ibid.*; *Haus v. Clark*, 37-355.

70. Where there is entire want of notice, no motion to correct the error need be made before the justice of the peace rendering the judgment, and the error may be taken advantage of by writ of error, if the party has knowledge thereof within the proper time, or afterwards by an independent action: *Holmes v. Hull*, 48-177.

71. Where it is sought to make a judgment the basis of a new recovery, it is always permissible to show that the court rendering the judgment had no jurisdiction. So held where the return of service purporting to show service by leaving a copy at defendant's place of residence did not show that defendant could not be found nor that the place where it was left was defendant's place of usual residence, nor the name of the person with whom the copy was left, nor at whose house it was left: *Clark v. Little*, 41-497.

72. Courts of limited jurisdiction: The presumption which is entertained in favor of the jurisdiction of courts of general jurisdiction is not exercised in relation to the jurisdiction of a court which is inferior and limited, but its jurisdiction must be shown: *Cooper v. Sunderland*, 3-114; *Morrow v. Weed*, 4-77.

73. Where, however, the jurisdiction of a court of limited and inferior jurisdiction is shown, the same presumption exists in favor of its proceedings as in favor of the proceedings of a superior court: *Ibid.*

74. An inferior court should set out on the face of its proceedings the facts necessary to show its jurisdiction. After the necessary facts are thus set out they are presumed to be true and *prima facie* sufficient to support the jurisdiction. Such allegations, however, in the record may be contradicted, as, for instance, by the other parts of the record, or perhaps by evidence *aliunde*: *Ibid.*

75. The judgment of a court of inferior jurisdiction must show the facts that confer jurisdiction: *Goodrich v. Brown*, 30-291.

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of limited jurisdiction, *held*, that it would be presumed to have acted regularly after jurisdiction had attached, and that when the court had jurisdiction of the parties and subject-matter, a judgment authorizing a guardian's sale of real estate could not, in the absence of fraud, be impeached collaterally because of irregularities: *Pursley v. Hayes*, 22-11.

84. Where, in such a case, the notice was attached to the petition, and referred to it, and the officer's return showed due service of the notice upon the minor owners of the property, *held*, that it would not be presumed, in a collateral proceeding to impeach the sale, that a copy of the petition was not served upon the minors as required by statute: *Ibid*.

85. In such case, *held* also, that a defect in the service which the county court held and treated as immaterial should not defeat the title, the objection being first raised in a collateral proceeding: *Ibid*.

86. Where a statute required the publication of notice of an administrator's sale for three successive weeks, and it appeared that title to property was involved which had stood unquestioned for years, *held*, that publication for three consecutive weeks was sufficient, although the sale in pursuance of the notice was made before the expiration of the third week: *Morrow v. Weed*, 4-77.

87. When a new or special right or power is given, and its mode and circumstances are prescribed, these must be obeyed substantially: *Ham v. Steamboat Hamburg*, 2-460.

88. Where summary proceedings are given by statute, everything necessary to give the court jurisdiction must appear of record and nothing will be taken by intendment. If a judgment of the court in such proceeding is afterwards called in question, the record may be looked into to determine whether the facts there appearing were sufficient to confer jurisdiction. If not, the judgment may be collaterally attacked: *Tiffany v. Glover*, 8 G. Gr., 887.

89. The board of supervisors of a county constitute, for the purpose of authorizing the construction of a levee and the assessment of taxes upon land therefor, a court of special and limited jurisdiction, and in the absence of a showing by the record of the board or in

some other manner authorized by law, no presumption will be exercised as to the existence of the jurisdictional facts necessary to show that the board acquired authority to act. The court will not presume the existence of facts upon which their jurisdiction wholly depends: *Richman v. Board of Supervisors*, 70—.

90. Proceedings wherein certain parties not within the territorial jurisdiction of the court are served with process of publication are not in accordance with the course of the common law, and are only valid when authorized by statute, though binding in courts exercising general jurisdiction. They are special, and judgments rendered therein stand on the same footing as those of courts of inferior and limited jurisdiction: *Bradley v. Jamison*, 46-68; *Miller v. Corbin*, 46-150.

91. The jurisdiction of a court of record in an attachment proceeding is not inferior or limited: *Rowan v. Lamb*, 4 G. Gr., 468.

92. When the jurisdiction of a court of limited jurisdiction is once established, it is entitled to the same presumptions in favor of its action which are entertained in favor of the action of a superior court, and subsequent irregularities will not render its proceedings void or subject to collateral attack: *Little v. Sinnett*, 7-324; *State v. Berry*, 12-58; *Shawhan v. Loffer*, 24-217.

93. When the jurisdiction of a court of limited jurisdiction is shown to have attached, its subsequent proceedings are presumed as regular as those of a court of general jurisdiction, and its decision upon every question properly arising is binding and conclusive until reversed on appeal: *Smith v. Engle*, 44-265.

94. So *held* with reference to the sufficiency of a discharge in a bankruptcy proceeding: *Ibid*.

95. Therefore, *held*, also, that an entry on the docket of a justice of the peace that the cause was continued by agreement of parties in open court could not be contradicted by affidavits denying the agreement: *Caughlin v. Blake*, 55-684.

96. Judgments, orders or decrees of a probate court made within the scope of its powers given by the statute are regarded as conclusive against a collateral attack, when

Presumption in favor of court's action

the court has jurisdiction of the parties and subject-matter: *Barney v. Chittenden*, 2 G. Gr., 165.

b. *Presumption in favor of court's action; insufficient or defective notice or service.*

97. Action upheld: If the jurisdiction depends upon a fact which must be ascertained by the court, and such fact appears and is stated in the record (as, for instance, the fact of service of notice), a party who had an opportunity to controvert such jurisdictional fact, and did not, but contested the case upon its merits, cannot afterwards impeach the record in a collateral proceeding, and show the jurisdictional fact therein stated to be untrue: *Morrow v. Weed*, 4-77.

98. Where there is evidence of the jurisdictional fact, and the only question is as to its sufficiency, then the court must judge of its own jurisdiction, and its judgment is valid unless set aside in some regular manner: *Ibid.*

99. Where the jurisdiction of a court depends upon a fact and it assumes jurisdiction, it will be presumed that such fact was proved and that it acted rightfully: *Lees v. Wetmore*, 58-170.

100. Where it is necessary in order to sustain the judgment of a justice of the peace, it may be presumed that acts which are shown to have been done were done in such order as was necessary in order that the jurisdiction should have been properly exercised: *Hodge v. Ruggles*, 36-42.

101. Jurisdiction having once been acquired by a justice of the peace, the presumption is that it continues until judgment, in the absence of an affirmative showing to the contrary: *Moore v. Reeves*, 47-30.

102. And where it appeared that judgment on the answer of the garnishee was not rendered within three days thereafter, *held*, that the presumption would be that the case was continued until the day on which judgment was rendered: *Ibid.*

103. Where the statute of the state in which judgment was rendered by a justice of the peace provided that action might be brought before a justice of the township of plaintiff's or defendant's residence or of a

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Presumption in favor of court's action; insufficient notice.

111. **Insufficient service and want of service:** There is a clear distinction between a service insufficient only in the manner of making it and a case where no service at all is made or attempted to be made. In the latter case, there is no question of jurisdiction to decide, and if a judgment is rendered under such circumstances against a party, it will be a nullity. But if there is a question of jurisdiction raised which the court must decide, if it does so erroneously against the defendant, and renders a judgment for plaintiff, such judgment will be voidable, but binding upon the parties until reversed or corrected on appeal: *Bonsall v. Isett*, 14-809.

112. Where it appears that there was notice and return of personal service, a defect therein which is held immaterial by the tribunal cannot be taken advantage of collaterally: *Pursley v. Hayes*, 22-11; *Ballinger v. Tarbell*, 16-491.

113. Though the notice be irregular and insufficient, yet if the court takes jurisdiction to render judgment, the judgment is not void, but the error can only be taken advantage of on appeal: *Moody v. Taylor*, 12-71; *De Tar v. Boone County*, 34-488; *Woodbury v. Maguire*, 42-339.

114. Where there is service, though defective, the judgment can only be attacked in a direct proceeding. The presumption is in favor of the correctness of the proceedings of a court of general jurisdiction and that a public officer properly discharges his duty: *Boker v. Chapline*, 12-204.

115. Therefore, *held*, that the judgment of a court of general jurisdiction rendered upon service, by leaving a copy, although the return did not show that defendant was not found, could not be attacked collaterally: *Bonsall v. Isett*, 14-809; *Gregg v. Thompson*, 17-107; *Muscatine Turn Verein v. Funk*, 18-469.

116. Where there is actual service and the return is defective, the judgment is not void and can only be attacked in a direct proceeding: *Moomey v. Maas*, 22-380.

117. Where it appears that there was notice and service, though they were defective, yet if the court determines in favor of their sufficiency, even though the determination be erroneous, the court will have jurisdiction, and its judgment cannot be held void in a

collateral proceeding: *Shawhan v. Loffer*, 24-217; *Farmers' Ins. Co. v. Highsmith*, 44-330; *Shea v. Quintin*, 30-58; *Ballinger v. Tarbell*, 16-491.

118. Where a decree recited a finding by the court that defendant had been served with notice, *held*, that the presumption was in favor of such finding, and the fact that the record did not otherwise show service would not overthrow the presumption. The party claiming the fact to be otherwise must allege and prove such fact: *Hale v. First Nat. Bank*, 50-642.

119. If there is notice, but it is illegal and technically defective, and the court holds it sufficient and enters judgment, such judgment is not void or subject to collateral attack: *Dougherty v. McManus*, 36-657.

120. Where the judgment of the court shows that there was notice of some kind, and that the sufficiency of the service was determined by the court in favor of its jurisdiction, the proceedings cannot be regarded as void for want of jurisdiction on account of irregularities appearing in the record which affect the service. Such judgment cannot be questioned in a collateral proceeding but only upon appeal or otherwise as provided by law: *Woodbury v. Maguire*, 42-339.

121. It will be presumed in such case that due proof of all matters necessary to be shown was made to the court upon which the adjudication of the sufficiency of the service was had: *Tharp v. Brenneman*, 41-251.

122. Where a judgment was rendered on a return of service which did not state the date thereof, *held*, that it was not subject to collateral attack by a motion to vacate the judgment filed four years after its rendition: *Wilson v. Call*, 49-463.

123. If there is notice, though defective, the proceeding will not be void on account of error of the court in holding the notice sufficient: *Bunce v. Bunce*, 59-533.

124. Where a statute provided that notice in a particular proceeding should be given, such as the court might prescribe, and the court ordered due notice to all concerned to be given, and then entered on its record a recital that service of notice of the proceeding had been made, pursuant to the direction

Insufficient notice.—Errors as

of the court, *held*, that the determination was sufficient and the judgment could not be attacked collaterally: *Stanley v. Noble*, 59-666.

125. Where the court necessarily determines, in rendering judgment, that the service of notice was sufficient, the correctness of this ruling cannot be questioned in a collateral proceeding: *Fanning v. Krapfl*, 68-244.

126. Mere want of compliance with the requirements of statute as to form of notice and manner and time of service will not constitute a want of notice, such as to render the judgment void. If there is a mere defect in the notice or service, it is subject to correction on appeal, but cannot be relied on as avoiding the judgment: *Shea v. Quintin*, 30-58.

127. For instance, where the notice directs defendant to appear at the next term, but does not name the term, a judgment rendered in pursuance thereof will not be void for want of jurisdiction. Such a case is one of defective notice and not want of notice: *De Tar v. Boone County*, 34-488.

128. Where the original notice and return of the officer were regular and sufficient, but the copy delivered was defective in erroneously stating the date of commencement of the term of court in which defendant was required to appear, *held*, that the judgment was not void and subject to collateral attack: *Irions v. Keystone Mfg. Co.*, 61-406.

129. Where some essential requirement of the law going to make up and constitute notice to the party is omitted, so that practically the notice required by the law has not been given, then there is such a fatal defect in the substance of the notice that no jurisdiction is conferred thereby; but if a party has been served with a notice which informs him of the remedy sought and the time and place he is required to appear, proceedings had in conformity with such notice will not be held void in a collateral proceeding, although there are defects in the notice or service: *Lyon v. Vanatta*, 35-521.

130. Where a defendant is personally served with notice, a judgment of the court by default will not be void for want of jurisdiction, although he was not served the requisite number of days before the return

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Errors and irregularities as affecting.

138. Action brought in wrong county: Fraud cannot be predicated upon the fact of bringing an action in a court having jurisdiction, even though brought in the wrong county: *Leach v. Kohn*, 36-144.

139. An erroneous change of venue will not render the proceedings of the court to which the change is taken, void for want of jurisdiction: *Marshall v. Kinney*, 1-96.

140. Judgment excessive or unjust: Error in the judgment, whether of law or fact, which does not go to the jurisdiction of the court, can only be taken advantage of by writ of error or appeal, and cannot be made the subject of collateral attack. So held where it appeared that judgment was rendered for a larger amount than claimed in the pleadings: *Walker v. Sleight*, 30-310.

141. Error in rendering judgment for a greater amount than that for which the defendant is liable will not make the judgment void: *Freemcn v. Hart*, 61-525.

142. The enforcement of a judgment rendered by a court having jurisdiction to render it will not be restrained merely because it is an improper or unjust judgment. The proceedings of a court having jurisdiction cannot be questioned collaterally, and are absolutely binding until set aside by the tribunal in which they occur, or are regularly reversed: *Burlington & M. R. R. Co. v. Hall*, 37-620.

143. Relief not asked: Where the notice advised defendant that plaintiff claimed the foreclosure of a mortgage in the action, but the prayer of the petition did not ask such relief, held, that the sale of property on special execution under such judgment, where the sale might equally have been made on a general execution under a personal judgment rendered in the action, would not be set aside, the error being purely technical: *O'Connell v. Cotter*, 44-48.

144. Garnishment under defective writ of attachment: A garnishment under an attachment which was irregular on account of the writ bearing the seal of the wrong court, but which upon motion in the case was corrected and declared valid, held not void so as to be disregarded in a subsequent garnishment proceeding between other parties: *Rose v. Des Moines Valley R. Co.*, 47-420.

145. Judgment before maturity of indebtedness: The fact that a portion of the

notes covered by a mortgage are not due at the time decree of foreclosure of the mortgage is entered as to such notes, as well as to others which are due, will not render the judgment void: *Carr v. Hunt*, 14-206.

146. Refusal of jury trial or other erroneous action of the court will not oust jurisdiction of the court, and the proper remedy for such error is by appeal: *State v. Schmidt*, 65-556.

147. Orders in bankruptcy: A discharge in bankruptcy granted by a court having power to adjudicate cases in bankruptcy is conclusive of the fact of a discharge, unless impeached for fraud: *Wright v. Watkins*, 2 G. Gr., 547.

148. An order in bankruptcy made by a court having jurisdiction in such proceeding concerning an estate or the appointment of a provisional assignee, although it may be irregular and erroneous, cannot be treated as void in an action by the assignee in relation to the estate: *Raymond v. Morrison*, 59-371.

149. The action of township trustees under a statute authorizing them, upon a petition signed by a given proportion of the tax-payers, to submit to vote the question of aiding in the construction of a railway, is not subject to collateral attack, and can only be assailed in a direct proceeding: *Ryan v. Varga*, 87-78.

150. Foreign judgments not assailable for error: An error in a foreign judgment, if the court rendering it had jurisdiction, cannot be taken advantage of as a defense to an action brought thereon: *Olds v. Glaze*, 7-86.

151. The fact that the summons under which a foreign judgment is rendered appears not to have been served by any officer known to the law or authorized to serve such writs, held not sufficient to show a want of jurisdiction: *Struble v. Malone*, 3-586.

152. Although a judgment is so irregular that on appeal it would have been reversed, yet when the court has jurisdiction of the subject-matter and defendant's person, such irregularity will not constitute a defense to an action thereon in another state: *State of Indiana v. Helmer*, 21-870.

153. A foreign judgment cannot be void for want of jurisdiction, when the record shows that the parties appeared and tried

the case upon its merits in a court having jurisdiction of the subject-matter: *Danforth v. Thompson*, 34-243.

154. Want of jurisdiction may be shown as against foreign judgment: In an action upon a judgment, where defendant admits the record upon which the action is brought, but in avoidance alleges that the court rendering such judgment had no jurisdiction by reason of want of service or appearance, the defendant has the burden of proof: *Lowe v. Lowe*, 40-220.

155. While in an action upon a foreign judgment the presumption is in favor of the court's jurisdiction, the defendant may by evidence overcome such presumption, notwithstanding the certified copy of the judgment entry recites that he was duly served with process: *Pollard v. Baldwin*, 22-828.

Further as to presumptions in favor of foreign judgment, see *supra*, §§ 59-62.

156. In an action on a foreign judgment, the return of the answer in the action of which the judgment was rendered showing service may be contradicted by parol evidence: *Webster v. Hunter*, 50-215.

157. Where a judgment or decree rendered in another state is introduced in evidence, it is competent to establish by parol that the court had no jurisdiction: *State v. Fleak*, 54-429.

158. Where a foreign judgment is relied upon, it is competent for the party reciting it to show facts extrinsic to the record or inconsistent with it, to prove that the court rendering it had not jurisdiction: *O'Rourke v. Chicago, M. & St. P. R. Co.*, 55-332.

Further as to actions on foreign judgments, see JUDGMENTS, §§ 498-499.

159. Jurisdiction acquired by fraud: The fact that jurisdiction of defendant was procured by fraud may be set up in an action upon a judgment rendered in another state: *Dunlap v. Cody*, 81-260.

160. It is not necessary in such case that defendant appear in the jurisdiction rendering the judgment and ask to have such judgment set aside for fraud: *Ibid.*

161. A judgment may be impeached for fraud in an action brought thereon, when it is obtained in evasion of the courts, where it is sought to be enforced: *Ibid.*

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Judgments in personam and in rem.

170. Service by publication or personal service without the state upon a person who is not a resident or citizen of the state confers no jurisdiction upon the person. It simply authorizes the court to conclude the rights and interests of the non-resident in property over which the court, by process of attachment or otherwise, has acquired jurisdiction *in rem*, and to subject such property to sale in satisfaction of the amount found due. A personal judgment in such a case is a nullity: *Lutz v. Kelly*, 47-807.

171. Service within the state upon citizen of another state will give a court jurisdiction, although he is but temporarily within the jurisdiction at the time of service: *Darrah v. Watson*, 86-116.

172. Procuring service upon non-resident within the state by fraud: But if the person upon whom the service is thus made has been brought within the jurisdiction by fraud, as, for instance, by false statements as to the purpose for which his presence is desired, and concealment of the fact that it was intended to serve notice upon him when brought within such jurisdiction, the court will not entertain the jurisdiction thus sought to be acquired: *Dunlap v. Cody*, 31-260.

173. The rule, that if a person residing in one jurisdiction be induced under false pretenses and representations to come within another for the purpose of there getting service upon him, the jurisdiction will be there held fraudulent and the judgment void, has no application in a suit against a non-resident to subject debts due to him by a corporation operating a line of railway within the state: *Mooney v. Union Pacific R. Co.*, 60-346.

As to fraud in obtaining jurisdiction, see *supra*, §§ 159-162.

As to jurisdiction acquired by abuse of process in civil and criminal cases, see *Courts*, §§ 276-280.

174. Service by publication does not confer personal jurisdiction: Judgments *in personam* cannot be rendered where jurisdiction is acquired by publication only: *Doolittle v. Shelton*, 1 G. Gr., 272.

175. Where the action is improperly commenced by publication, defendant being a resident of the state, and he enters an appear-

ance without service of notice, the jurisdiction is not *in rem* only, but is personal to the same extent that it would have been if he had been personally served: *Equitable L. Ins. Co. v. Gleason*, 56-47.

176. Jurisdiction by publication limited: Jurisdiction can be acquired through service by publication only by compliance with the statute authorizing such service, and judgments in such cases stand upon the same footing as those of limited jurisdiction: *Bradley v. Jamison*, 46-68.

177. In such cases, presumption as to the fact of publication will not be indulged in to support the jurisdiction: *Müller v. Corbin*, 46-150.

178. Judgment upon publication in attachment proceedings: It is error to enter a judgment *in personam* upon service by publication in a proceeding for attachment against a non-resident: *Wilkie v. Jones*, *Mor.*, 97.

179. In such a case, judgment should be *in rem* only, and a personal judgment would be void, even though the attached property were sold thereunder: *Smith v. Griffin*, 59-409.

180. A judgment in an attachment proceeding upon service by publication binds only the property attached, and cannot be enforced *in personam*, and other property than that seized under the attachment cannot be sold, nor can the attachment operate as a lien upon other property: *Banta v. Wood*, 82-469; *Mayfield v. Bennett*, 48-194.

181. Therefore, *held*, that where an action by attachment was brought upon a note without reference to the mortgage given to secure it, the mortgaged property not levied on under the attachment could not be sold under the execution: *Banta v. Wood*, 82-469.

182. Where a suit is commenced for attachment upon service by publication only, and no property is attached, the judgment is a nullity: *Judah v. Stephenson*, 10-493; *Cooper v. Smith*, 25-269.

183. The court acquires no jurisdiction in an attachment proceeding upon service by publication, unless the property of defendant is attached: *Wells v. Sequin*, 14-148.

184. Where, in an action by attachment against a non-resident, no property was levied on in the county, but a levy was made in

another county to which, upon subsequent appearance of defendant in the action and motion to change the venue, the cause was transferred, *held*, that the lien of the attachment was valid from the date of the levy, and took precedence of an attachment in another action brought in the county in which the property was situated before the change of venue in the first action was had to that county: *Laird v. Dickerson*, 40-665.

185. Where notice of garnishment is served in an attachment proceeding commenced by publication, but no debt due the defendant is reached thereby, the court acquires no jurisdiction, and cannot, by a subsequent proceeding, subject a debt afterwards coming into existence: *Morris v. Union Pacific R. Co.*, 56-135.

186. The fact that a writ of attachment issues against defendant as a non-resident does not render the proceedings *in rem*, where it appears that defendant was personally served: *Darrah v. Watson*, 36-116.

187. In a suit against a non-resident by attachment upon service by publication, a debt due for personal services rendered by such non-resident in the state of his residence, and payable there, may be subjected, by garnishment of his creditor in this state, to the payment of a claim, although by the laws of the state of his residence the debt would be exempt from execution: *Mooney v. Union Pacific R. Co.*, 60-346.

188. In proceedings for divorce commenced by publication of notice, the court acquires jurisdiction to allow alimony: *Harshberger v. Harshberger*, 26-503; *Twing v. O'Meara*, 59-326.

189. Proceedings in rem conclusive: A proceeding *in rem*, whatever disposal the court makes of the property by sale or transfer, will be valid, wherever the question of title thereto comes either directly or indirectly in question: *Melhop v. Doane*, 31-397.

190. So far as property is seized and subjected to sale in a proceeding *in rem*, defendant is precluded from recovering in an action against the plaintiff the value of such property thus seized and sold: *Ibid*.

191. Proceedings against boats and rafts: In a proceeding *in rem* against a boat, the issuance of a warrant and seizure of the boat

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minors and adults is conclusive against such minors, and a judgment for costs in the proceeding is binding upon them: *Johnson v. Carson*, 8 G. Gr., 499.

198. Actions against insane persons: Probate jurisdiction over the persons and property of insane persons does not exclude the jurisdiction of a court of law in an action against an insane person with reference to his property: *Flock v. Wyatt*, 49-466.

JURORS.

As to the selection of trial jurors in civil cases, challenge, etc., see PRACTICE, III, a; and as to the same matters in criminal cases, see CRIMINAL LAW, III, 10, b.

1. Jury list: The requirement that jurors shall be chosen from the body of the county is intended to prevent the selection of jurors resident out of the county, and does not require that jurors shall be taken from all parts of the county; therefore, *held*, that a statute authorizing the holding of the district court in two places in a county, and providing that when held at one of these places, the jurisdiction should be limited to certain townships, and the jurors should be selected from only these townships, did not interfere with the right of trial by jury: *Trimble v. State*, 2 G. Gr., 404.

2. But one jury list of petit jurors is contemplated, from which the jurors for both the district and circuit courts are to be drawn: *State v. Lawrence*, 88-51.

3. That eighty-five instead of seventy-five names were returned from which to select the grand jury, and the extra names were stricken off before the grand jury was drawn, *held* not an irregularity: *State v. Knight*, 19-94.

4. A failure to record the names returned on the grand jury list does not invalidate proceedings of the grand jury drawn therefrom: *Ibid.*; *State v. Howard*, 10-101.

5. Where the judges of election and county canvassers each failed to make out and return names of jurors for one election precinct, but two names were supplied by the board of supervisors, which two jurors, however, were not drawn upon the grand jury, *held*, that the irregularity did not vitiate an indictment: *State v. Brandt*, 41-598.

6. No formal certificate of the judges of election to the lists so returned is necessary, though it would be proper. Where the record in the record book shows due and proper selection, the presumption is that such record was the result of the list duly made. When the law has been substantially complied with, an indictment should not be set aside for slight irregularities in such matters: *State v. Ansleme*, 15-44.

7. It is not required that the records of the board of canvassers shall show that the selection of jurymen was made for precincts from which no returns were sent in: *State v. Carney*, 20-82.

8. A substantial compliance with the provisions of the law relating to the selection of jurymen is all that is required: *Ibid.*

9. Drawing: Before the amendment of Code, § 240, by 17 G. A., ch. 184, *held* that, it not being provided that the deputy sheriff might act in the place of the sheriff in drawing the jury, a drawing in which he acted would be invalid: *State v. Brandt*, 41-598, 602; *Dutell v. State*, 4 G. Gr., 125.

10. Summoning: Service of the precept may be made by the deputy sheriff and special constables: *State v. Arthur*, 39-631.

11. New precept: The provision of Code, § 244, authorizing the setting aside of the precept and causing a new precept to be issued to the sheriff commanding him to summon a sufficient number of persons to serve as jurors at the term, does not apply to a case in which a sufficient number of grand jurors fail to appear as contemplated in Code, § 4256: *State v. Pierce*, 8-231.

12. Where the list of jurors was accidentally destroyed, it was *held* proper for the court to order a new precept. Under such precept, commanding the sheriff to summon a new jury from the body of the county, *held*, that a jury taken from ten out of twenty townships in the county was sufficient: *State v. Arthur*, 39-631.

13. The fact that the jury is filled up by persons specially summoned is not a valid ground of objection when no abuse of discretion on the part of the court is shown: *Emerick v. Sloan*, 18-189.

14. The provisions of Code, §§ 232, 244, for an additional drawing, and for setting aside the precept and issuing a new one, relate to

Qualification of jurors.—Jurisdiction

jurors for the term, for the trial of all cases, where the panel is not full, and have no reference to the manner in which a jury may be obtained for the trial of a criminal action, where the regular panel is exhausted: *State v. Ryan*, 70—.

15. Qualifications of jurors: Under certain facts, *held*, that a juror was incompetent as not being a qualified elector: *State v. Groome*, 10-308.

16. So, *held*, that an objection to the competency of a juror should be interposed when he is sworn, but if not then known, may be interposed after verdict: *Ibid*.

17. A judgment rendered upon a verdict by a jury, some members of which are disqualified, is erroneous, but not void; it might be reversed upon appeal, but it cannot be disregarded as a nullity: *Foreman v. Hunter*, 59-550.

18. Exemption from jury service is not a cause of challenge but a privilege to the person exempt: *State v. Adams*, 20-486.

19. Excusing jurors: That jurors have been excused on their own statements, not under oath, is not ground of objection by the defendant in a criminal case, and he cannot have an attachment issued to compel the attendance of those so excused: *State v. Osterlander*, 18-485, 448.

20. Filling the panel: The fact that vacancies in the jury panel are filled by talesmen instead of by the additional drawing contemplated in Code, § 232, is not ground of challenge to the panel, and can be raised, if at all, only by challenge to such talesmen when drawn: *Buford v. McGetchie*, 60-298.

21. No penalty is attached for a failure to comply with the provision for drawing additional jurors to fill the panel. It must be regarded as directory, and a simple disregard of its provisions, where error does not affirmatively appear, is not sufficient to authorize reversal of the judgment: *State v. Harris*, 64-287; *Brentner v. Chicago, M. & St. P. R. Co.*, 68-530.

22. By Code, § 239, it is a cause of challenge that a juror not on the regular panel has served on the jury within one year: *Barnes v. Newton*, 46-567.

23. Compensation: Where a case before a justice of the peace is commenced in one

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Jurisdiction in general.—As prescribed by statute.

3. Presumption of regularity:¹ It may be presumed in favor of the judgment of a justice of the peace that acts which are shown to have been done were done in such order as was necessary in order that the jurisdiction should be properly exercised: *Hodge v. Ruggles*, 36-42.

4. Thus where it appeared that under the statutes of another state action might be brought before a justice in the township of the residence of plaintiff or defendant, or in an adjoining township, *held*, in an action on a judgment of a justice of such state, it being shown that the township in which the judgment was rendered was not that of the residence of plaintiff or defendant, it would be presumed that it was an adjoining township, the contrary not appearing: *Church v. Crossman*, 49-444.

5. While it may be that the decision of a justice of the peace that he has jurisdiction, is presumed to be right until the contrary is shown, yet where the assumption upon which the decision is based appears, and the decision is thereby shown to be erroneous, the presumption in favor of the justice's jurisdiction is thereby rebutted: *Brown v. Davis*, 59-641.

6. Jurisdiction having once been acquired by a justice of the peace, the presumption is that it continues to judgment, in the absence of a showing to the contrary: *Moore v. Reeves*, 47-30.

7. Therefore where judgment was rendered against a garnishee on his answer more than three days after it was filed, *held*, that it would be presumed that the case was properly continued to the day judgment was rendered: *Ibid*.

8. Where a justice has acquired jurisdiction, subsequent proceedings are deemed regular and cannot be collaterally assailed. Therefore, *held*, that a recital on the justice's docket of continuance by agreement could not be contradicted by affidavits denying

such agreement: *Caughlin v. Blake*, 55-634.

9. So, also, the recitals of the justice's record as to the time in the day at which default is entered is conclusive as against collateral attack: *Cory v. King*, 49-365.

10. The correctness of a judgment as to a question arising in a case of which the justice has jurisdiction cannot be questioned in an action by *scire facias* on the judgment: *Haggarty v. Burr*, 22-219.

*b. As prescribed by statute.*²

11. Action against resident of another county; consent: A justice does not acquire jurisdiction over an action against a resident of another county, even though he appear and proceed to trial without objection: *Chapman v. Morgan*, 2 G. Gr., 374; *Boyer v. Moore*, 42-544; *McMeans v. Cameron*, 51-691.

12. Service within township: The justice does not acquire jurisdiction by notice served in the township where suit is brought, upon a resident of another county, and a judgment rendered thereon is void. Defendant is not required to appear and plead, suggesting want of jurisdiction: *Hamilton v. Millhouse*, 46-74.

13. Attachment: If the suit is for money against an actual resident of another county, the fact that an attachment is sought against property in the county in which suit is brought will not confer jurisdiction: *Gates v. Wagner*, 46-355.

14. What constitutes residence in the county: A resident of one county went with his family to another county to reside there temporarily, boarding at a hotel while building a school-house under a contract, with intention of returning to his former home when the work was completed. *Held*, that he did not become a resident of the latter county so as to give a justice of the peace of that

¹ Code, § 3869. The future proceedings of all officers, and of all courts of limited and inferior jurisdiction within this state, shall, like those of a general and superior jurisdiction, be presumed regular, except in regard to matters required to be entered of record, and except where otherwise expressly declared.

² Code, § 3507. The jurisdiction of justices of the peace, when not specially restricted, is co-extensive with their respective counties, but does not embrace suits for the recovery of money against actual residents of any other county, except as provided in section three thousand five hundred and thirteen of this chapter.

§ 3508. Within the prescribed limit, it extends to all civil cases, except cases by equitable proceedings, where the amount in controversy does not exceed one hundred dollars; and, by consent of parties, it may be extended to any amount not exceeding three hundred dollars.

county jurisdiction in an action against him: *Bradley v. Fraser*, 54-289.

15. It is actual and not legal residence that is contemplated by the statute. The fact that defendant's domicile is in another county than that in which suit is brought does not prove that he is an actual resident of such other county, though that may be his legal residence. Therefore, *held*, that a contractor upon a railroad who had resided in another county for seven years and was absent from that county only for the purpose of constructing such railroad and expected to return to that county as soon as the job upon which he was at work should be completed, was not an actual resident of such other county within the meaning of this section, it appearing that he was living and keeping house with his family during the time that he was performing his contract in the county where suit was brought: *Fitzgerald v. Arel*, 63-104.

16. A person may be engaged in business in a county and personally present superintending it, and yet not be an actual resident of the county: *Fitzgerald v. Grimmell*, 64-261.

17. Suits against copartners: Where suit is brought before a justice of the peace against two persons jointly, as partners, and one of such partners is resident of another county, the justice of the peace acquires no jurisdiction as to such partner by service upon him in the county of his residence. The justice may acquire jurisdiction to render judgment against the firm by service upon the resident partner, but not as against the non-resident partner individually: *Ebersole v. Ware*, 59-663.

18. For business purposes and the service of process the partnership should be regarded as a resident of each county in which business is done, in so far as to allow suits to be brought against it in any of said counties. The partnership may have a residence for purposes of business, which need not be at the same place as that of the partners or either of them: *Fitzgerald v. Grimmell*, 64-261.

19. A justice of the peace may have jurisdiction of an action against a partnership doing business in his county, although the partners are actual residents of other counties: *Ibid*.

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Jurisdiction as prescribed by statute.

the entire account is in controversy, although the recovery cannot exceed the amount claimed: *Hall v. Biever*, Mor., 113.

27. Attorney's fee: The amount of attorney's fee provided for in the note is not to be taken into consideration in determining the amount in controversy, the attorney's fee being part of the costs: *Spiesberger v. Thomas*, 59-606.

28. Counter-claim: In determining the amount in controversy it is not proper to add together the amounts of the original claim and of a counter-claim: *Madison v. Spitsnogle*, 58-369.

29. Interest included: Where the claim stated in the notice was for one hundred dollars with interest and costs, *held*, that such a statement entitled plaintiff to interest on the amount demanded, from the time of commencement of suit, and therefore the amount claimed was over one hundred dollars, and the justice had no jurisdiction: *Galley v. Tama County*, 40-49.

30. Determined by petition: But where the petition claimed one hundred dollars, and the notice stated that that amount was claimed, but also stated that unless defendant appeared, etc., judgment would be rendered "for the whole amount with interest and costs," *held*, that the amount claimed did not exceed one hundred dollars, and the justice had jurisdiction: *Moran v. Murphy*, 49-68.

31. Consent to jurisdiction beyond one hundred dollars: A clause in a note giving a justice of the peace jurisdiction in an action thereon to the amount of three hundred dollars will entitle plaintiff to bring action thereon before any justice who, but for the amount in controversy, would have had jurisdiction without such clause. The execution of such note and its acceptance by payee constitute a sufficient consent to give the justice jurisdiction: *Marshalltown Bank v. Kennedy*, 53-357.

32. Where a note dated and payable at Des Moines recited that judgment might be taken thereon "before any justice in said county," the only county mentioned therein being that of the maker's residence, Dallas county, *held*, that the specification did not operate to give a justice of the peace in Polk county, before whom action was properly brought,

jurisdiction of the case to an amount in excess of the amount of one hundred dollars: *Brown v. Davis*, 59-641.

33. Attorney's fee: Where the claim was for three hundred dollars, on a promissory note with attorney's fees, it being stipulated in such note that a justice of the peace should have jurisdiction thereof, *held*, that the claim as to attorney's fees was merely descriptive of the note and did not make the amount in controversy greater than three hundred dollars: *Long v. Loughran*, 41-543.

34. It is the fact of consent which gives the justice jurisdiction where the amount in controversy exceeds one hundred dollars, and if such fact exists, his judgment for more than that amount will be valid even though no record of the fact of consent appears: *Schlisman v. Webber*, 65-114.

35. In an attachment proceeding, the amount in controversy is the claim plaintiff seeks to enforce, and not the value of the attached property: *Hoppe v. Byers*, 39-573.

36. Garnishment: If the judgment is for an amount within the jurisdiction of the justice, he may, in a proper proceeding, render judgment against a garnishee for the entire amount due under such judgment, although, by reason of costs, the judgment against the garnishee exceeds the sum for which the justice may render judgment in an original action. The proceeding by garnishment is merely auxiliary to the original judgment and follows it as an incident for its enforcement: *Gillett v. Richards*, 46-652; *Hodge v. Ruggles*, 36-42.

37. A justice of the peace, who has jurisdiction of the indebtedness which is sought to be recovered, by reason of consent of parties, where the amount in controversy exceeds one hundred dollars, has also jurisdiction of an attachment proceeding auxiliary thereto, although there is no consent to jurisdiction for more than one hundred dollars as to the attachment: *Houghton v. Bauer*, 70—.

38. Jurisdiction not exclusive: The jurisdiction of justices over cases where the amount does not exceed one hundred dollars is not exclusive: *Nelson v. Gray*, 2 G. Gr., 397; *Hutton v. Drebitis*, 2 G. Gr., 593; *Chapman v. Morgan*, 2 G. Gr., 374.

39. No equitable jurisdiction: A justice has no equitable jurisdiction: *David v. Ryan*, 47-642, 646.

40. Equitable relief not given on appeal: Therefore; *held*, that where an action was brought before a justice upon a note blank as to amount, the plaintiff could not, on appeal to the circuit court, ask a reformation of the note and judgment thereon as reformed, for the reason that he thereby sought to introduce an equitable cause of action which could not be tried before a justice: *Hollen v. Davis*, 59-444.

II. VENUE.

a. Place of bringing action.¹

41. In what township: Defendant may be sued in any township where service is obtained on him, provided he be a resident of the county: *Klingel v. Palmer*, 42-166.

42. Suing in wrong township: That a suit before a justice is brought in the wrong township is not ground for change of venue. Such fact should be pleaded in abatement. Whether a motion to dismiss would be proper in such case, *quære*: *Meunch v. Breitenbach*, 41-527.

43. In replevin and attachment suits the jurisdiction of a justice (under Code, § 3511, see foot-note), is not limited to the township in which the defendant resides, or in which the property may be found, but is co-extensive with the county: *Leversee v. Reynolds*, 13-810; *Biddle v. Allender*, 14-410.

44. In such cases the justice has jurisdiction throughout the county without regard to the particular township in which the parties reside or the property is situated. (Overruling *Meunch v. Breitenbach*, 41-527): *Knowles v. Pickett*, 46-508.

45. But the justice does not have jurisdiction of an action for the recovery of money

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¹ Code, § 3509. Suits may in all cases be brought in the town wherein the defendant resides.

§ 3510. They may also be brought in any other township where more of the defendants reside.

§ 3511. Actions to recover personal property, and suits for any county and township wherein any portion of the property is situated within the county.

§ 3512. If none of the defendants reside in the state, suit may be brought in any county and township wherein either of the defendants may be found.

§ 3513. On written contracts, stipulating for payment at any county and township where the payment was agreed to be made.

Venue; place of trial.—Commencement of action; notice.

ness for affiant, *held*, that the application was made in time: *Marshall v. Kinney*, 1-580.

52. The change must be granted where a motion and affidavit are filed complying with the requirements of the statute: *Berner v. Frazier*, 8-77.

53. Whether another justice of the county can act at the request of the one before whom the suit is brought, but who, by reason of relations with one of the parties, deems that it would be improper for him to try the case, *doubted* (under a statute, Code, § 3629, providing that "in case of sickness or other disability, or necessary absence of a justice at the time fixed for the trial of a cause, . . . any other justice of the township may at his request attend and transact the business for him without any transfer of the business to another office"): *Ely v. Dillon*, 21-47.

54. Nearest justice; how determined: Although the justice from whom the change is taken commit an error in sending the case to a justice who is not the nearest one in the county to whom it might be sent, yet the justice to whom the case is thus sent cannot review such decision, and will have jurisdiction, and his action cannot be collaterally attacked: *Tennis v. Anderson*, 55-625.

55. It is necessary that the justice granting a change shall designate by name the next justice to whom the case is sent. This is a judicial determination, and in no other way can it be known who is the proper justice to whom the case has been transferred. Until the justice does determine and designate such nearest justice, the change of venue is not complete and no other justice can acquire jurisdiction: *Bremner v. Hallowell*, 59-433.

c. Place of trial.

56. Outside of township: The fact that, by consent of parties, a trial before a justice of the peace is had at a place outside his township will not oust his jurisdiction: *Rogers v. Loop*, 51-41.

III. COMMENCEMENT OF ACTION; APPEARANCE; PLEADINGS.

a. Notice.

57. What sufficient statement in: A technical setting forth of the cause of action

is not demanded, but a notice stating it in general terms, if sufficient to apprise the defendant of the nature of the claim against him, is all that is required: *Fauble v. Stewart*, 35-379.

58. Where the cause of action stated in the notice was "forty dollars damages in the sale of oxen," plaintiff was allowed to prove and recover upon a warranty made in such sale; and it was held that the notice sufficiently set forth such cause of action: *Dilley v. Nusum*, 17-238.

59. Where the claim was upon a written instrument of guaranty of a promissory note, and the notice stated the claim as upon "a promissory note," *held*, that the notice was sufficient: *Francis v. Bentley*, 50-59.

60. Where the notice of suit in the justice's court set out the cause of action as a claim for a certain sum with interest, etc., etc., and the petition filed on the return day claimed to recover the same sum, with interest, etc., upon a bond signed by defendant as surety, *held*, that the petition was not based upon a different cause of action from that stated in the notice: *Winneshiek County v. Humpal*, 61-172.

61. Under notice of a claim for money due for "damages for the illegal and wrongful taking and detention" of property, "and as damages for the detention thereof," *held*, that plaintiff could recover the value of property wrongfully taken: *Paden v. Griffith*, 12-272.

62. Should state hour for appearance: The notice should state the hour when defendant is required to appear, and where the notice fixed the time as "11 o'clock M.," *held*, that it was not sufficient: *Hodges v. Brett*, 4 G. Gr., 345.

63. Return day: A notice in which the return day is left blank is of no validity: *Phinney v. Donahue*, 67-192.

64. Place: In stating the place, it is not essential that the notice give the township of the justice: *Johnson v. Dodge*, 19-106.

65. Service upon agent: A service of original notice upon the agent will not constitute service upon the principal, though the agent may bind the principal by appearance: *Brown v. Newman*, 13-546.

66. Defective notice or insufficient service: A defective notice, if service is properly had, does not affect the jurisdiction of

the court nor the validity of the proceeding. If the justice err in holding the notice sufficient, advantage thereof must be taken on appeal if at all: *Dougherty v. McManus*, 36-657.

67. Where the notice was served less than five days previous to trial, *held*, that judgment thereon was erroneous, but not void. Judgment on a defective or insufficient notice can only be attacked by appeal, and not collaterally: *Shea v. Quintin*, 30-58; *Ballinger v. Tarbell*, 16-491.

68. Error in rendering judgment on a defective notice or insufficient service cannot be corrected by writ of error unless a motion to set aside the judgment is first made before the justice: *Leonard v. Hallem*, 17-564; *Smith v. Parker*, 28-359.

69. Effect of entire absence of notice: If the justice has no jurisdiction by reason of entire want of notice, the defendant need not move for correction of the error in rendering judgment against him, but may, if he knows of the judgment in time, have the error corrected by writ of error, or may afterward bring an independent action to set it aside: *Holmes v. Hull*, 48-177.

70. Evidence of service: The officer's return is the best evidence of the service of notice and is not overcome by failure to enter the fact of return of service on his docket: *Bridges v. Arnold*, 37-221.

71. The notice is not "process," and may under some circumstances be served out of the county, although it is provided that process from a justice's court cannot issue into another county (Code, § 3631): *Klingel v. Palmer*, 42-166.

b. Appearance.

72. Voluntary appearance gives the justice jurisdiction as to the party without any service of notice whatever: *Acres v. Hancock*, 4-568.

73. The appearance waives any defect in the notice: *Houston v. Walcott*, 1-86.

74. Appearance by motions for continuance and for change of venue waives objection to the notice or service: *Shaffer v. Trimble*, 2 G. Gr., 464.

75. Special appearance to object to sufficiency of service of notice confers jurisdiction: *Church v. Crossman*, 49-444.

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6-534; *Clark v. Barnes*, 7-6; *Weimer v. Linhard*, 12-359; *Richman v. Brown*, 25-33.

103. But where the entry of the justice indicates that there was no denial of a set-off, it should be regarded as admitted: *Brock v. Manatt*, 5-270.

104. Counter-claim: In order that a counter-claim may be properly interposed so as to defeat plaintiff's right to dismiss the action, it must be set up in a written answer filed, or must be stated to the justice and the substance thereof entered on his docket: *Kuhn v. Bone*, 10-392.

105. The failure of the justice to mark an instrument as filed will not prejudice the rights of the party filing it: *Stone v. Murphy*, 2-35.

106. Nor prevent its being admitted in evidence in a trial on appeal: *Eggleston v. Collis*, 10-554.

IV. TRIAL AND JUDGMENT.

a. Incidents of the trial.

107. Continuance: A continuance by consent to an indefinite time will not enable one party to obtain judgment by default against the other without notice to the other as to the time when the cause is again set for trial: *Rowley v. Baugh*, 33-201.

108. After the death of a party before trial, a continuance may be granted to allow an administrator to be appointed, so that he may be made party: *Caughlin v. Blake*, 55-634.

109. Time to demand jury: Under a statute (Code, § 3537) providing that a jury, if desired, must be demanded at or before the time for joining issue, *held*, that for a reasonable time after the filing of defendant's answer, plaintiff had the right to demand a jury trial: *Hall v. Chicago, B. & Q. R. Co.*, 65-258.

110. Instructions: A justice of the peace has no power to give instructions to a jury sitting in the trial of a case before him: *St. Joseph Mfg. Co. v. Harrington*, 53-380.

111. Where it appeared upon writ of error to the circuit court that the justice had given instructions to the jury, *held*, that the cause should have been remanded for new trial, although the giving of instructions was not urged as error: *Ibid*.

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Dismissal or nonsuit and default.—Judgment; its entry and enforcement.

tion is upon a written instrument which has been filed with the justice prior to appearance day, as authorized by law: *Jewett v. McLelland*, 3 G. Gr., 568.

123. If plaintiff appears before decision of a motion for nonsuit on account of his non-appearance, the motion should be overruled: *Wright v. Philips*, 2 G. Gr., 191.

124. Setting aside default: A judgment by default cannot be set aside on a showing, supported by affidavits, that the justice entered judgment by default before a particular time of day. The recitals of the judgment are conclusive upon that point: *Cory v. King*, 49-365.

125. Where defendant appears and demands a jury, and judgment is rendered against him for want of an answer, such judgment is not by default in such sense that it can be set aside on motion, as provided for in case of judgments by default: *Rhodes v. De Bow*, 5-260.

126. So, where defendant appeared and answered, but did not appear at time of trial, and judgment was rendered against him, *held*, that it was not a judgment by default: *Douglass v. Langdon*, 29-245.

127. Motion to set aside default; notice: No notice to the opposite party of a motion to set aside default is necessary: *Stivers v. Thompson*, 15-1; *Park v. Ratcliffe*, 42-42.

128. Excuse for default: As to what is a satisfactory excuse, much is left to the discretion of the justice: *Stivers v. Thompson*, 15-1.

129. Costs: An order of the justice, upon setting aside default, that it be at the cost of defendant, *held* correct: *Ibid*.

c. Judgment; its entry and enforcement.

130. When to be entered:¹ A judgment on the verdict of a jury should be entered up forthwith; and where there was a delay of sixty days in entering judgment, *held*, that the judgment so entered was void: *Harper v. Albee*, 10-389.

131. Such judgment might be reversed on a writ of error, but cannot be appealed from:

Ibid; *Brown v. Scott*, 2 G. Gr., 454; *Guthrie v. Humphrey*, 7-23.

132. "Forthwith" means within a reasonable time; and *held*, that where a confession was made on Saturday night before a justice and entered up Monday morning, it was in time, and that even when there is unreasonable delay, the judgment would, as between the parties, be voidable, but not void: *Burchett v. Casady*, 18-342.

133. Where a verdict was rendered at 10:30 P. M. on one day and judgment entered on the docket at 11 A. M. the next day, it was *held* that the statute was sufficiently complied with: *Davis v. Simma*, 14-154.

134. Entry upon the docket constitutes the rendition of the judgment: *Brown v. Scott*, 2 G. Gr., 454.

135. Form: A justice in rendering judgment need follow no particular form: *Stowers v. Milledge*, 1-150; *Barrett v. Garragan*, 16-47; *Church v. Crossman*, 41-373.

136. An entry reciting, "after hearing all the testimony on both sides it is believed that the plaintiff is entitled to seventy-five dollars debt," etc., *held* sufficient to constitute a judgment: *Stowers v. Milledge*, 1-150.

137. Where the transcript of the judgment of a justice of the peace showed the time, place, parties, matter in dispute, and the result, *held*, that it showed all the requisites of a valid judgment: *Church v. Crossman*, 41-373.

138. Where the time, place, parties, matter in dispute and the result were so concisely and clearly stated as to be unmistakable, *held*, that the entry was sufficient: *Barrett v. Garragan*, 16-47.

139. Entries in particular cases, irregular in form, *held* sufficient: *Moore v. Manser*, 9-47; *Lavalle v. Badgley*, 83-155.

140. Presumptions: In a collateral proceeding liberal rules are recognized in relation to judgments of justices of the peace: *Williams v. Brown*, 28-247.

And see *supra*, §§ 3-10.

141. Filing transcript of judgment: A transcript of a judgment before a justice can only be filed and become a lien in the county where rendered. To make it a lien in another

¹ Code, § 3552. In cases of dismissal, confession, or on the verdict of a jury, the judgment shall be rendered and entered upon the docket forthwith. In all other cases, the same shall be done within three days after the cause is submitted to the justice for final action.

county, a transcript must be taken to such county from the judgment as filed in the clerk's office in the county where rendered: *Blaney v. Hanks*, 14-400.

142. The filing of a transcript does not prevent the prosecution of an appeal or writ of error: *Wilson v. Robinson*, 61-357.

143. Execution on the transcript may issue from the office of the clerk of the circuit court at any time within twenty years: *McCoy v. Cox*, 54-595.

144. Issuance of execution: The provision of Code, § 3569, extending the time within which execution may issue on the judgment beyond that provided in the Revision, is applicable to cases in which the time allowed under the Revision had not expired when the Code was enacted, but not to cases where such time had expired: *Woods v. Haviland*, 59-476.

145. Form of execution: An execution specifying who recovered the judgment and against whom it was recovered, but not reciting formally the names of the parties to the action, held sufficient: *Williams v. Brown*, 28-247.

146. An execution sale, after the expiration of the execution under which levy is made, and without renewal as contemplated by statute, will be valid: *Walton v. Wray*, 54-531.

As to the authentication of judgments to be used as evidence in another state, see EVIDENCE, §§ 549-554.

V. APPEALS AND WRITS OF ERROR.

a. Appeal and trial anew.

147. Right of appeal: Whenever, in any case, there is final judgment before a justice, the right of appeal is given, unless denied by express provision or necessary implication. So held in an action against a defendant for violation of a city ordinance under a charter giving justices jurisdiction in such cases: *Dubuque v. Rebman*, 1-444.

148. But if the justice exercises a new jurisdiction created by statute, in which the proceedings are summary, and different from the common law, *certiorari* and not appeal is the proper method of review: *Ibid.*

149. Only after judgment: A party cannot appeal from the verdict of a jury. There

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Appeal and trial anew.

upon the validity of the award: *Whitis v. Culver*, 25-30.

As between appeal and writ of error, which is the proper method of proceeding, see also, *infra*, §§ 273-278.

161. Amount in controversy: The statute limiting the right of appeal to cases in which the amount in controversy exceeds twenty-five dollars is not unconstitutional as depriving the party of a trial before a common law jury in such cases. The constitution authorizes the legislature to provide for trial by jury of less than twelve, in inferior courts, irrespective of the right of appeal: *Higgins v. Farmers' Ins. Co.*, 60-50.

162. Where the defendant makes a tender which is not accepted, the amount in controversy is the difference between the amount claimed and the amount tendered, and if that does not exceed twenty-five dollars, no appeal is allowed: *Young v. McWaid*, 57-101.

163. In determining the amount in controversy under this section the costs taxed up by the justice of the peace will not be taken into consideration: *Curran v. Excelsior Coal Co.*, 63-94.

164. Where plaintiff claimed less than twenty-five dollars in his account, and defendant set up, not by way of counter-claim, but as a defense, the payment of more than twenty-five dollars to plaintiff on the indebtedness, *held*, that the amount in controversy was what was claimed and not what defendant alleged that he had paid: *Boyle v. Wilcox*, 59-466.

165. Where the amount claimed by plaintiff is more than twenty-five dollars and he recovers less than that amount, and defendant appeals, the amount in controversy is that claimed by plaintiff, and not that for which judgment is rendered, for plaintiff may, on the appeal, if he establishes his right thereto, recover the whole amount of his claim: *Lundak v. Chicago & N. W. R. Co.*, 65-473.

166. The question whether the amount in controversy between the parties exceeds twenty-five dollars is to be determined from the pleadings. Whenever one of the parties to the litigation has asserted a claim or demand in his pleadings upon which he asks relief against his adversary, which the other party denies, a controversy exists between

them as to such claim or demand, and it is immaterial that upon the trial of the appeal the party asserting such demand does not introduce evidence to substantiate it, or is able to prove but a portion of it. Such failure of evidence will not justify the dismissal of the appeal, where the amount stated in the pleadings is sufficient: *Sterner v. Wilson*, 63-714.

167. Where plaintiff's cause of action was for less than twenty-five dollars but defendant interposed a counter-claim for more than that amount, and judgment was rendered against plaintiff for costs, and he appealed, *held*, that as the appeal brought up the whole controversy for trial anew, the amount of the counter-claim was involved and the appeal was proper: *Perry v. Conger*, 65-588.

168. If the party in whose favor judgment is rendered for more than twenty-five dollars remits the excess over that amount, the opposite party cannot appeal: *Milner v. Gross*, 66-252.

As to what constitutes the amount in controversy, see *supra*, §§ 000-000; and APPEALS, III, a.

169. Where, upon recovering a judgment for less than the sum of twenty-five dollars in an action in which more than that amount was asked, the plaintiff filed a paper before the taking of the appeal withdrawing his claim and asking only the sum for which judgment had been rendered, *held*, that an appeal could not thereafter be taken: *Bateman v. Sisson*, 70—.

170. Waiver of right to appeal: A party may by agreement, before or after the judgment is rendered, relinquish or waive his right of appeal from such judgment. (Overruling *Clark v. Gibson*, Mor., 328): *Lyon v. Sanders*, 8 G. Gr., 332.

171. A party cannot appeal from a judgment entered before a justice of the peace by his consent: *Stever v. Heald*, 61-709.

172. The filing of the transcript in the circuit court does not prevent the taking of appeal or writ of error: *Wilson v. Robinson*, 61-357.

As to waiver of right of appeal, in general, see APPEAL, §§ 5-22.

173. Waiver of error: Any error in the ruling upon an incidental motion is waived by answering and proceeding in the case: *Rahn v. Greer*, 37-627.

174. Error in dismissing an action upon refusal to give security for costs is waived by commencing a new suit on the same cause of action: *Gordon v. Ellison*, 9-317.

175. Withdrawal, abandonment or dismissal of appeal: A party may withdraw his appeal, at least with the acquiescence of the other party: *McKeever v. Horine*, 12-227.

176. After giving of notice and bond, but before filing of transcript, the appellant may withdraw his appeal and move before the justice to have the judgment set aside: *Park v. Ratcliffe*, 42-42.

177. Where the steps for an appeal were taken before the justice, but it was not prosecuted for four years, *held*, that appellant could not object to his property being subjected to the payment of the judgment: *Warder v. Rivers*, 64-412.

178. A party may be allowed to dismiss his appeal in the court to which it is taken: *Harper v. Albee*, 10-339; *Goodenow v. Perry*, 12-350.

179. A party has the same right to dismiss his appeal as to dismiss any other action: *Harris v. Laird*, 25-143.

180. Motion before justice to correct error: Where the party prejudiced by the error of the justice might have it corrected on motion before the justice, he cannot maintain a writ of error to correct the error until he has made such motion and it has been overruled. Therefore, *held*, that where default was entered on insufficient notice, a writ of error would not lie until a motion to set aside the default had been made and overruled by the justice: *Leonard v. Hallem*, 17-564; *Smith v. Parker*, 28-359.

The rule is the same as on appeals to the supreme court: See APPEALS, §§ 193-209.

181. But if the justice has no jurisdiction the party prejudiced need take no steps before the justice to remedy the error in assuming jurisdiction, but may proceed by writ of error, or, if he does not know of the judgment in time for that, may maintain an independent action to set the judgment aside: *Holmes v. Hull*, 48-177.

182. Party to appeal: It is only parties to the action that have a right to appeal. A surety on a replevin bond cannot appeal from a judgment against his principal, and relit-

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Appeal and trial anew.

der and direction of the revenue collector, and that it was not necessary that such order should set forth the facts of which the collector was required by law to be satisfied before granting the same: *Doud v. Wright*, 22-336.

192. Notice is not essential to give the court to which the appeal is taken jurisdiction, but failure to give proper notice simply entitles the appellee to a continuance: *Bond v. Davis*, 37-163.

193. Service of notice of appeal on appellee is not necessary if the appeal is allowed and perfected on the day on which judgment is rendered: *Holloway v. Baker*, 6-52.

194. Appearance waives notice: The appearance of an appellee in the court to which the appeal is taken will amount to a waiver of any irregularity or defect in the taking of the appeal, provided the court has jurisdiction of the subject-matter: *Wilgus v. Gettings*, 19-82.

195. Notice or appearance must be shown: Where it does not appear affirmatively that proper notice of appeal was given, or that appellee appeared, judgment should not be rendered against the appellee: *Quillan v. Windsor*, 6-396; *McCormick v. Bishop*, 3 G. Gr., 99.

196. Appeal bond: A bond equivalent in form to that given in the statute and substantially complying with its requirements is sufficient: *Moore v. Manser*, 9-47.

197. Where the bond is not, in form or substance, such as is required by statute, it is error to enter up judgment thereon against the sureties, as authorized by statute when the bond is in the form prescribed: *Wilson v. Knight*, 3 G. Gr., 126.

198. Any defect in the bond may be cured by tendering a sufficient bond in the court to which the appeal is taken (such case being within the general provisions of Code, § 248, as to defective bonds): *Brock v. Manatt*, 1-128.

199. Fee for approving appeal bond: The justice is not entitled to any fee for approving an appeal bond which is prepared by the attorney and handed him ready for approval: *McKay v. Maloy*, 53-33.

200. Qualification of surety: The justice may require the surety to himself make affidavit as to his qualification as surety: *Lane v. Goldsmith*, 23-240.

201. Filing papers and transcript: Whenever the transcript and papers from the justice are filed in the office of the clerk of the court to which appeal is taken, the cause is to be deemed in that court: *Holloway v. Baker*, 6-52.

202. Notes or other evidences of indebtedness, claimed to be those on which the action before the justice was based, and not certified by the justice with his record, are not to be received in evidence on the appeal unless marked filed by the justice or otherwise identified as the same as those used in the trial of the case before the justice. Otherwise the identity of the cause of action tried on appeal with that tried before the justice would not appear: *Graft v. Diltz*, 2 G. Gr., 570.

203. Transcript certified by an ex-justice: The certificate of an ex-justice in relation to proceedings had before him while in office, is not entitled to legal consideration: *Brown v. Scott*, 2 G. Gr., 454.

204. An amended transcript sent up by the justice within the time for filing transcript should be considered: *Smith v. Snodgrass*, 4 G. Gr., 282.

205. Filing fee of transcript: The justice is not required to pay the clerk's fee for the filing of the transcript in the circuit court, and therefore cannot demand prepayment to him of such fee before filing his transcript in the clerk's office: *McKay v. Maloy*, 53-33.

206. Transcript perfected: Application to the court to which the appeal is taken, to require a more complete transcript, should not be refused, if made in due time: *Atwater v. Woodward*, 4 G. Gr., 431.

207. Correction of justice's record may be made by the court to which the appeal is taken, if a mistake or omission therein is unquestionably established, in order that the case may be fully tried on the issues presented before the justice: *Cooper v. Woodward*, 3-189.

208. The court may hear evidence explaining a mistake or showing an omission in the justice's record: *Brown v. Beesett*, 13-185.

209. Should be filed for regular term: The "next" term of court at which the transcript should be filed is the next regular term. The return should not be made to a special term: *Coon v. Matthews*, 10-290.

210. Dismissal or affirmance for failure to file transcript: Failure of the justice to file his transcript at the proper term is not sufficient ground for an affirmance of the judgment: *Fisher v. Harber*, 10-298.

211. If the appellant fails to have a transcript filed, it may be filed by appellee, and he may then have the appeal dismissed, or the judgment affirmed: *Holloway v. Baker*, 6-52.

212. The neglect of the justice to make the return in the proper time is not a ground for dismissing the appeal: *Whitcomb v. Holloway*, 4 G. Gr., 811. And see *Whitehead v. Thorp*, 22-425.

213. Under a rule of court allowing appellee to pay the filing fee and have the appeal docketed and the judgment of the justice affirmed, upon a failure of appellant, after taking the appeal, to pay the fee and cause the case to be docketed, the appellee is not entitled to such affirmance where the clerk docketed the case without having required the fee in advance from appellant: *Squires v. Millett*, 31-169.

214. If the default or omission in paying the docket fee in such cases is remedied before the opposite party has suffered any detriment or made objection on that account, a motion for affirmance should not afterwards be allowed on that ground: *Hinman v. Weiser*, 9-561; *Robertson v. Eldora R., etc., Co.*, 27-245.

215. So an offer of appellant to pay the fee before the ruling of the court on the motion to affirm would render it improper to sustain the motion: *Squires v. Millett*, 31-169.

216. But where the rule of court required payment of docket fee by appellant by the morning of the second day, and the motion to affirm was made on the third day and determined on the ninth day, *held*, that an offer on the last named day by appellant to pay the fee, without showing a good excuse for not having sooner paid it, would not render an order of affirmance made on such motion erroneous: *State v. Glass*, 9-325.

217. So, where the rule required payment of the docket fee at the beginning of the term, *held*, that an order of affirmance in pursuance of such rule, made several days after the beginning of the term, should not be set aside on motion, no excuse for the

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227. The allowing of an amendment correcting the name of the partnership suing as plaintiff, *held* not erroneous: *Adae v. Zangs*, 41-586.

228. In order to secure a trial of the appeal upon the very merits of the case, errors or insufficiencies in the pleadings should be allowed to be cured by amendment: *Clow v. Murphy*, 52-695.

229. New defense: Although the statute forbids any new demand or counter-claim being set up on the appeal, defendant may file an amended answer setting up the defense of payment. Such matter does not constitute a new demand or a counter-claim: *St. Louis Type Foundry v. Medes*, 60-525.

230. A new cause of action or defense, of which the justice would not have had jurisdiction, cannot be set up on appeal; as, for instance, a claim for equitable relief: *Hollen v. Davis*, 59-444.

231. Nor can a claim for rescission of a contract be thus set up: *Griswold v. Bowman*, 40-367.

232. Defendant in default before the justice may by statutory provision (Code, § 3596), on an appeal from the judgment, file in the circuit court any pleadings necessary to set forth any defense he may have, and this provision extends to defaults for want of appearance as well as to defaults for failure to plead: *McFarland v. Lowry*, 40-467.

233. Under this provision it is the absolute right of the party appealing from a judgment against him by default to file an answer in the circuit court, and in the absence of any rule or special order of court with reference to the time for filing such pleading, he may do so at any time before the case is reached for trial: *Harty v. Des Moines & M. R. Co.*, 54-327.

234. But before the adoption of such statutory provision, the defendant against whom judgment on default had been rendered before the justice, could not, on appealing from such judgment, as matter of right, file an answer interposing a defense without showing some reason or excuse for not having answered before the justice: *Ruddick v. Vail*,

7-44; *Craine v. Fulton*, 10-457; *Leftwick v. Thornton*, 18-56.

235. The fact that defendant had not been served with a sufficient notice, by reason of which he did not plead before the justice, might be a ground for granting leave to plead on the appeal: *Graves v. Heaton*, 11-169.

236. Appeal from judgment by default; affirmance: In case of an appeal by a defendant from a judgment against him by default before the justice, if defendant does not appear nor interpose a defense in the court to which the appeal is taken, the judgment may be affirmed on plaintiff's motion: *Atkins v. McCready*, 8-214.

237. In such case defendant may appear and cross-examine witnesses in the same manner as in case of default in ordinary cases in such court. But if he makes no appearance the judgment of the justice may be affirmed without again introducing the evidence: *Harty v. Des Moines & M. R. Co.*, 54-327.

238. In the absence of any general rule of court to the contrary, such cases cannot be disposed of, even on failure of the party appealing to appear, until reached for trial on the regular call of the docket: *Ibid*.

239. On appearance without interposing a defense, the defendant in default before the justice may contest the amount of plaintiff's recovery, but not his right to recover: *Leftwick v. Thornton*, 18-56.

240. Trial term: Unless ten days intervene between the taking of the appeal and the commencement of the next term, neither party can be required to go to trial at that term: *Seeberger v. Miller*, 20-428.

241. The rule as to the trial term is the same as in case of original actions in the same court: *Mediken v. Mason*, 10-406.

242. If the notice of appeal is not given ten days before the term, the appellee is entitled to a continuance, but he cannot have the appeal dismissed on that ground: *Bond v. Davis*, 37-168.

As to change of venue on the trial of the appeal, see VENUE, §§ 108-110.

243. Method of trial; what questions considered: ¹ As an appeal brings up the case

¹ Code, § 3590. An appeal brings up a cause for trial on the merits, and for no other purpose. All errors, irregularities and illegalities are to be disregarded under such circumstances, if the cause might have been prosecuted in the circuit court.

for hearing upon the merits, defects in the service of the original notice are not material: *Graves v. Heaton*, 11-169.

244. Technical errors of pleading are to be disregarded: *King v. Gottschalk*, 21-512.

245. Error in overruling a demurrer is waived by the appeal and the case is to be tried on its merits; advantage of such an error can be taken only by writ of error, if at all: *Leftwick v. Thornton*, 18-56.

246. Where the justice improperly sustained a demurrer to an answer, *held*, that such action should be disregarded and evidence under the answer admitted: *Oleson v. Hendrickson*, 12-222.

247. A variance between the petition and the original notice as to the facts of plaintiff's cause of action cannot be raised on appeal: *Frink v. Whicher*, 4 G. Gr., 382.

248. Objections to depositions other than for incompetency or irrelevancy should not be regarded, unless made in the justice's court: *Alverson v. Bell*, 13-308.

249. If the cause of action before the justice is stated in different forms and a recovery is had in one form, an appeal brings up the whole case for trial on the merits and not merely the right to recover in the particular form which was upheld below: *Edwards v. Trulock*, 37-244.

250. Upon an appeal by defendant from a judgment against him for a part of plaintiff's claim in the justice's court, the plaintiff may, if he shows himself entitled thereto, recover a larger sum than that recovered before the justice: *Lundak v. Chicago & N. W. R. Co.*, 65-473.

251. Where, upon a demurrer being sustained in the justice's court to plaintiff's petition, such petition was amended and plaintiff recovered thereon, but on appeal the plaintiff withdrew his amendment and a trial was had on the merits and plaintiff again recovered, *held*, that defendant was not entitled to arrest of judgment on the ground that there was no issue, that objection not having been made until after verdict: *Ranney v. Templin*, 54-240.

252. Although the district court has no jurisdiction of an appeal from a justice of the peace in civil cases, yet, where such appeal pending in the circuit court is consolidated with another action originally brought

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Appeal and trial anew.—Writ of error.

of the bond: *Perry v. Denson*, 1 G. Gr., 467.

263. Although it is error in the court to enter up judgment against the appellant for a greater sum than the penalty of the bond, yet such a judgment would not be void for want of jurisdiction: *Freeman v. Hart*, 61-525.

264. If the appeal is dismissed because the amount in controversy is insufficient to warrant an appeal, judgment may be rendered against appellant and the sureties on the bond for the amount of the judgment in the court below and the costs of appeal: *Prescott v. Bacon*, 64-702.

265. Surety may appeal: A surety against whom judgment is rendered on the appeal bond has such an interest in the judgment that if erroneous he may move for its correction, or for a new trial, or may appeal therefrom: *Freeman v. Hart*, 61-525.

266. Costs on appeal: Under the statutory provision that appellant must pay the costs of the appeal unless he obtains a more favorable judgment than that from which he appeals (Code, § 8592), there is no ground for apportionment of costs, if the judgment is less favorable than that before the justice: *Best v. Dean*, 8-519.

267. But such provision is only applicable to an appeal by the party who recovers the judgment before the justice: *Ibid.*; *Howder v. Overholser*, 48-365.

268. Where the appeal was by defendant from a judgment against him before the justice, and on the appeal plaintiff recovered on only a part of several items of demand included in the first judgment, held, that the case was a proper one for apportionment of costs: *Howder v. Overholser*, 48-365.

269. The fact that judgment on appeal by the party recovering judgment before the justice is only enough greater in amount than that recovered before the justice to cover accrued interest thereon will not render the judgment more favorable to appellant in such sense as to entitle him to recover costs: *Traer v. Filkins*, 10-568.

270. Proffer of certain sum to defeat costs of appeal: If the party against whom

judgment is rendered by the justice appeals therefrom, and desires to avoid the costs of appeal in the event that appellee recovers on appeal a less amount, he (appellant) must proffer to pay a certain sum, and accrued costs, and then, if the judgment for appellee on appeal is for less than the amount proffered, the costs of the appeal will fall upon appellee. (Code, § 8593): *Best v. Dean*, 8-519.

271. The proffer must be of a certain amount *with costs*; otherwise the appellee, if he recover judgment on appeal, is entitled to judgment for the entire costs, although he did not recover more than the amount proffered: *Powell v. Western Stage Co.*, 2-50.

272. These provisions do not restrict the statutory provisions as to an offer to confess judgment: *Watts v. Lamberton*, 38-272.

b. Writ of error and proceedings thereunder.

273. What reviewable:¹ Decisions of justices upon matters of law are reviewable upon writ of error; and where the decision of the justice is final and does not affect the right of the plaintiff to recover in another action, but is upon a question affecting the jurisdiction of the justice, the capacity of the parties to sue or be sued, etc., it is to be reviewed on writ of error and not upon appeal: *Belding v. Torrence*, 39-516.

274. This is a proper remedy where a justice errs, by refusing to take jurisdiction: *Ibid.*

275. Or where he improperly takes jurisdiction, or renders judgment by default: *Craine v. Fulton*, 10-457.

276. Error of the justice in overruling a demurrer should be taken advantage of by writ of error. It would be waived by appeal: *Leftwick v. Thornton*, 18-56.

277. The action of the justice in rejecting or recommitting an award, or refusing to do so, may be reviewed by writ of error: *Whitis v. Culver*, 25-80.

278. Where the right of plaintiff to exemplary damages was not raised by motion or demurrer, but the case was submitted to

¹ Code, § 8597. Any person aggrieved by an erroneous decision in a matter of law, or other illegality in the proceedings of a justice of the peace, may remove the same, or so much thereof as is necessary, into the circuit court for correction.

the jury, *held*, that the defendant could not, by writ of error, call in question the judgment entered by the justice on the verdict of the jury, on the ground that it allowed exemplary damages: *Atkinson v. Chicago & N. W. R. Co.*, 70—.

As to what questions may be reviewed on appeal, see *supra*, §§ 152-160.

279. Right not lost by taking transcript:

The fact that the party recovering the judgment files a transcript thereof in the circuit court does not prevent the judgment being reviewed by writ of error: *Wilson v. Robinson*, 61-357.

280. Time within which application may be made: Under the provisions of Code of '51, § 2350, which did not limit the time within which application might be made for the writ, *held*, that the provisions as to the time within which an appeal might be taken were not applicable, and there was no limit: *Porter v. Helmick*, 2-87; *Mudgett v. Park*, 2-287. (Code, § 3598, makes the provisions as to time of taking appeal applicable to writs of error.)

281. Notice: A proceeding by writ of error without notice to the appellee cannot be entertained: *Sprote v. Marshall*, 4 G. Gr., 344.

282. Affidavit for the writ: The affidavit may be made by the attorney of the party asking the writ, when he shows himself sufficiently acquainted with the facts to make the necessary statements: *Dixon v. Brophay*, 29-460.

283. The affidavit need not show that the party resisted the decision of the justice of which he complains, or excepted thereto, or that he applied to the justice to correct it: *Ibid.*

284. The affidavit required to obtain a writ of error must be signed by the affiant. It is not sufficient that it be sworn to without signing: *Crenshaw v. Taylor*, 70—.

285. Dismissal for insufficiency of affidavit: Where the statements of error made in the affidavit are insufficient and do not show error, the proceeding may be dismissed on motion before the hearing of the case: *Elliott v. Mitchell*, 3 G. Gr., 237.

286. The writ: Where it does not appear to whom the writ was directed it will be presumed it was directed to the proper justice if

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Writ of error.— Attachment, etc.— Remedy for forcible entry, etc.

of in the affidavit for the writ of error: *Hays v. Gorby*, 3-203; *State v. Nichols*, 5-418.

295. The court will not, on the writ of error, review the findings of the justice as to questions of fact. Appeal is the proper remedy: *Taylor v. Rockwell*, 10-530; *State v. Roney*, 37-30.

296. And this is true, although all the evidence before the justice is set out in a bill of exceptions: *Lane v. Goldsmith*, 23-240.

297. The circuit court can render final judgment only where no trial is necessary. If there must be a new trial, the case should be sent back to the justice. The circuit court has no authority to retain and try the case itself: *Swan v. Bournes*, 47-501.

298. On a writ of error from a judgment of a justice of the peace upon a verdict which did not properly specify the amount of recovery, held, that upon determination that the judgment was erroneous, the cause should have been remanded to the justice and the circuit court could not render judgment: *Bartle v. Plane*, 68-227.

299. Under statutory provisions as to appeals similar to those now regulating writs of error, held, that upon reversal of the action of the justice it was not proper to order a new trial in the court in which the appeal was decided: *Davis v. Curtis*, 2 G. Gr., 575.

300. Though the justice may not have had jurisdiction, yet upon the removal to the circuit court, that court obtains jurisdiction, and its judgment is not void, although erroneous: *Finch v. Hollinger*, 47-173, 176.

301. The judgment of a justice should not be reversed on writ of error for any error which might have been corrected by the justice on motion, unless such motion is made and overruled: *Leonard v. Hallem*, 17-564; *Smith v. Parker*, 28-359.

302. If, after the application for and service of the writ, but before the hearing, the

opposite party causes the judgment to be modified so as to correct the error, no objection to such modification being made, the judgment should not be reversed on the hearing, although the party making the modification might be required to pay the costs of the proceeding by writ of error: *Rahn v. Greer*, 37-627.

VI. ATTACHMENT AND GARNISHMENT.

303. For less than five dollars: Although attachments are not allowable in justices' courts if the sum claimed is less than five dollars, yet in such an action the judgment may be for less than five dollars, and that fact that it is will not necessarily render the attaching plaintiff liable on his bond: *Bradley v. McCall*, 2 G. Gr., 214.

304. Attachment of property of non-residents: The fact that the notice which is required to be posted in such cases does not state the township in which the action is pending will not render the judgment invalid: *Johnson v. Dodge*, 19-106.

305. Garnishment of resident of another county: The justice having jurisdiction of the subject-matter and the defendant may render judgment against a garnishee who has answered, although he be a resident of another county: *Smith v. Dickson*, 58-444.

VII. REMEDY FOR FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY.¹

306. Jurisdiction of the action: A justice of the peace alone has original jurisdiction in such proceedings, and therefore, when an appeal is taken from his judgment, the appellate court should try the case as made before the justice, and not allow it to be changed and entirely new issues made: *Dicks v. Hatch*, 10-380.

¹ Code, § 3611. A summary remedy for forcible entry or detention of real property is allowable:

1. Where the defendant has by force, or intimidation, or fraud, or stealth, entered upon the prior actual possession of another in real property, and detains the same;

2. Where a lessee holds over after the termination, or contrary to the terms of his lease;

3. Where the defendant continues in possession after a sale by foreclosure of a mortgage, or on execution, unless he claims by a title paramount to the lien by virtue of which the sale was made, or by title derived from the purchaser at the sale; in either of which cases, such title shall be clearly and concisely set forth in the defendant's pleading.

§ 3616. The proceedings may be had before a justice of the peace of the township where the property is situated. . . . They shall be governed by the same rules as other cases before justices of the peace, except as herein modified.

Remedy for forcible entry or detention of real property.

307. The district court can acquire no jurisdiction in such cases, not even by stipulation of the parties: *Easton v. Fleming*, 51-805.

308. Threats sufficient to induce fear of violent ouster, held sufficient to bring the case within corresponding provision, although personal violence was not threatened: *Harrow v. Barer*, 2 G. Gr., 201.

309. A tenant holding over after the expiration of his lease does not become a tenant at will, entitled to thirty days' notice to terminate such tenancy, but is entitled to only the three days' notice to quit: *Kellogg v. Groves*, 53-395.

310. Fraud in the execution of a lease under which defendant holds possession cannot be set up by him in justification for holding over after the expiration of such lease: *Simons v. Marshall*, 3 G. Gr., 502.

311. The tenant of property sold under execution can be put out of possession by the provisions of this section after the purchaser's right to possession under his deed becomes complete, notwithstanding such tenant may have sowed or planted crops which are not yet matured, they having been sowed or planted with knowledge that his right to possession would terminate before time for harvesting the same: *Wheeler v. Kirkendall*, 67-612.

312. Possession: The question involved in the action is the fact of possession alone, and not the right to possession. A person may render himself liable to this action by entering on his own premises by force, fraud, or stealth, even when he has the right to immediate possession: *Stephens v. McCloy*, 36-659; *Emsley v. Bennett*, 37-15.

313. The action may be brought by a trespasser who has had possession, even against the real owner who has forcibly and illegally turned him out of possession: *Lorimier v. Lewis*, Mor., 253.

314. The right of a tenant to possession under a contract of lease, under which he has not had actual possession, cannot be asserted in this action: *Krumweide v. Schroeder*, 56-160.

315. There may be possession in fact of uninclosed or unimproved land, and such possession may be protected by this action, which covers all cases of actual possession as

distinct from mere possession in law. To constitute such possession it is not necessary that the premises be surrounded with a fence or built upon: *Langworthy v. Myers*, 4-18.

316. Who may bring the action: By statute (Code, § 3613) the legal representatives of a person who might have brought the action, if alive, may bring it after his death. By legal representatives is meant the executor or administrator. The right of the heir to bring such action exists without statutory enactment: *Beezley v. Burgett*, 15-192.

317. Pleading; petition: A petition in such action conforming in its averments to the requirements of the statute is sufficient: *Simons v. Marshall*, 3 G. Gr., 502.

318. Question of title cannot be tried in this action. (See Code, § 3620.) The party who has been in possession cannot make use of such action instead of an action of right in order to have the right of possession determined: *Settle v. Henson*, Mor., 111.

319. Where defendant sets up a paramount title, or the question of title is otherwise involved, the action cannot be maintained: *Bosworth v. Farrenholtz*, 4 G. Gr., 440.

320. Where the petition stated the title of plaintiff for the purpose of showing that defendant was a tenant holding over after the termination of a tenancy at will, held, that it did not thereby appear that title was involved: *Jordan v. Walker*, 52-647.

321. Where defendant denied plaintiff's title, and averred title in himself, such answer not being in any way responsive to the petition, and the averment being a mere conclusion of law, held, that no question of title was thereby raised: *Jordan v. Walker*, 56-686.

322. Where plaintiff alleged entry by defendant by fraud and stealth, and defendant, denying entry by fraud and stealth, alleged that he had entered and was in possession with permission of plaintiff under a contract of purchase, held, that this allegation did not raise a question of title, but was in effect a mere denial of plaintiff's allegations: *Oleson v. Hendrickson*, 12-222.

323. Proof of title is not admissible for the purpose of showing constructive possession in the absence of other evidence of possession: *Stephens v. McCloy*, 36-659.

Remedy for forcible entry, etc. — The lease, etc.

324. Notice to quit:¹ Under particular facts, *held*, that defendant went into possession as assignee of an unexpired lease, and not by stealth, and was, therefore, at the expiration of the lease, entitled to three days' notice to quit: *Gifford v. King*, 54-525.

325. Proof of service of such notice by affidavit of a person not an officer, in the manner provided for service of original notices by private persons, is not sufficient to entitle the notice to be received in evidence without further proof. The notice is not one in an action, but one which forms the basis of a private right, and must be proved as any other matter *in pais*: *Hollingsworth v. Snyder*, 2-435.

326. The fact that instead of serving the three days' notice to quit, required by the section last above referred to, service is made of a thirty days' notice to terminate a tenancy at will, as authorized by Code, § 2015, the case being one in which no such thirty days' notice is necessary, will not render the proceedings under such notice, after the expiration of thirty days from the service thereof, void and without jurisdiction, but will be an irregularity only: *Shuver v. Klinkenberg*, 67-544.

327. Notice of suit: The fact that the notice is served nine days before the time fixed for appearance instead of two to six days as provided by Code, § 3617, will not deprive the court of jurisdiction nor render its proceedings void. The notice will be defective only: *Ibid*.

328. Appeal: Although parties may not on appeal file amended pleadings changing the issues before the justice, yet where the issue remained the same and the amendment was merely for the purpose of more fully describing the property, and was unnecessary in the absence of a motion for a more specific statement, *held*, that the allowance of such amendment was not improper: *Kuhn v. Kuhn*, 70—.

329. Issuance and execution of an order of removal, after judgment for plaintiff in such an action, should not be enjoined on the averment that defendant intends to appeal. Whether after appeal is taken he might have such injunction upon a showing that he

will sustain irreparable injury, *quære*. (By statute, McClain's Ann. Stat., § 3623½, appeal does not prevent the warrant of removal being executed, except by consent): *Curd v. Farrar*, 47-504.

330. The fact that plaintiff has prosecuted to judgment a second action of forcible entry and detainer constitutes a waiver of his right to appeal in a former action for the same purpose in which he has been defeated: *Liebuck v. Stahle*, 66-749.

331. Bar: Peaceable and uninterrupted possession for thirty days, with knowledge of plaintiff, is by statute declared to be a bar to the action (Code, § 3621), but neither the good faith with which the defendant went into possession, nor the fact that he made improvements on the property, are material nor sufficient to constitute a defense in the absence of the kind and length of possession contemplated: *Fultz v. Black*, 3-569.

LANDLORD AND TENANT.

I. THE LEASE AND RIGHTS THEREUNDER;
RENT; REPAIRS; IMPROVEMENTS; DAMAGES.

II. TENANCY AT WILL; NOTICE TO TERMINATE; EMBLEMENTS.

III. LANDLORD'S LIEN.

As to mining leases, see MINING.

As to LICENSES, see that title.

As to liability of landlord for permitting use of premises for illegal sale of liquors, see INTOXICATING LIQUORS, §§ 208-211.

As to what notice or knowledge will render landlord liable for permitting such use of premises, see INTOXICATING LIQUORS, §§ 140-142.

I. THE LEASE AND RIGHTS THEREUNDER.

1. Right to lease: A party shows a *prima facie* right to lease property by the fact that he is in possession thereof by consent of the owner, and delivers such possession: *Goldsmith v. Wilson*, 68-685.

2. Term: It is essential to a lease for years that it be for a definite period, or for a purpose which of itself seems to ascertain the

¹ Code, § 3614. Before suit can be brought in any except the first of the above classes [in sec. 3611, *supra*], three days' notice to quit must be given to the defendant in writing.

The lease and rights thereu

length of time for which the premises are to be occupied: *Melhop v. Meinhardt*, 70—.

3. Acceptance: Facts in a particular case held not sufficient to constitute an acceptance of a contract of lease binding upon the lessor: *Gifford v. King*, 54-525.

4. Consideration for reduction of rent: An indorsement by the landlord on the lease of an agreement to reduce the rent to a lower sum may be in consideration of a supposed advantage to him in retaining the tenant and enabling him to carry on business, and is therefore binding. It is essentially the same thing as if the original lease had been surrendered and a new lease substituted providing for the reduced rental: *Jaffray v. Greenbaum*, 64-492.

5. Merger: The purchase by the landlord of a lease upon his own property will not merge the leasehold interest into the fee title so as to divest the outstanding interest in the leasehold estate already acquired in good faith. For the protection of such outstanding interest the lease will, if necessary, be kept alive: *Denham v. Sankey*, 38-269.

6. Surrender: A lease may be terminated by agreement which need not be express but may be inferred from the circumstances. The circumstances of a particular case, however, held not sufficient to show a surrender and discharge of the tenant: *Martin v. Stearns*, 52-345.

7. As between the landlord and tenant, the execution of a new lease for the unexpired term of the former lease operates as an extension of the old lease, so that the respective rights of the parties thereto will be governed by the new lease. But held, that a mortgagee whose mortgage was subordinate to the lien of the landlord under the old lease did not acquire priority over such lien under the new lease as to the rent for the unexpired term of the old lease: *Rollins v. Proctor*, 56-326.

8. Renewal: Where a lease was given for two years, to terminate at the expiration of that time, subject to be continued or renewed upon notice, security for the rent being given, the giving of notice and security without demand are conditions precedent to the renewal of the lease, and unless performed the instrument ceases to operate for a future term: *McFadden v. McCann*, 25-252.

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The lease and rights thereunder; rents, etc.

held, that the party who had thus taken possession might, upon payment of rent for the term of the actual occupancy by him, surrender the premises, and would not be liable for further rent under the terms of the lease, and a lien for such rent could not be enforced against his property: *Stibbs v. Agner*, 65-818.

17. Where the lease was blank as to the amount of rent which the lessee covenanted to pay, *held*, that the lease amounted only to an implied covenant to pay rent, which was determined upon an assignment of the lease and the acceptance of rent from the assignee: *Fanning v. Stimson*, 13-42.

18. Sub-lease: Where the lessee enters into an agreement with a third person for the occupation of the leased premises by the latter, reserving new rents and providing for the delivery of possession to the original lessee and not to his lessor, such agreement amounts to a sub-letting and not to an assignment of the original lease: *Collamer v. Kelley*, 12-319.

19. Merger: In such case, if the original lease passes by assignment to a party who holds the premises under the assignment of the sub-lease, the sub-lease thereby becomes merged in the original lease, and the obligation to pay the excess of rent provided for in the sub-lease over that specified in the original lease terminates: *Ibid.*

20. Covenants: Where a contract of lease provided by way of covenant that the tenant was to build a building upon the premises for which the landlord was to pay, at the expiration of the lease, such a price as three disinterested parties should fix upon it, *held*, that such covenant was one running with the land, and that it was binding upon the person to whom the land was sold, and the lease transferred by the original landlord: *Frederick v. Callahan*, 40-811.

21. To entitle a tenant to recover from a landlord for breach of implied covenants for quiet enjoyment, where the landlord's title is terminated by judicial sale and expiration of the period of redemption under a judgment which was a lien on the premises at the time of the execution of the lease, it is not necessary to show actual eviction, but it is sufficient to show that a title accrued superior to that of the lessor, and that the purchaser asserted such title and right of possession by giving

notice to the tenant that he claimed the rent: *Kane v. Mink*, 64-84.

22. Certain covenants in a lease in regard to sale of the property by lessor construed, and *held* that the term "sale," as therein used, was a sale terminating the right of possession by either party and not a mere contract of sale contemplating future conveyance and delivery of possession: *Stewart v. Pier*, 58-15.

23. Rent is a certain profit either in money, provisions, chattels or labor, issuing out of lands and tenements in retribution or return for their use: *Merritt v. Fisher*, 19-354.

24. Share of crops as rent: A share of crops reserved by the lease to the landlord is to be regarded as rent: *Townsend v. Isenberger*, 45-670.

25. The owner of the land acquires no property in the part of the crop reserved for rent, until it has been set apart to him by the tenant: *Ibid.*; *Blake v. Coates*, 3 G. Gr., 548; *Rees v. Baker*, 4 G. Gr., 461.

26. The rent is not paid until the share of the crop is set apart, and is not payable until that can be done: *Townsend v. Isenberger*, 45-670.

27. And the landlord will be liable for trespass in going upon the leased premises and taking a portion of the crop before it is harvested: *Blake v. Coates*, 3 G. Gr., 548.

28. So where a landlord leased premises to a tenant for the purpose of raising a crop of winter wheat, and the tenant prepared the soil and sowed the crop, which was winter killed, *held*, that the landlord, although the agreed rent was a share of the crop, was not entitled to possession until after the time when the crop would have been harvested, and upon taking possession of the premises and planting another crop thereon, he was liable to the tenant for the value of the labor previously spent by the tenant in the preparation of the soil for the winter wheat: *Rees v. Baker*, 4 G. Gr., 461.

29. When land is rented on shares the tenant is the exclusive owner of the crop while growing, and the landlord has no control over it, nor title to the part reserved as rent, until it is set apart to him: *Howard County v. Kyte*, 69-307.

30. A landlord has no such interest in the growing crops of his tenant as to enable him

to maintain an action against a person who injures the crop: *Drake v. Chicago, R. I. & P. R. Co.*, 70—.

31. As between the tenant and the purchaser at foreclosure sale under a mortgage against the landlord, crops which are matured though not harvested are to be regarded as personal property not passing by the sale: *Hecht v. Dettman*, 56-679.

32. Where a lease to a field tenant provided that the tenant should pay a portion of the crop raised as rent, and there was no stipulation as to the time when such payment should be made, *held*, that there could be no action for a money judgment upon failure of the tenant to deliver the portion of the crop due as rent until demand therefor had been made, even though by the terms of the statute (Code, § 2015) such a lease terminates upon the first day of December of the year for which the lease is made: *Johnson v. Shank*, 67-115.

33. The measure of damages in an action by the landlord for rent payable in grain is its value when first demanded: *Safely v. Gilmore*, 21-588.

34. When by the terms of the lease the tenant is to deliver a part of the crop in crib, the ownership vests at once in the landlord, or his assignee, when the crop is cribbed, and he may bring replevin for the possession: *Hatfield v. Lockwood*, 18-296.

35. Where the lease provided that the rent should become due "when the crop matures or any portion of it shall be fit for market," *held*, that an action for the rent brought when oats raised on the premises were in stack, and the corn was ripe, and the tenant had commenced to gather and feed it, was not premature: *Hull v. Stogdell*, 67-251.

36. Rate of rental in absence of contract: If a tenancy is without stipulation as to the amount of rent, the landlord can recover a fair consideration for the use and occupation of the premises: *Newell v. Sanford*, 13-191.

37. Rate where tenant holds over: A tenant holding over without any new terms fixed, tacitly consents to the terms of the former lease: *Ibid.*

38. Implied liability: From the occupancy of premises, belonging to a married son, by his mother, not a member of his fam-

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The lease; improvements; repairs; estoppel.

who is entitled to the rent, the landlord is thereby estopped from afterward recovering the rent so paid: *Winterink v. Maynard*, 47-386.

46. Liability for rent continues with possession: Where property upon the leased premises had been seized by the sheriff under attachment at the suit of the landlord, but there was no surrender of the premises by the tenant, nor eviction therefrom, *held*, that the tenant's liability for rent still continued: *Daniels v. Logan*, 47-395.

47. Improvements: A tenant at will who has erected buildings on real estate without an agreement for removing them has no right to or interest in such improvements. They become attached to and a part of the realty and belong to the owner: *Wheeler & Wilson Mfg. Co. v. Hasbrouk*, 68-554.

48. A building erected by the tenant upon leased premises which cannot be removed by him becomes attached to such premises and is subject to the same rules as to liens and conveyances which apply to the interest of the tenant in the land, and a judgment against a tenant will be a lien upon his interest in the land including such buildings, and paramount to a subsequent chattel mortgage executed by him upon the buildings. Indeed, it would appear that the same rule would apply even though the building thus erected by the tenant was erected with the right to remove it at the end of the term: *Hayden v. Goppinger*, 67-106.

49. Obligation to repair: Under a lease binding the lessee to keep the premises in a good state of repair, he may be compelled to rebuild in case of total destruction by fire, even though subsequent to the execution of the lease the fire limits of the city in which the property is situated are so extended that in rebuilding the lessee must construct a more expensive building than the one burned: *David v. Ryan*, 47-642; *Harris v. Heackman*, 62-411.

50. Right of access: A tenant who leases land is bound to inquire as to the means of access thereto, and it does not constitute fraud on the part of the landlord, in the absence of misrepresentations, to lease property to which there is no means of access: *Handrahan v. O'Regan*, 45-293.

51. Tenant cannot deny landlord's title: A tenant will not, during the existence of the tenancy, be allowed to deny the title of his landlord. He may contest the title of the lessor, if he has been evicted or has yielded the possession to one having a paramount title, but not when the adverse title has been asserted by his own procurement or bad faith: *Stout v. Merrill*, 35-47.

52. If the landlord's title has been extinguished, or is terminated after the tenant has entered under the lease, and the tenant has the right to possession derived from another source, this may be shown by him against the lessor's claim: *Ibid*.

53. A sub-tenant may show that the landlord, and not his immediate lessor, has dispossessed him and given him a new lease. A lessee may also show that the lessor has assigned his title and that he has become bound thereby to the assignee: *Ibid*.

54. A tenant may surrender possession to the holder of a paramount title, and take a new lease or abandon the premises and resist the landlord's claim by setting up a paramount title, but he can only dispute the title of his lessor in any of these ways where it is necessary for his own protection. In all cases where he may surrender the lease or abandon possession and afterward resist the claim of the landlord, he can do so only upon notice or after some other act that will give the lessor an opportunity to take possession or in some other way vindicate his right to the land: *Ibid*.

55. Even if the term of the lease has expired the tenant cannot dispute his landlord's title until he shall have made some explicit and open disavowal of holding under the landlord and asserted a claim under another, which fact must be brought home to the knowledge of the landlord: *Ibid*.

56. Therefore, *held*, that a tenant could not purchase and set up as against his landlord the outstanding right of a minor to defeat the landlord's title by redeeming from a tax sale under which the landlord held: *Ibid*.

57. A tenant cannot, before the expiration of his lease and while in possession under it, deny his landlord's title: *Bowditch v. Dubuque*, 38-341.

58. Where a party has possession as a mere

trespasser, and afterwards by compromise accepts a lease of the premises of the real owner, his possession is to be deemed derived from the landlord in such sense that he cannot afterwards set up title against the landlord in an action for possession of the premises: *Ibid.*

59. In an action on a note given in consideration of a lease, defendant may show that there was no consideration for the reason that plaintiff had no title to the leased premises, and defendant did not and could not have obtained possession under such lease. Such defense is not precluded by the rule that defendant cannot dispute the landlord's title: *Andrews v. Woodcock*, 14-397.

60. The provision of Code, § 2013, that an attornment by a tenant to a stranger is void unless made to a mortgagee after the mortgage has become forfeited, means only that such attornment may be made after all rights of the mortgagor to the mortgaged premises have been lost by foreclosure and the expiration of the year of redemption: *Mills v. Hamilton*, 49-105; *Mills v. Heaton*, 52-215.

61. A tenant holding under an executor, and having, as tenant, paid rents to such executor, is estopped from denying the executor's right to recover the balance due on rent: *Sullivan v. Finn*, 4 G. Gr., 544.

62. Fraud on the part of the landlord in obtaining the lease cannot be set up for the purpose of defeating the landlord's title: *Simons v. Marshall*, 3 G. Gr., 502.

63. Damages: If the lessor refuses to permit the lessee to occupy the premises in accordance with the agreement, he thereby renders himself liable to an action for damages. The tenant is not in such case confined to an action of ejectment against the landlord: *Adair v. Bogle*, 20-238.

64. The general rule for the measure of damages in such case is the difference between the rent reserved and the value of the premises for the term, and if the value of the premises does not exceed the rent reserved, the tenant not being substantially injured can in general recover only nominal damages, even though the refusal of the landlord to give possession is without just cause; and it makes no difference in the application of this rule that the rent reserved is payable in kind instead of money: *Ibid.*

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Tenancy at will; notice to terminate.

71. Where the tenant claims actual damages for failure of the landlord to put the premises in the condition required by the terms of the contract, it is not proper to allow the landlord to show that he employed skillful mechanics, good material, etc., in the repair of the premises: *Swift v. East Waterloo Hotel Co.*, 40-322.

72. The fact that the landlord, being the owner of a lot adjoining the leased premises, excavated the cellar upon such adjoining lot for the purpose of erecting a building, and thereby caused the use of the basement of the leased premises to be unprofitable by reason of the cold, *held* not sufficient to render the landlord liable to the tenant: *McMillin v. Staples*, 36-532.

73. Under a lease binding the tenant to cultivate the premises in a good, farmer-like manner, and keep the buildings and fences in good repair, he will be liable in damages for mismanagement of the premises, such as permitting fruit trees to be injured by sheep: *Elbert v. Wilson*, 8 G. Gr., 520.

74. Where by the terms of the lease the landlord was to have the cornstalks upon the leased farm and the lessee sub-let to a sub-tenant who sold his crop to defendant who turned in cattle, eating up the stalks and damaging trees, fences, shrubbery, etc., *held*, that defendant was liable to the landlord for such damage: *Babley v. Vyse*, 48-481.

II. TENANCY AT WILL; NOTICE TO TERMINATE; EMBLEMENTS.

75. **What constitutes:** Continuance in possession by the tenant with consent of the landlord after the expiration of his term of years implies, in the absence of express agreement, that the premises are held on the former terms, but want of consent on the part of the landlord prevents the application of this rule. A tenant in possession under an agreement to lease, without having paid rent, is a tenant at will, and so is one who, after his lease has expired, is permitted to continue in possession pending a treaty for a further lease: *Dubuque v. Miller*, 11-583.

76. Where property is bought in at execution sale under such circumstances that there is no right of redemption, but the execution defendant is allowed to remain in pos-

session during the year following the sale and thereafter, he becomes a tenant at will: *Dobbins v. Lusch*, 53-304; *Munson v. Plummer*, 59-120.

77. All the right and interest of a tenant is terminated by judicial sale without right of redemption made under a judgment which was a lien on the premises prior to the lease, and if the tenant continues in possession after the sale, and notice to him by the purchaser, he does so not as tenant under his lease, but as tenant at will of the purchaser, and is liable to account to the latter for the use of the premises after the sale: *Kane v. Mink*, 64-84.

78. A person in possession not recognizing the owner as landlord cannot be regarded as a tenant at will: *Martin v. Knapp*, 57-336.

79. **Notice to terminate the tenancy:** Where a tenancy is to cease at an agreed time, the tenant is not entitled to the thirty days' notice to quit provided for by Code, § 2015, with reference to notice required to terminate a tenancy at will: *Shuver v. Klinkenberg*, 67-544.

80. Where a tenant was in possession under an agreement to occupy as long as he was in the employ of the landlord, *held*, that after leaving such employ he was a tenant holding over after the expiration of his lease and not a tenant at will, and therefore was only entitled to three days' notice to quit before action of forcible entry and detainer: *Grosvenor v. Henry*, 27-269.

81. A tenant holding over after the expiration of his lease does not become entitled as tenant at will to thirty days' notice to terminate the tenancy, but only to three days' notice before expulsion by action of forcible entry and detainer: *Kellogg v. Groves*, 53-395.

82. A notice to quit the house is sufficient notice to quit the land upon which the house is situated: *Kuhn v. Kuhn*, 70—.

83. The provisions of Code, § 2015, that a field tenant's lease shall terminate not later than the first day of December, does not establish a rule for the government of parties in making their contract, but simply fixes the time at which, in the absence of express agreement to the contrary, the lease shall terminate. The time thus fixed by statute for the termination of the lease does not be-

Notice to terminate; emblements

come a part of the contract with reference to the time for the payment of rent where no express time is stipulated: *Johnson v. Shank*, 67-115.

84. Where notice was served to terminate a tenancy at will, but the defendant continued in possession for some years thereafter, *held*, that he did not stand in any different position after such notice: *Newell v. Sanford*, 13-191.

85. Notice to terminate mining licenses: A person in possession under a parol license to mine is a tenant at will and entitled to the thirty days' notice to terminate the tenancy required in other cases: *Bush v. Sullivan*, 8 (1. Gr., 844; *Beatty v. Gregory*, 17-109; *Harkness v. Burton*, 39-101.

86. Emblements: In order to entitle a tenant, or his executor or administrator, to emblements, his tenancy must be uncertain in its duration, and must be determined by the act of God or the act of the lessor or owner: *Reilly v. Ringland*, 89-106; *Reilly v. Ringland*, 44-422.

87. A tenant having the right to emblements has the corresponding right to enter on the premises and harvest the crops growing at the termination of his tenancy: *Ibid*.

88. Therefore, *held*, that an occupying claimant who, under the provisions of statute, became entitled to occupy the premises until his judgment for improvements was paid, became a tenant at will, and upon the termination of his tenancy by the payment of the judgment was entitled to emblements: *Ibid*.

89. A mortgagor is not entitled to emblements: *Downard v. Groff*, 40-597.

90. Where a lease was granted subsequently to the mortgage without the concurrence of the mortgagee, and the assignee of the mortgage became the purchaser under a foreclosure and sale of the premises, *held*, that he was entitled to the emblements and might maintain trespass against the mortgagor or his lessee for taking and carrying away crops growing at the time of the sale: *Ibid*.

91. Where a defendant appealed from a judgment of foreclosure against him without superseding the judgment, and pending the appeal the premises covered by the mortgage were sold under the judgment to the plaintiff, who, however, did not demand pos-

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Landlord's lien.

counts, etc., kept upon the leased premises: *Ibid.*

100. **Priority:** A creditor of the tenant cannot, by levy on a growing crop, acquire priority over the landlord's lien for rent: *Atkins v. Womeldorf*, 53-150.

101. Where the rent is payable in a share of the crops, the landlord has a lien for such share, and when the tenant is to gather such share and does not, the landlord has a lien, also, for the value of the labor necessary to gather the same: *Secrest v. Stivers*, 35-580.

102. While the right of property in growing crops planted on the shares is, as between landlord and tenant, in the tenant until division is made, yet a creditor of the tenant cannot seize upon the whole crop to the exclusion of the landlord's lien for rent: *Atkins v. Womeldorf*, 53-150.

103. The lien of the landlord is inferior to that of a recorded mortgage of personal property executed before such property is brought or used upon the leased premises, even when the mortgagee took his mortgage with notice that the property was to be so used: *Jarchow v. Pickens*, 51-381; *Rand v. Barrett*, 66-731.

104. Where, at the time of the acquisition by the tenant of title to chattel property used by him upon the leased premises, the landlord had notice of a mortgage thereon, *held*, that his lien for rents was inferior to the lien of the mortgage: *Perry v. Waggoner*, 68-403.

105. Where a chattel mortgage was executed by the tenant during the term of the lease, and afterward, before the expiration of the term, a new lease was executed covering the remainder of the term and an additional period, *held*, that for rent accruing during the unexpired term of the old lease, the landlord's lien remained paramount to the chattel mortgage: *Rollins v. Proctor*, 56-326.

106. A landlord cannot claim a lien prior to that of a mortgage, where he did not at the time of the execution of the mortgage have a subsisting contract by virtue of which the rent claimed was to accrue: *Thorpe v. Fowler*, 57-541.

107. The fact that the landlord consents to the substitution as lessee of a party who has been guarantor of a note of the first lessee, secured by chattel mortgage on the property

prior to the landlord's lien, such mortgage appearing to be canceled, but being in fact the property of the guarantor who has paid it, will not entitle him to priority over such mortgage: *Rand v. Barrett*, 66-731.

108. A landlord cannot, by collusion with the tenant and antedating the lease, render his lien prior to that of a deed of trust previously executed upon the tenant's property: *Grey v. Hudson*, 5-554.

109. **Following property into hands of purchaser:** A lien exists upon crops raised by the tenant, and such crops may be followed by the landlord into the hands of the purchaser: *Holden v. Cox*, 60-447.

110. The lien of the landlord can be enforced against a purchaser from the tenant, of property which in the ordinary course of business of the tenant is kept for use and not for sale, such as the team of horses used in cultivating a farm: *Richardson v. Petersen*, 58-724.

111. Where it appeared that the property of the tenant was purchased from him at a time when he was not in arrears for rent, and when he was not, in fact, upon the premises, although he had been there before, and there was no evidence of fraudulent purpose or knowledge on the part of the purchaser, who paid a consideration, *held*, that he took the property free from the landlord's lien: *Nesbitt v. Bartlett*, 14-485.

112. In case of a stock of goods kept for sale, the lien is upon the stock *en masse* and not in detail, and does not attach to such goods as are sold in the ordinary course of business: *Grant v. Whitwell*, 9-152; *Gilbert v. Greenbaum*, 56-211.

113. **When the lien attaches:** The lien of the landlord is a security existing beforehand for the payment of the rent as it comes due. It attaches at the commencement of the lease or when the property is brought on the demised premises, and not simply on the commencement of an action or on maturity of the rent: *Grant v. Whitwell*, 9-152; *Carpenter v. Gillespie*, 10-592; *Doane v. Garretson*, 24-351; *Gilbert v. Greenbaum*, 56-211.

114. **For entire term:** Under the statute the landlord acquires a lien for the rent of the entire term from the commencement of the lease upon all the property of the tenant then upon the premises, and upon all other



Nature of the right.—Revocation.—Possession.

attachment, the party whose property is seized is entitled to recover the damages sustained: *Harger v. Spofford*, 46-11.

LIBEL.

See SLANDER AND LIBEL.

LICENSE.

License to mine, see, also, MINING.

As to licenses constituting EASEMENTS, see that title.

1. **Nature of the right:** A mere license or privilege to use property for a particular purpose, with the option of surrendering it at any time, does not constitute an interest in real property, but is personalty: *Melhop v. Meinhardt*, 70—.

2. **Revocation:** A parol license to work a mineral vein cannot be arbitrarily revoked by the licensor without cause or notice, when the licensee is in possession and has expended money or labor under the license; but where the license has not been acted upon, it may be countermanded: *Upton v. Brazier*, 17-153.

3. A parol license to mine is valid and can only be terminated by compensation to the licensee or the notice necessary to terminate the tenancy at will. It is good as against a subsequent lessee or licensee with notice: *Harkness v. Burton*, 30-101.

4. Where a party has, under a parol license, made improvements and performed services, he is entitled to six months' notice to quit, before his license can be revoked: *Bush v. Sullivan*, 3 G. Gr., 344.

5. When a licensee has acted under the authority conferred and incurred expenses in the execution of it, equity regards it as an executed contract and will not permit it to be revoked: *Cook v. Chicago, B. & Q. R. Co.*, 40-451.

6. While it is held in this as in some other states that a license under some circumstances is not revocable, yet such cases are where the licensee has gone upon the ground and expended money thereon in doing the things which he was licensed to do. Where the licensee had done nothing except to stake out land for a building, etc., held, that the license was revocable, even though the licensee had purchased also a lot adjoining the land on which the license was granted,

with the presumed intention of using it in connection therewith: *Kipp v. Coenen*, 55-63.

7. **Possession:** A parol license to mine, under which the licensee enters into and holds possession, and which is established also by the licensor's testimony, is valid under the statute of frauds, but it is otherwise if possession is not taken under and by virtue of the license: *Anderson v. Simpson*, 21-399.

8. Possession of a licensee as well as that of a lessee is that of the landlord: *Keokuk & D. M. R. Co. v. Lindley*, 48-11.

9. **Not exclusive:** A simple parol grant to one person of the privilege of mining upon the land of another will not, unless clearly expressed or necessarily implied, be held to be exclusive: *Upton v. Brazier*, 17-153.

10. **Cutting timber:** Where defendant gave to plaintiff the right to cut trees on the land of the former and make staves therefrom, in consideration of an agreed price per thousand, held, that the title passed from the time of cutting the timber, although the purchase money was not paid, the effect of the contract being to give the purchaser a credit as to the purchase money until the number could be estimated: *Mohn v. Stoner*, 14-115.

11. In contracts for the sale of standing timber to be taken off within a given time, the purchaser merely acquires a right of entry during the time specified. In such a contract time enters into the consideration, and when it expires the rights of the purchaser are concluded and he cannot afterwards enter: *Sanders v. Clark*, 23-275.

12. While a court of equity might, upon a showing of good cause for failure to remove the timber, reasonably extend the time stipulated, the fact that the purchaser, after executing the contract, entered into the military service, will not constitute such cause: *Ibid.*

LIMITATION OF ACTIONS.

I. GENERAL PRINCIPLES; CONSTRUCTION AND EFFECT OF THE STATUTE; HOW PLEADED.

II. WHEN THE STATUTORY PERIOD COMMENCES TO RUN.

a. *In general.*

b. *In cases of fraud or mistake.*

c. *In cases of mutual account:*

In actions to recover REAL PROPERTY, see that title.

III. WHEN THE STATUTORY BAR BECOMES COMPLETE.

a. *In general.*

b. *In case of minors, insane persons, etc.*

c. *In case of non-residents, persons in military service, etc.*

IV. COMMENCEMENT OF ACTION IN PROPER TIME.

V. REMOVAL OF BAR BY ADMISSION OR NEW PROMISE.

VI. PERIOD OF LIMITATION IN PARTICULAR CASES.

As to limitation of time for appointment of administrator, see ESTATES OF DECEDENTS, §§ 4-7.

As to limitation of time for filing claim against an estate, see ESTATES OF DECEDENTS, §§ 169-198.

As to limitation of time for bringing action to attack a guardian's or administrator's sale, or a tax sale, see GUARDIANSHIP, §§ 63-68; ESTATES OF DECEDENTS, §§ 260, 261; TAXATION, XII.

I. GENERAL PRINCIPLES; CONSTRUCTION AND EFFECT OF THE STATUTE; HOW PLEADED.

1. **In equitable actions:** The statute of limitations applies equally to actions at law and suits in equity: *Phares v. Walters*, 6-106; *Relf v. Eberly*, 23-467; *Williams v. Allison*, 33-278; *District T'p v. District T'p*, 62-30.

2. Under earlier statutory provisions, *held*, that in case of concurrent jurisdiction, courts of equity equally with courts of law are bound by the statute and may, therefore, in such cases, be said to act in obedience thereto, while in cases where the jurisdiction is not concurrent, courts of equity apply the statute in many, and indeed in most, instances, by way of analogy to the law: *Wright v. Leclair*, 3-221.

3. While equity will usually, in analogy to the law, follow the statute of limitations, it will not in any case cut off rights of parties to relief within a shorter time than that prescribed by the statute, unless the other party is shown to have been prejudiced by delay in some manner which would render it inequi-

General principles.

tional as impairing the obligation of existing contracts: *Parsons v. Carey*, 28-431; *Harren-court v. Merritt*, 29-71; *Campbell v. Long*, 20-382.

And see CONSTITUTIONAL LAW, §§ 140-142.

14. The statute of limitations pertains to the remedy and not to the right of action or validity of the cause of action, and even though it prevent action being brought on a cause of action such as a judgment which is still valid and enforceable in another state, it does not conflict with the provisions of the constitution of the United States, securing in each state full faith and credit to the judicial provisions of other states: *Meek v. Meek*, 45-294.

15. Changes in statutes of limitation take effect on antecedent contracts: *Sleeth v. Murphy*, Mor., 331.

16. The Code being a re-enactment of the provisions of the Revision as to limitations of actions, the time which had run at the date when the Code was enacted is to be added to the time running under the Code in making the period of limitation. To construe the Code as extending the period of limitation, and allowing the full period in each case after its taking effect as to causes of action already existing, would affect rights already accrued, contrary to the provisions of Code, § 50, with relation to its taking effect: *McDonald v. Jackson*, 55-37.

17. The statute of limitations applies to the remedy only, and if there is a cause of action existing, not barred when the statute takes effect, the statute applies to it, even though it is not made retrospective in its operations: *Higgins v. Mendenhall*, 42-675.

18. Before the bar of the statute is complete, the legislature may by statute enlarge the period: *Harwood v. Quinby*, 44-385.

19. Effect of repeal: Where a statute of limitations is unconditionally repealed without any saving clause, the rights of parties are to be adjudicated in the same manner as if the act had never existed unless the period of limitation under the previous statute has already expired, in which case the repeal of the previous act will not revive the right of action: *Norris v. Slaughter*, 1 G. Gr., 338.

20. While the legislature has the power to enlarge the time for the statute to run, or to repeal a statute which has run for a part of

the time prescribed, and give to past creditors the same length of time to prosecute their claims as future creditors, it cannot revive any right of action already barred: *Ibid.*

21. The repeal or amendment of the statute of limitations cannot act retrospectively so as to disturb rights acquired thereunder and deprive parties of protection to which they were fully entitled under a prior enactment. Actions which have become barred are not revived upon the repeal of the statute of limitations: *Thompson v. Read*, 41-48.

22. Where a previous statute was repealed and a new one enacted without any saving clause, *held*, that in computing the statutory period on an action arising before the taking effect of the new law, the period of time which had elapsed prior to the taking effect of the new law could not be included: *Ibid.*; *Forsyth v. Ripley*, 2 G. Gr., 181; *Wile v. Matherson*, 2 G. Gr., 184.

23. Where the statute reduced the period of limitation as to existing causes of action, *held*, that the new period for such actions was not to exceed the whole period allowed by the new statute, nor the period which would have been allowed under the old. (Overruling *Bennett v. Bevard*, 6-82; *Phares v. Walters*, 6-106); *Wright v. Keithler*, 7-92; *Montgomery v. Chadwick*, 7-114; *Campbell v. Long*, 20-382.

24. And further as to the effect of the provisions of the Code of '51 as to causes of action not already barred, see *Kilbourne v. Lockman*, 8-380.

25. Effect: The fact that the period of limitation has expired as against a note will not support an averment of payment. A barred debt is not to be regarded as extinguished: *Austin v. Wilson*, 46-362.

26. Satisfaction of a judgment will be presumed after a lapse of twenty years, subject to explanation in regard to the non-residence of defendant. Within the twenty years, however, the jury may be authorized to presume payment from circumstances but not from the lapse of time alone: *Hendricks v. Wallis*, 7-224.

27. Statutes of limitation do not affect the validity of the cause of action, and the fact that a judgment is still valid and may be enforced in the state where rendered does

not prevent its being barred by the provisions of our law, notwithstanding the requirements of the constitution of the United States, that full faith and credit shall be given to the judicial proceedings, etc., of another state: *Meek v. Meek*, 45-294.

28. In case of surety: A claim which is, by the statute of limitations, barred as against the principal debtor, is by reason thereof barred also as against the surety, whether the statutory period as to the surety has expired or not: *Auchampaugh v. Schmidt*, 70—.

29. The same period of limitation applies in an action against sureties upon an official bond that would apply in an action against the principal, and it is immaterial that judgment against the principal has already been obtained: *Wadsworth v. Gerhard*, 55-367.

30. The fact that the principal debtor is discharged by the statute of limitations does not prevent a surety on the original indebtedness being held on a new promise or admission: *Collins v. Bane*, 34-385.

31. Counter-claim: By statutory provision a counter-claim may be pleaded as a defense to any cause of action, notwithstanding such counter-claim is barred, if it was the property of the party pleading it at the time it became barred, and was not barred at the time the claim sued on originated. (Code, § 2540): *Allen v. Maddox*, 40-124.

32. Any counter-claim which is authorized by statute (Code, § 2659) may be pleaded as a counter-claim, notwithstanding it is barred, and the statutory provision in that respect is not limited to counter-claims which were strictly so named under previous statutes: *Folsom v. Winch*, 63-477.

33. No recovery can be allowed on a counter-claim, which is thus interposed although barred, for any amount over and above the amount of plaintiff's claim, such being the express statutory provision: *Ibid.*

34. Special statutes of limitation with reference to the time of filing claims against an estate do not apply to an offset interposed by a person who is sued by an administrator to recover a debt due from him to the estate: *Ware v. Howley*, 68-633.

35. A claim against one who is an heir may be properly set up against him in settling his distributive share of the estate,

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General principles.—When statutory period commences to run.—In general.

44. In the absence of statutory provision the statute of limitations must be pleaded, and cannot be raised by demurrer: *Sleeth v. Murphy*, Mor., 321.

45. Where a special form of action is provided by statute, and it is also provided that it shall be pursued within a limited time, such limitation need not be pleaded, and the objection may be made by motion to dismiss the action if brought after the time limited: *Newcomb v. Steamboat Clermont*, 3 G. Gr., 295.

46. While at common law the defense of the statute of limitations could not be made by demurrer, but must be set up by way of answer or plea, the rule was otherwise in chancery: *Phares v. Walters*, 6-106.

47. And where it appeared on the face of a bill in equity that the action was barred by limitation, such objection might be raised by demurrer: *Pierson v. David*, 1-23.

And see PLEADINGS, §§ 698-703.

48. Matter removing the bar: Plaintiff may in his petition allege matters displacing the apparent bar of the statute: *Petchell v. Hopkins*, 19-581.

49. Thus, under a former statutory provision by which plaintiff might call defendant as a witness to prove a cause of action barred by the statute, *held*, that plaintiff must in such a case, if his cause of action was apparently barred, state in his petition that he intended to rely upon defendant's testimony or his petition would be subject to demurrer: *Newfield v. Blawn*, 16-297.

50. Who may take advantage of: Where land is sold at foreclosure sale for an indebtedness represented by a second note secured by mortgage, the purchaser may plead the statute of limitations in an action in which it is sought to subject the land to the payment of the first note secured by the same mortgage. The original maker of the notes and mortgage being a party to the action, but no judgment being asked against him, cannot make admissions in the pleadings, such as will defeat the defense of the statute of limitations as to such purchaser: *Day v. Baldwin*, 34-880.

51. Where a devise is made upon condition that the devisee pay all the debts enforceable against testator's estate, the period

of limitation as against such devisee who accepts under the will is not extended: *Huston v. Huston*, 37-668.

II. WHEN THE STATUTORY PERIOD COMMENCES TO RUN.

a. In general.

52. When cause of action accrues: The statute of limitations begins to run from the time the cause of action accrues. After the statute once begins to run, no subsequent disability will suspend it unless the statute itself provides therefor. Before a cause of action will accrue or the statute begin to run, there must exist a cause of action and a person authorized to prosecute it. So the statute will not run against a cause of action accruing to the estate of a decedent until there is a personal representative in whose name it may be prosecuted: *Sherman v. Western Stage Co.*, 24-515, 553.

And see further as to this class of cases, *infra*, §§ 222, 223.

53. It is not the date of a promise, but the time when the cause of action accrues thereon, which determines when the statutory period commences to run: *Walker v. Lathrop*, 6-516.

54. The statute of limitations commences to run when the cause of action has fully accrued: *Eaker v. Johnson County*, 43-645.

55. Where it was agreed between the heirs of an estate, that, upon the setting aside of the will, a certain amount should be allowed to two such heirs upon final distribution of the property of the estate, *held*, that the statute of limitations against the claim of the heirs for the amount thus agreed upon did not commence to run until the final distribution of the property: *Rogers v. Gillett*, 56-266.

56. Where a person indebted to an estate made certain payments, and afterwards failed to set such payments up in defense to the action in behalf of the estate by reason of an arrangement for a compromise, and judgment was rendered against him for a larger amount than his indebtedness, and thereafter the terms of the compromise were violated by the opposite party, *held*, that the debtor's cause of action to recover payments not set up by him in the action accrued only

When the statutory period comm

from the time of the violation of the agreement for the compromise: *Savery v. Sypher*, 39-675.

57. On written contract to convey: In an action to recover the part of the purchase money paid, in case of breach of written contract to convey, the statute commences to run from the time of demand and refusal to convey, and not from date of payment of the money, such action not being for money had and received: *Deming v. Haney*, 23-77.

58. No time for the performance of a contract to convey being specified, it is implied that the performance shall be made within a reasonable time, and the statute of limitations will commence to run from that time: *Harbour v. Rhinehart*, 39-672.

59. Under continuous contract: When labor is performed during a continuous period under one contract, the statute of limitations begins to run from the completion of the work: *Shorick v. Bruce*, 21-305.

60. It must be presumed that it is the universal custom to render compensation for personal services at intervals, whatever may be the time of employment. But unless the custom is known to exist in case of expenses and services in support of a child or other person running through a long series of years, if the contract fixes no time for its termination, the law will presume that, unless terminated, the contract continues to run so long as the services are rendered, or in case of a child until majority, and the amount of charges for such services and expenses will be deemed entire and not from year to year: *Carroll v. McCoy*, 40-38.

61. In case of partnership: The statute of limitations does not begin to run against an action for settlement of a partnership until the partnership is dissolved, or until sufficient time has elapsed after demand for accounting and settlement: *Richards v. Grinnell*, 63-44.

62. In case of surety: The payment of a judgment by a surety gives rise immediately to a right of action against the principal debtor for the money so paid, and the fact that such payment is made upon the mere indefinite promise by the principal to repay at some future time will not suspend the surety's right of action and the running of

When the statutory period commences to run.—In general.

which breach is complete without the demand, the statute will commence to run from the time that demand might have been made: *Prescott v. Gonser*, 84-175.

70. A person cannot postpone the operation of the statute of limitation by failing to make a demand where the demand is all that is necessary to fix the liability of the other party: *Lower v. Miller*, 66-408.

71. When the right of action depends on a demand, such demand must be made within the statutory period of limitation after the right to make it accrues, unless there are special circumstances excusing the party from so doing; otherwise the demand will be considered as not made within a reasonable time: *Ball v. Keokuk & N. W. R. Co.*, 62-751.

72. Therefore, *held*, that where it appeared that a railway company had a contract with a land-owner by which the former was entitled to a deed for a right of way upon demand as soon as the road was located, and no demand was made until the expiration of ten years after the right to make it had accrued, the right of the company to a deed had become barred: *Ibid*.

73. A revivor of a judgment by *scire facias* is not a new judgment against which the statute of limitations commences to run from its rendition, but the statute continues to run against the judgment revived from the time of its original rendition: *Meek v. Meek*, 45-294.

74. Claim against township or school district: Where a township clerk paid an order which should have been allowed by the township trustees at the first settlement thereafter, *held*, that the statute of limitations, as against an action of *mandamus* to enforce the allowance of the claim, commenced to run from that time, and not from the time of subsequent demand: *Dewey v. Lins*, 57-235.

75. The statute of limitations commences to run against warrants drawn by a district township on its own treasurer, at least from the time of their presentation for payment, although such payment is refused only for the reason that there are not funds on hand at the time: *Carpenter v. District T'p*, 58-335.

76. Option as to payment: Where the debtor has the option to pay the debt at any

time before a certain date, the cause of action does not accrue until the expiration of such time: *Creighton v. Rosseau*, 1-133.

77. Against sheriff for right of way damages: A right of action against a sheriff for money paid to him in pursuance of an assessment for damages for right of way accrues at the expiration of the thirty days allowed for appeal from such assessment: *Lower v. Miller*, 66-408.

78. Where a right of action against a sheriff has accrued during his first term, and he is re-elected for a second term, such re-election does not stop the running of the statute as to such money. It cannot be claimed that he received at the beginning of the second term from himself an amount for which he was liable during his first term: *Ibid*.

79. Void county bonds: Where, by reason of an adjudication that bonds issued in payment of stock in a railroad company were void, a county became entitled to the return of such bonds, or damages on account of their having passed into the hands of innocent purchasers, *held*, that such right accrued when the bonds were declared void: *Wapello County v. Burlington & M. R. R. Co.*, 44-585.

80. On accommodation paper: A right of action in favor of the accommodation maker of paper against the party accommodated only arises upon failure of the latter to pay the paper at maturity or to reimburse the maker in case he is compelled to pay it: *Jefferson County v. Burlington & M. R. R. Co.*, 66-385.

81. But where a county issued negotiable bonds in aid of a railroad company which had passed into the hands of innocent holders, who could recover thereon although the bonds were in fact issued without authority, it being believed, however, at the time they were issued, by all parties, that they were valid, *held*, that the right of action of the county against the railway company to recover the amount of the liability thus improperly incurred in behalf of such company accrued at the time the bonds passed into the hands of the railway company, and the right of action was barred in five years thereafter: *Ibid*.

82. Against officer for taking improper bond: A cause of action against a clerk for

When the statutory period comm

taking a defective stay bond does not accrue until plaintiff has been damaged, that is, until a right of action has accrued on the bond: *Steel v. Bryant*, 49-116.

83. Therefore, an action by a clerk against his deputy, for default of the latter in approving such bond, does not accrue until the same time: *Moore v. McKinley*, 60-367.

84. **Against trustee:** The statute of limitations will run in favor of the trustee of a resulting or constructive trust, from the time he disowns the trust and claims title in his own right to the trust property: *Otto v. Schlapkahl*, 57-226; *Gebhard v. Sattler*, 40-152.

85. The conveyance of the trust property by the trustee holding under a resulting trust by a deed in which he asserts that he is the absolute owner, followed by possession of his vendee, is sufficient to constitute a denial of the trust: *Peters v. Jones*, 35-512.

86. The statute of limitations will limit and control the right of action in equity in cases of implied or resulting trusts: *Harbour v. Rhinehart*, 39-672.

87. A contract to make a deed to a certain piece of land, provided the grantor should get a pre-emption on the same, "in the penal sum of two hundred dollars," held not to constitute a case of direct or express trust which in equity has been considered not to be barred by the statute of limitations. Even if in such case the purchase money has been paid, the trust is still one raised by implication and therefore within the statute: *Johnson v. Hopkins*, 19-49.

88. Although the statute of limitations will not run against an express trust, yet a right of action accrues whenever there is a breach of the trust, and the statute begins then to run, at least if the breach is known to the beneficiary: *Wilson v. Green*, 49-251.

89. **In case of continuing injury:** Where the injury is such that it follows as the result of natural causes in consequence of one wrongful act, the action for all the damages resulting therefrom accrues at the time of the doing of the act, and the statute of limitations then commences to run: *Powers v. Council Bluffs*, 45-652.

90. Where plaintiff alleged damages resulting from the diversion of a stream of water in the negligent construction of de-

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In cases of fraud or mistake.

fact paid, and thereupon the holder of the legal title was required to repay to the holder of the tax title all taxes paid by the latter on the land, *held*, that such obligation to repay being a mere equity, incident to the relief granted, was not affected by the statute of limitations, and should not be limited to taxes paid within five years: *Harber v. Sexton*, 66-211.

As to recovery of taxes paid by mistake, see *infra*, §§ 119, 120.

Adverse possession: As to what constitutes sufficient adverse possession to cause the statute of limitations to commence to run against an action for the recovery of real property, see REAL PROPERTY, 21-109.

Action against stockholder: As to when an action against a stockholder by a creditor of the corporation to enforce payment of his claim becomes barred, see CORPORATIONS, § 194.

b. *In cases of fraud or mistake.*

97. Ignorance of claim: When no fraud is charged, ignorance of a right will not prevent the operation of the statute of limitations against an action based thereon: *Campbell v. Long*, 20-382; *Brown v. Brown*, 44-349.

98. The fact that the extent of injury or damage is not fully known at the time the cause of action therefor accrues does not postpone the time of commencement of the statutory period: *Gustin v. Jefferson County*, 15-158; *Steel v. Bryant*, 49-116.

99. Where a judgment plaintiff failed to credit a payment made on the judgment, and afterward, on execution, recovered the whole amount thereof, *held*, that the action to recover back the amount of the payment was barred in five years, although the judgment defendant was not aware of the failure to credit the payment until the expiration of the five years: *Shreves v. Leonard*, 56-74.

100. A cause of action by one county against another for support of a pauper arises when the support is furnished, and ignorance of the fact as to the proper place of settlement of the pauper will not delay the opera-

tion of the statute as against such claim: *Washington County v. Mahaska County*, 47-57.

101. A party who collects the amount due on a note given as collateral security becomes liable to pay over the excess beyond the amount of indebtedness at the time of the receipt of the money, and the cause of action commences to run at that time. A failure to pay in such a case cannot be deemed a fraud, so as to prevent the running of the statute until the receipt of the money becomes known to the party entitled thereto; *Brunson v. Ballou*, 70—.

102. Fraudulent concealment of a cause of action by the party against whom it exists, preventing the opposite party from acquiring knowledge thereof, will prevent the statute from commencing to run until the cause of action was or might have been discovered, and this is true irrespective of the statutory provision as to the cases of fraud and mistake: *District T'p v. French*, 40-601; *Findley v. Stewart*, 46-655.

103. Statutory provision;¹ cases cognizable in chancery: A cause of action on account of fraud such as was heretofore cognizable in chancery commences to run from the time of the discovery of the fraud: *Cowin v. Toole*, 81-513.

104. The fraud contemplated in this statutory provision is only such as was heretofore solely cognizable in chancery: *Gebhard v. Sattler*, 40-152; *Brown v. Brown*, 44-349; *Phoenix Ins. Co. v. Dankwardt*, 47-432.

105. Where the fraud is not of that character, but the plaintiff's remedy is concurrent, the exception here made does not apply: *Relf v. Eberly*, 23-467; *McGinnis v. Hunt*, 47-668.

106. An action to rescind a contract for fraud, and set aside a deed and restore the parties to their rights prior to the fraud, is an action solely cognizable in a court of chancery, and the statute begins to run with the discovery of the fraud: *Relf v. Eberly*, 23-467.

107. Where plaintiff dismissed an action on a bond for specific performance upon defendant's testimony that a subsequent con-

¹ Code, § 2530. In actions for relief on the ground of fraud or mistake, and in actions for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake, or trespass complained of shall have been discovered by the party aggrieved.

In cases of fraud or mistake.

veyance to a third person was without notice of plaintiff's rights, and subsequently learned that such testimony was false and the pretended conveyance was fraudulent, held, that the statute of limitations as against an action for relief from such fraud commenced to run from the discovery thereof, although the action on the bond was barred: *Muir v. Bozarth*, 44-499.

108. In actions brought by an assignee in bankruptcy to recover damages for fraud, the limitation of two years imposed by the statutes of the United States upon such actions commenced to run when the fraud is discovered: *Clews v. Traer*, 57-459.

109. An action for money paid by mistake of one party and fraudulently received and retained by the other is not an action for relief on the ground of fraud "in a case heretofore solely cognizable in a court of chancery," and therefore is barred in five years irrespective of the time of discovery of the fraud or mistake: *Higgins v. Mendenhall*, 51-135.

110. The cases of mistake referred to in the statutory provision are not limited to those cognizable solely in equity, but include such as are cognizable at law as well: *Higgins v. Mendenhall*, 42-675; *McGinnis v. Hunt*, 47-668; *Higgins v. Mendenhall*, 51-135.

111. Allegations; evidence; burden of proof: In an action for relief on the ground of fraud, defendant pleading the statute of limitations must show that plaintiff had knowledge of the fraud more than five years before the action was brought: *Baldwin v. Tuttle*, 23-66; *Harlin v. Stevenson*, 30-371.

112. But the statute commences to run not merely from the actual discovery of the fraud, but from the time when it might, by the use of diligence, have been discovered: *Humphreys v. Matoon*, 43-556.

113. The recording of a deed is sufficient notice of any fraud in its execution to cause the statute to begin to run against an action based upon such fraud: *Bishop v. Knowles*, 53-268.

114. Where a sale is made under the provisions of a deed of trust, which is void by reason of insufficiency of notice, and that fact appears upon the face of the conveyance.

¹ Code, § 2531. When there is a continuous open current have accrued on the date of the last item therein as proved

In cases of mutual account.— When statutory bar complete.

closed by settlement or otherwise, and is a running, connected series of transactions. Where there was a hiatus of two years, followed by an item of a different character than those before, *held*, that the last item was not properly a part of the same account: *Tucker v. Quimby*, 87-17.

128. A claim for work performed at different periods of time, under separate and distinct contracts, is not a continuous, open, current account: *Shorick v. Bruce*, 21-305.

124. Where the indebtedness was accruing daily, monthly or yearly for items of board, rent, etc., *held*, that it would constitute a current account: *Moser v. Crooks*, 32-172.

125. And so *held* in case of a charge for keeping and providing for another continuously: *Wendeling v. Besser*, 31-248.

126. Though a special contract be made as to a specific piece of work, the price thereof may still be a proper item of account: *Mills v. Davies*, 42-91.

127. The fact that no date, or an incorrect date, was fixed to the account, or that it was not directly charged to any one, *held* not to prevent the provisions of this section from applying: *Tubbs v. Maquoketa*, 82-564.

128. In a case not involving the construction of this section, *held*, that an intervening statement of a balance did not prevent subsequent items from forming a portion of the same continuous account: *Lamb v. Hanne-man*, 40-41.

129. An interval of one year and nine months between two of the consecutive items of an account, both of which were on the credit side, *held* not sufficient to show such break in the account or cessation of dealing as to cause the statute of limitations to commence to run, it appearing that all the items had relation to the same open and continuous transaction between the parties: *Keller v. Jackson*, 58-629.

130. Where, after the conclusion of the debit items of an account, the payment of the same was assumed by a third person who afterwards made payments thereon, *held*, that such payments were not to be treated as items of the account, and the running of the statute was determined by the date of the last debit item: *Hammond v. Hale*, 61-88.

131. Under a statute requiring an action to foreclose an account for a mechanic's lien

to be brought within one year from the time the payment should have been made, *held*, that no item of the account of charges for which the lien was claimed should be considered as due before the date of the last item: *Merchand v. Cook*, 4 G. Gr., 115.

132. The claim of a public officer for compensation is not in the nature of an open account. Each one of several terms of office is to be deemed a separate employment: *Griffin v. Clay County*, 63-413.

133. Where, in such a case, plaintiff had confessed that his account was made up of separate causes of action, amending his petition and setting out the same in separate counts, *held*, that he could not afterwards, for the purpose of defeating the statutory bar, claim that they were parts of an open account: *Ibid*.

134. Under a statute which authorized defendant to be called as a witness to prove a cause of action which was barred by the statute, *held*, that an account apparently barred was admissible for the purpose of forming a foundation to remove the bar by calling defendant as a witness: *Thorn v. Moore*, 21-285.

III. WHEN THE STATUTORY BAR BECOMES COMPLETE.

a. In general.

135. The time during which a party is prevented by injunction from enforcing a judgment in his favor should be excluded in calculating the period of limitation, both as to the person enjoined and those claiming under him: *Tredway v. McDonald*, 51-663.

136. Where the statute has commenced to run against a cause of action, it will not be suspended on account of the death of the party in whose favor the cause of action has existed and the minority of the persons to whom his rights have been passed: *Bishop v. Knowles*, 53-268.

137. Where plaintiff, within one year after attaining his majority, brought action to redeem from a tax sale made during his minority, claiming title by virtue of a bond for a deed executed more than ten years previously, *held*, that the right which the grantor in the title bond would have to interpose the defense of the statute of limitations, against any

In case of minors, insane per

claim of plaintiff thereunder, passed to defendant by the tax deed and might be interposed by him against plaintiff's action to redeem: *Byington v. Stone*, 51-317.

b. *In case of minors, insane persons, etc.*¹

138. Minors: By the statutory provision, action for the recovery of real property must be brought by a minor within one year after attaining majority, when the ten years' limitation expires during the year or during minority. If the limitation runs for more than a year after majority, the minor's rights are the same as those of an adult: *Campbell v. Long*, 20-282.

139. The statute of limitations will not bar an action by a minor brought before the termination of his minority: *McGinnis v. Edgell*, 39-419.

140. The statute commences to run during infancy, but the action is not barred until at least one year after majority: *Mathews v. Stephens*, 39-279.

141. Where the minor owns as tenant in common with others, the fact that his claim or right is kept alive by this exception in his favor will not keep alive the claims of his cotenants: *Peters v. Jones*, 35-512.

142. Under a statute extending in favor of a minor the time for redeeming from a tax sale to a year "after such liability is removed" (Code, § 892), held, that such disability was removed by death and the redemption must be made within the year following and not afterwards: *Gibbs v. Sawyer*, 48-443.

143. Insane persons: Under the Revision, there was no such exception in favor of insane persons, nor was there at common law: *Shorrick v. Bruce*, 21-305.

c. *In case of non-residents or persons in military service.*

144. Time of non-residence not computed: Under the statutory provision (Code, § 2533) that the time during which a defendant is a non-resident of the state shall not be included in computing the statutory periods

¹ Code, § 2535. The times limited for actions herein, except in favor of minors as defined by this Code, and persons from and after the termination of such disability within

In case of non-residents or persons in military service.

a mere temporary absence, during which the family of the party remained at his usual place of abode, and service of notice might have been had upon him by leaving a copy with some member of such family: *Penley v. Waterhouse*, 1-498.

151. The term beyond seas, used in a previous statute as indicating an exception to the running of the statute, was held to be considered as beyond the limits of the United States, and not merely as beyond the limits of the state: *Darling v. Meachum*, 2 G. Gr., 602.

152. If, by reason of non-residence of the debtor, an action on a note is not barred, neither is the action to foreclose a mortgage securing the same: *Clinton Co. v. Cox*, 37-570.

153. Evidence of non-residence; burden of proof: Where the only evidence of absence from the state was that defendant went east, held, that non-residence did not sufficiently appear in order to defeat the defense: *Tremaine v. Weatherby*, 58-615.

154. Where a person leaves the state in the employ of the general government, with the intention of returning when such employment shall cease, but the time of his returning is indefinite, and he retains no domicile in the state, he is to be deemed a non-resident: *Hedges v. Jones*, 68-573.

155. When a note shows on its face that it is barred by the statute of limitations, and defendant's answer denies the indebtedness and interposes the plea of the statute, judgment should not be rendered against defendant by default without proof of his not having been a non-resident of the state through the period of limitation: *Smith v. Gage*, 31-27.

156. It appearing that defendant was not a resident of the state where a judgment was recovered against him in 1850, nor subsequently when revivors thereof were had, and that he resided in this state in 1873, at the time of commencement of suit against him upon such judgment, held, that under the facts a presumption arose that he had resided here continuously from a period anterior to the rendering of the judgment in 1850: *Meek v. Meek*, 45-294.

157. When defendant pleading the statute of limitations shows when the statute commenced to run, the burden of proving an exception by reason of non-residence is upon the party relying thereon: *Evans v. Montgomery*, 50-325.

158. Heirs of a person dying in this state and who have themselves been residents of the state cannot be presumed in the absence of evidence to have afterwards been non-residents: *Laird v. Kilbourne*, 70—.

Further as to RESIDENCE, see that title.

159. Bar in foreign jurisdiction:¹ If the cause of action did not arise in this state, the fact that defendant resided here before going to the state where the cause of action became barred, will not prevent his taking advantage of such bar in a subsequent suit here: *Lloyd v. Perry*, 32-144.

160. The use of the words "has previously resided" does not imply that the defendant interposing the plea of bar must at such time be a resident of this state. That plea may be interposed by either a resident or a non-resident: *Lebrecht v. Wilcoxon*, 40-93.

161. Aside from statute the rule is that a debt barred by the statute of the state in which it was contracted is not barred by the laws of another state in which suit may be brought. To enable a party to avail himself of the provisions of our statute to the contrary, he must show that he has, previous to his removal to this state, resided in another state by the laws of which the cause of action has been fully barred: *Sloan v. Waugh*, 18-224; *Petchell v. Hopkins*, 19-531.

162. A party must rely upon either the domestic or foreign bar. He cannot weld the time which elapsed before he came to this state to that which elapsed thereafter, in order to obtain the years requisite to constitute a bar under our statute: *Sloan v. Waugh*, 18-224.

163. As against an indebtedness contracted while defendant was a resident of another state, the statute only commences to run when he becomes a resident of this state (unless the claim was then barred as provided in Code, § 2534): *Petchell v. Hopkins*, 19-531.

164. It will not be presumed that because

¹ Code, § 2534. When a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter; but this section shall not apply to causes of action arising within this state.

Persons in military service.—Comme

notes are barred by the law of the state where the defendant has previously resided a mortgage given to secure them is also barred thereby: *Gillett v. Hill*, 32-220.

165. Before the change of the statute in 1870, which added the last sentence to this section, *held*, that the provisions as to the bar of a foreign statute fully completed were applicable to actions arising within the state, if they were general in their nature, so that they might have been prosecuted where defendant resided: *Davis v. Harper*, 48-513.

166. And *held*, also, that where a cause of action arising in this state had thus become barred under the laws of a foreign state, the subsequent enactment of the statutory provision of 1870 did not remove such bar: *Thompson v. Read*, 41-48.

167. A cause of action for the recovery of taxes paid by a person claiming to be the owner of real estate, but against the one subsequently adjudged by the owner thereof, is a cause of action arising in this state under the statutory provision: *Bradley v. Cole*, 67-650.

168. Persons in military service: Under previous statutes exempting the property of volunteers in the United States military service from execution or attachment, providing that the statute of limitations should not run in favor of such volunteer, *held*, that an action to enforce a mechanic's lien against the property of such volunteer did not commence to run until after his discharge from the service: *Edwards v. McCaddon*, 20-520.

169. *Held*, also, that such provision did not apply in case of action by a soldier against one not in the military service: *Hulbert v. Hopkins*, 33-123.

170. The statutory provisions applied in a particular case: *Gray v. Spanton*, 35-508.

IV. COMMENCEMENT OF ACTION IN PROPER TIME.

171. What deemed commencement of action:¹ Where the original notice was not served until a month after the petition was filed, *held*, that the court would presume the

¹ Code, § 2532. The delivery of the original notice to the person served immediately, which intent shall be presumed unless notice by another person, is a commencement of the action.

Commencement of action.—Removal of bar.

deemed commencement of the action for other purposes: *Parkyn v. Travis*, 50-436.

And see ORIGINAL NOTICE, §§ 58, 59.

178. **Amendment:** The filing of an amended petition, if the cause of action remains the same, does not affect the question as to whether the action is brought in time: *Cobb v. Illinois Cent. R. Co.*, 38-601, 626.

179. Where an action was commenced in the name of two parties as executors before the period of limitation had expired, but after the expiration of such period an amended petition was filed by one only claiming as sole heir, *held*, that as the amendment was allowed without objection, defendant could not claim that the action as made by amendment was a different one from that originally commenced: *Wade v. Clark*, 52-158.

180. An amendment to the petition claiming additional damages, and predicated upon the same cause of action on which the original petition was founded, may be interposed after the time for bringing action on the original cause of action has expired, provided that the action on which such amendment was filed has been brought within the proper time: *Cooper v. Mills County*, 69-350.

181. Where the original petition, although not stating all the facts necessary in law to enable plaintiff to succeed in the action, was not attacked by demurrer or motion, *held*, that the fact that the party afterwards filed an amendment thereto after the time when, but for the commencement of the original action, the statute of limitations would have barred the action, would not deprive plaintiff of the benefit of having brought his action within the proper time: *Myers v. Kirt*, 68-124.

182. **Renewal of action:**¹ This provision applies when no judgment on the merits has been rendered and another suit is brought on the same cause of action. If judgment on the merits is rendered in the first suit, it will bar a new one: *McDonald v. Jackson*, 55-37.

183. This section will not operate to extend the period of limitation where a condi-

tion precedent to the right to bring the action has not been complied with in proper time, for instance, the presentation of a claim to a board of directors: *District T'p v. District T'p*, 62-30.

184. Nor will this provision apply to dismissal of an action by plaintiff unless such dismissal is compulsory. Therefore, *held*, that where plaintiff voluntarily dismissed his action for the reason that he found that he could not obtain justice in the court in which the cause was pending, a new action brought by him after the expiration of the period of limitation, but within six months after the dismissal of the preceding action, was barred: *Archer v. Chicago, B. & Q. R. Co.*, 65-611.

185. Under this statutory provision the fact that the first suit was discontinued (under Code, § 2800), for failure of plaintiff's attorney to file the petition by the time fixed in the notice, constitutes such negligence as to prevent another suit on the same cause of action being brought after the expiration of the statutory period of limitation: *Clark v. Stevens*, 55-361.

V. REMOVAL OF BAR BY ADMISSION OR NEW PROMISE.²

186. **Original action revived:** The subsequent promise is to be considered as a waiver of the statute or the bar created by the statute: *Penley v. Waterhouse*, 8-418.

187. An admission or new promise may be made before the bar of the statute becomes complete as well as afterwards: *Ibid.*; *Lindsey v. Lyman*, 37-206.

188. A new consideration is not necessary to support it. The action should be brought on the original cause of action and not on such admission or new promise: *Frisbee v. Seaman*, 49-95.

189. Either an admission or new promise is sufficient. Both are not necessary: *Mahon v. Cooley*, 36-479; *Ayres v. Bane*, 39-518.

190. A new promise which operates to keep alive a debt will also keep alive the lien of a mortgage given to secure the same: *Clinton County v. Cox*, 37-570.

¹ Code, § 2537. If, after the commencement of an action, the plaintiff fail therein for any cause except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

² Code, § 2539. Causes of action founded on contract are revived by an admission that the debt is unpaid as well as by a new promise to pay the same. But such admission or new promise must be in writing, signed by the party to be charged thereby.

191. And an admission of the husband, without the wife's consent, will keep alive the lien of a mortgage given on the homestead to secure the debt: *Mahon v. Cooley*, 36-479.

192. A renewal by acknowledgment or new promise, made prior to the sale of the premises mortgaged to secure the debt so renewed, will be binding on the vendee thereof, and he cannot set up the statute of limitations against such mortgage: *Palmer v. Butler*, 36-576.

193. But it is otherwise if the renewal is made subsequently to the sale: *Day v. Baldwin*, 34-380.

194. Where a junior mortgage was taken while a senior mortgage was in existence and not barred by the statute of limitations, and the senior mortgage afterward became barred, but was subsequently revived by a new promise of the mortgagor to pay the debt, made while the junior mortgage was in process of foreclosure, *held*, that no equities having intervened in favor of junior mortgagee, the debt secured by the senior mortgage was still a prior lien to that of the junior mortgage: *Kerndt v. Porterfield*, 56-412.

195. What sufficient admission: An admission should not be excluded because made on Sunday: *Ayres v. Bane*, 39-518.

196. Partial payments and indorsements thereof on a promissory note are not sufficient to prevent the bar of the statute. The rule was different before the adoption of the statutory provision, but as the statute applies to the remedy, it is not unconstitutional as affecting contracts already made: *Parsons v. Carey*, 28-431; *Harrencourt v. Merritt*, 29-71; *Roberts v. Hammon*, 29-128.

197. An indorsement of part payment made on a note signed by the maker of the note does not constitute such admission that the debt is unpaid and a new promise to pay the same as is required to revive the debt: *Hale v. Wilson*, 70—.

198. Under the statute of Nebraska providing that part payment shall take the indebtedness out of the statute of limitations, *held*, that payment secured by enforcing the claim against the debtor's property by an action *in rem* without personal service on him was not sufficient to take the case out of the statute: *Thomas v. Brewer*, 55-227.

Removal of bar by admission or new promise.

tion will not make a new cause of action: *Cobb v. Illinois Cent. R. Co.*, 38-601.

206. Whether an admission would be good, if made to one not a party in interest or the agent of such party, *quære*: *Collins v. Bane*, 34-385, 389; *Palmer v. Butler*, 36-576.

207. But the admission need not show to whom it was made: *Mahon v. Cooley*, 36-479.

208. A writing admitting the debt proven to be by the party sought to be charged, but not signed by him, is not admissible, and the oral testimony of defendant that the debt in controversy is the one referred to in certain written admissions is not competent, not being an admission in writing: *Collins v. Bane*, 34-385, 390.

209. A renewal of notes evidencing partnership indebtedness made by the surviving member of the firm, *held* sufficient to remove the bar of the statute of limitations as to an action to enforce the payment of the indebtedness out of firm property held by the representatives of the surviving partner: *Van Staden v. Kline*, 64-180.

210. Where a mortgagor, in executing a second mortgage to persons as trustees under a will, expressly stated that it was subject to a prior mortgage held by the same persons as trustees of the will of a different person, *held*, that the recital in the second mortgage was a sufficient admission to the mortgagees, so far as they held under the first mortgage, to take the case out of the statute of limitations, and amounted to a sufficient admission of the existence of the previous mortgage to authorize the inference of a promise to pay the same: *Palmer v. Butler*, 36-576.

211. A proposition to compromise is not a new promise to pay and does not revive the debt: *Morehead v. Gallinger*, 9-519; *Brenneman v. Edwards*, 55-374.

212. As to the sufficiency of statements in letters to constitute admissions or new promises, see *Bayliss v. Street*, 51-627; *Oakson v. Beach*, 86-171.

213. The first part of the statutory provision already set out relating to admissions or new promises simply declares the common law rule. An acknowledgment of the debt is a sufficient admission, but it seems that if the admission or acknowledgment is coupled with the expression of an unwillingness to pay and an intention not to pay, it

will not revive the debt: *Penley v. Waterhouse*, 8-418.

214. Parol evidence may be received to show that a letter containing an admission was addressed to the plaintiff by defendant, and referred to the account in suit, but the amount of the recovery must be limited to the amount therein admitted: *Wise v. Adair*, 50-104.

215. In a particular case, *held*, that oral testimony was admissible to show that a letter addressed "Dear cousin" was sent to one having a beneficial interest in the note sued on, and therefore constituted an admission taking such note out of the statute of limitations: *Collins v. Bane*, 34-385.

216. The question whether a writing sufficiently identifies and refers to the claim in suit in order to constitute an admission taking such claim out of the statute of limitations is one of intention, and is properly left to the jury: *Ibid*.

217. The burden of proof is upon plaintiff to show that the acknowledgment has reference to the claim which he sets out, but the question whether it has reference to such claim or not is for the jury: *Dixon v. State*, 3-416.

218. After a debt has been revived by an admission, the statute commences to run anew against the original cause of action, and will run for the same length of time as against the original claim: *Bayliss v. Street*, 51-627.

219. Removal of bar by defendant's testimony: Under previous statutory provisions authorizing a recovery upon an action founded upon contract, although barred, if from defendant's answer, or his testimony as a witness, it appeared affirmatively that the cause of action still justly subsisted, *held*, that plaintiff, if he called defendant as a witness to prove the indebtedness, was concluded by the testimony of the latter: *Thorn v. Moore*, 21-285.

220. And that the testimony of defendant would remove the limitation only when it showed affirmatively that the cause of action still justly subsisted: *Porter v. McKinzie*, 20-462; *Stewart v. McMillan*, 34-455.

221. Such statutory provision applied: *Howells v. Patton*, 26-531; *McNitt v. Helm*, 29-302.

VI. PERIOD OF LIMITATION IN PARTICULAR CASES.¹

222. Injuries to person: Injuries resulting in death are "injuries to the person" within the meaning of the statute, and an action by the personal representative therefor is barred in two years: *Sherman v. Western Stage Co.*, 22-556; *S. C.*, 24-515; *Nord v. Burlington & M. R. R. Co.*, 37-498.

223. Where the injury and the death resulting therefrom are not simultaneous, the cause of action is deemed to have accrued to the person injured and not to his personal representatives. (Overruling *Sherman v. Western Stage Co.*, 24-515): *Kellow v. Central Iowa R. Co.*, 68-470; *Ewell v. Chicago & N. W. R. Co.*, 29 Fed. Rep., 57.

224. An action against a carrier of passengers upon a contract of transportation for personal injuries received is barred in two years: *Nord v. Burlington & M. R. R. Co.*, 37-498.

225. In case of injury to the person, the statute of limitations begins to run from the time of the injury and not from the time the extent thereof is discovered by the person injured: *Gustin v. Jefferson County*, 15-158.

226. An action by the wife or children against a person who causes the intoxication of the husband or father by selling intoxicating liquor to him in violation of law is an action for personal injuries, so as to be barred in two years: *Emmert v. Grill*, 39-690.

227. Statute penalty: The double damages allowed against a railroad company for killing stock (Code, § 1289) are not a statute penalty so as to come within this section. The

¹ Code, § 2529. The following actions may be brought if their causes accrue and not afterwards, except when otherwise provided.

1. Actions founded on injuries to the person or reputation, within two years.

2. Actions to enforce a mechanic's lien, within two years after the completion of the work.

3. Those against a sheriff or other public officer, growing out of an official capacity or by the omission of an official duty, within three years after the execution, within three years.

4. Those founded on unwritten contracts, those brought for fraud in cases heretofore solely cognizable in a court of equity, within five years.

5. Those founded on written contracts, on judgments of a court of record, and those brought for the recovery of real property.

6. Those founded on a judgment of a court of record, within twenty years after the date of the judgment, if the court is of the federal courts of the United States, within twenty years

Period in particular cases.

months from the time of filing the account or statement of the lien, *held*, that where the account was filed with the clerk within the ninety days allowed for filing such statement, the nine months' limitation began to run from the date of such filing, and when the account was not thus filed, the time began to run from the expiration of the ninety days within which the account should have been filed, although the failure to file the account would not defeat the lien as to parties having notice: *Gilcrest v. Gottschalk*, 39-811.

233. Action against public officer: An action against a treasurer, not on his bond, for moneys received and appropriated, is barred in three years as provided in ¶ 3 of the section: *Keokuk County v. Howard*, 41-11.

234. So an action against a treasurer and his sureties on his bond, for failure to account for and pay over revenues in his hands, is within this clause and barred within three years. It does not fall within the provisions of ¶ 5: *State v. Dyer*, 17-223; *State v. Henderson*, 40-242.

235. The action of *mandamus* against a public officer to compel the performance of an official duty cannot be maintained until there has been a refusal to perform such duty, and the statute commences to run from the time when the plaintiff has a right to demand the performance of the act, and he cannot delay or postpone it by neglecting to make such demand: *Prescott v. Gonser*, 34-175; *Beecher v. Clay County*, 52-140.

236. In an action against the clerk of the court for damages resulting from his negligence in accepting an insufficient stay bond, *held*, that the cause of the action did not accrue nor the statute begin to run until the stay expired: *Steel v. Bryant*, 49-116.

237. Under the Code of 1851, *held*, that the failure of a county judge to pay over money received by him in his official capacity was not the omission of an official duty, within the meaning of this clause, and, therefore, that the three years' limitation did not apply to an action on his bond to recover such money: *Poweshiek County v. Ogden*, 7-177.

238. If action against the sureties of an officer on his official bond be not brought

within three years after the breach thereof, it is barred, although in the meantime action may have been brought and judgment recovered against the principal: *Wadsworth v. Gerhard*, 55-387.

239. On unwritten contracts: A parol acceptance of a written proposition constitutes an oral contract: *Hulbert v. Atherton*, 59-91.

240. A contract by the board of supervisors with an agent for services to be performed does not become a written contract from the mere fact that the terms of such contract are embodied in the records of the board: *Baker v. Johnson County*, 33-151.

241. An oral acceptance of such employment by the opposite party makes the contract a parol and not a written contract: *Kinsey v. Louisa County*, 37-438.

242. In order to constitute a written contract sufficient to bring a case within the next paragraph and prevent the bar of five years from applying, the essential facts establishing the liability of defendant should be in writing: *Lamb v. Withrow*, 31-164.

243. Where it was sought to recover of defendant the amount paid by plaintiff in satisfaction of notes upon which the two appeared as joint makers, parol evidence being offered to show that plaintiff was only surety for defendant, *held*, that the action was upon an unwritten contract and could not be brought after five years: *Ibid*.

244. Where a surety on a judgment pays the same he may maintain an action against the principal for the amount so paid, but such action is founded upon a promise to repay, and not upon the judgment, and will therefore be barred in five years: *Johnston v. Belden*, 49-301.

245. An action by an accommodation indorser who has paid the judgment on a note to compel contribution by another indorser who is liable as co-surety must be brought within five years after the payment is made: *Preston v. Gould*, 64-44.

246. Action against a party to whom a note has been indorsed as collateral security to recover the excess of the amount collected on the note beyond the amount of the indebtedness is an action upon an implied contract and must be brought within five years from the receipt of the money: *Brunson v. Ballou*, 70—.

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the premises, inconsistent with such representations: *Fisher v. Beard*, 82-346; *S. C.*, 40-625.

279. The rule that an action by a junior mortgagee to redeem from a senior mortgage is barred in ten years is in no wise dependent upon the question of adverse possession: *Floyd County v. Cheney*, 57-160.

280. The mortgagor, or his grantee, or a subsequent incumbrancer, do not hold adversely to the mortgagor. Therefore, the statute of limitations will not run in favor of a subsequent grantee as against a mort-

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